



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

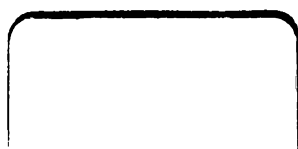
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



THE LAWYERS REPORTS ANNOTATED

BOOK LXII.

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE, WITH FULL ANNOTATION.

BURDETT A. RICH AND HENRY P.
FARNHAM, EDITORS.

ROCHESTER, N. Y.
THE LAWYERS' CO-OPERATIVE PUBLISHING COMPANY.
1904.

122124

JUL 29 1942

Entered according to Act of Congress, in the Year nineteen hundred four, by
THE LAWYERS' CO-OPERATIVE PUBLISHING CO.,
In the Office of the Librarian of Congress, at Washington, D. C.

TABLE OF CASES REPORTED

IN

LAWYERS' REPORTS, ANNOTATED, BOOK LXII.

A.

Aiken v. Southern R. Co. (Ga.)..... 668 Aikens, State ex rel. Durner v. (Wis.)..... 700 Ajax Gold Min. Co. v. Hilkey (Colo.)..... 555 Albert Mackie Grocery Co., Samuel M. Lawder & Sons Co. v. (Md.)..... 795 Allen, Veazey v. (N. Y.)..... 362 American Law Book Co., Edward Thompson Co. v. (C. C. App. 2d C.)..... 607 Anderson, Langenbaugh v. (Ohio)..... 948 Apex Transp. Co. v. Garbade (Or.)..... 513 Astoria & C. River R. Co., Scott v. (Or.)..... 543	Capital Traction Co., Kohner v. (D. C.)..... 875 Central of Ga. R. Co. v. Motes (Ga.)..... 507 Chandler v. Kansas City, Missouri, Gas Co. (Mo.)..... 474 Citizens' Nat. Bank, S. Blaisdell, Jr., Co. v. (Tex.)..... 968 Clark, Rachmel v. (Pa.)..... 959 Cleveland, C. C. & St. L. R. Co. v. Jenkins (Ill.)..... 922 v. Ohio Postal Teleg. Cable Co. (Ohio)..... 941 Cody, Jones v. (Mich.)..... 160 Colby, Foxworthy v. (Neb.)..... 393 Commercial Bank, Taylor v. (N. Y.)..... 783 Cook, State v. (Tenn.)..... 174 Crisman v. Shreveport Belt R. Co. (La.)..... 747 Curtis, Drude v. (Mass.)..... 755
---	---

B.

Ballard v. Mississippi Cotton Oil Co. (Miss.)..... 407 Bank, Citizens' Nat., S. Blaisdell, Jr., Co. v. (Tex.)..... 968 Commercial, Taylor v. (N. Y.)..... 783 First Nat., v. Selden (C. C. App. 7th C.)..... 559 Second Nat., v. Fitzpatrick (Ky.)..... 599 Barrier v. Kelly (Miss.)..... 421 Beckley, United States Sav. & L. Co. v. (Ala.)..... 33 Blaisdell, Jr., Co. v. Citizens' Nat. Bank (Tex.)..... 968 Boston Street Comrs., Sears v. (Mass.)..... 144 Brady v. Klein (Mich.)..... 909 Brown, State ex rel., v. Brown (Wash.)..... 974 v. (Wash.)..... 974 Thompson v. (Ky.)..... 398 Brundage, Mauk v. (Ohio)..... 477 Burnside v. Wand (Mo.)..... 427 Burt, State v. (S. D.)..... 172 Byrnes, Horan v. (N. H.)..... 602	D. Daniels v. New York, N. H. & H. R. Co. (Mass.)..... 751 Detroit, Ft. W. & B. I. R. Co. v. Osborn (Mich.)..... 149 Dillingham, Pierce v. (Ill.)..... 888 Dimick, Metropolitan L. Ins. Co. v. (N. J. Err. & App.)..... 774 Drude v. Curtis (Mass.)..... 755 Durner, State ex rel., v. Aikens (Wis.)..... 700 State ex rel., v. Hoyt (Wis.)..... 700 State ex rel., v. Huegin (Wis.)..... 700
--	---

E.

C. Cahoon, McKittrick v. (Minn.)..... 757 62 L. R. A.	Eckrich v. St. Louis Transit Co. (Mo.)..... 911 Edward Thompson Co. v. American Law Book Co. (C. C. App. 2d C.)..... 607 Ely & W. Dry-Goods Co., Passaic Print Works v. (C. C. App. 8th C.)..... 673 Employers' Liability Assur. Corp., Getchell & M. Lumber & Mfg. Co. v. (Iowa)..... 617
---	--

Equitable Loan & Security Co. v. Waring (Ga.).....	93
Eureka Paper Co., Rice v. (N. Y.)..	611

F.

First Nat. Bank v. Selden (C. C. App. 7th C.).....	559
Fitzpatrick, Second Nat. Bank v. (Ky.)	599
Flynn, Norfolk v. (Va.).....	771
Foxworthy v. Colby (Neb.).....	393

G.

Gadbury v. Ohio & I. Consol. Natural & I. Gas Co. (Ind.).....	895
Garbade, Apex Transp. Co. v. (Or.)..	513
Getchell & M. Lumber & Mfg. Co. v. Employers' Liability Assur. Corp. (Iowa).....	617
Goldberg, Southern Exp. Co. v. (Va.)..	669
Greater American Exposition Co., Zabriskie v. (Neb.).....	369
Green Bay & M. Canal Co. v. Kaukauna Water Power Co. (Wis.)	579
Greenfield, McCullough v. (Mich.)...	906
Guthrie, Lemert v. (Neb.).....	954

H.

Hall v. Keller (Kan.).....	758
Harrison v. Henderson (Kan.).....	760
Henderson, Harrison v. (Kan.).....	760
Hilkey, Ajax Gold Min. Co. v. (Colo.)	555
Hipp v. State (Tex.).....	973
Holman v. Omaha & C. B. R. & Bridge Co. (Iowa).....	395
Holmes v. Water (Wis.).....	986
Horan v. Byrnes (N. H.).....	602
Hoyt, State <i>ex rel.</i> , Durner v. (Wis.)..	700
Huber v. Merkel (Wis.).....	589
Huegin, State <i>ex rel.</i> , Durner v. (Wis.)	700
Hustace v. Phenix Ins. Co. (N. Y.)...	651

I.

Illinois C. R. Co. v. Laloge (Ky.)....	405
Insurance Co., Metropolitan L., v. Dimick (N. J. Err. & App.)..	774
Mutual L., Nichols v. (Mo.)...	657
Pacific Mut. L., Tompkins v. (W. Va.).....	489
Phenix, Hustace v. (N. Y.)....	651
Standard Life & Acci., Munz v. (Utah)	485
Union L., v. Parker (Neb.)....	390

J.

Jenkins, Cleveland, C. C. & St. L. R. Co. v. (Ill.).....	922
62 L. R. A.	

John D. Park & Sons Co. v. National Wholesale Druggists' Asso. (N. Y.)	632
Jones v. Cody (Mich.).....	160

K.

Kansas City, Missouri, Gas. Co., Chandler v. (Mo.).....	474
Karel, Opitz v. (Wis.).....	982
Kaukauna Water Power Co., Green Bay & M. Canal Co. v. (Wis.)..	579
Keller, Hall v. (Kan.).....	758
Kelly, Barrier v. (Miss.).....	421
Kinkel v. Winne (Kan.).....	596
Klein, Brady v. (Mich.).....	909
Kohner v. Capital Traction Co. (D. C.)	875

L.

Laloge, Illinois C. R. Co. v. (Ky.)....	405
Langenbaugh v. Anderson (Ohio)....	948
Law & Order Club, State <i>ex rel.</i> Stevenson v. (Ill.).....	884
Lawder, Samuel M., & Sons Co. v. Albert Mackie Grocery Co. (Md.)	795
Layton, State v. (Mo.).....	163
Leake v. Lucas (Neb.).....	199
Lemert v. Guthrie (Neb.).....	954
Liddle, Love v. (Utah).....	482
Love v. Liddle (Utah).....	482
Lucas, Leake v. (Neb.).....	190

M.

McCullough v. Greenfield (Mich.)....	906
McKittrick v. Cahoon (Minn.).....	757
McNeeley v. South Penn Oil Co. (W. Va.)	562
Mahaney, Wilde v. (Mass.).....	813
Maley, Reed v. (Ky.).....	900
Manser, Parsons v. (Iowa).....	132
Mauk v. Brundage (Ohio).....	477
Merkel, Huber v. (Wis.).....	539
Metropolitan L. Ins. Co. v. Dimick (N. J. Err. & App.).....	774
Miles, Williams v. (Neb.).....	383
Mississippi Cotton Oil Co., Ballard v. (Miss.)	407
Molineux, People v. (N. Y.).....	193
Monnier v. New York C. & H. R. R. Co. (N. Y.)	357
Motes, Central of Ga. R. Co. v. (Ga.)	507
Munz v. Standard Life & Acci. Ins. Co. (Utah)	485
Mutual L. Ins. Co., Nichols v. (Mo.)	657

N.

National Home for Disabled Volunteer Soldiers, Overholser v. (Ohio).....	936
--	-----

National Wholesale Druggists' Asso., John D. Park & Sons Co. v. (N. Y.)	632
New South Coal Co., Thompson v. (Ala.)	551
New York C. & H. R. R. Co., Monnier v. (N. Y.)	357
New York, C. & St. L. R. Co. v. Schaffer (Ohio)	931
New York, N. H. & H. R. Co., Daniels v. (Mass.)	751
Nichols v. Mutual L. Ins. Co. (Mo.)	657
Norfolk v. Flynn (Va.)	771

O.

Ohio & I. Consol. Natural & I. Gas Co., Gadbury v. (Ind.)	895
Ohio Postal Teleg. Cable Co., Cleveland, C. C. & St. L. R. Co. v. (Ohio)	941
Omaha & C. B. R. & Bridge Co., Hol- man v. (Iowa)	395
Opitz v. Karel (Wis.)	982
Osborn, Detroit, Ft. W. & B. I. R. Co. v. (Mich.)	149
Overholser v. National Home for Dis- abled Volunteer Soldiers (Ohio)	936

P.

Pacific Mut. L. Ins. Co., Tompkins v. (W. Va.)	489
Parker, Union L. Ins. Co. v. (Neb.)	390
Parsons v. Manser (Iowa)	132
Passaic Print Works v. Ely & W. Dry- Goods Co. (C. C. App. 8th C.)	673
Peck Bros. & Co. v. Peck Bros. Co. (C. C. App. 7th C.)	81
Peck Bros. Co., Peck Bros & Co. v. (C. C. App. 7th C.)	81
Pennsylvania R. Co. v. Rogers (W. Va.)	178
People v. Molineux (N. Y.)	193
Phenix Ins Co., Hustace v. (N. Y.)	651
Pierce v. Dillingham (Ill.)	888

R.

Rachmel v. Clark (Pa.)	959
Railroad Co., Astoria & C. River, Scott v. (Or.)	543
Illinois C., v. Laloge (Ky.)	405
New York C. & H. R., Monnier v. (N. Y.)	357
New York, C. & St. L., v. Schaf- fer (Ohio)	931
New York, N. H. & H., Daniels v. (Mass.)	751
Pennsylvania, v. Rogers (W. Va.)	178

Railway Co., Central of Ga., v. Motes (Ga.)	507
Cleveland, C. C. & St. L., v. Jenk- ins (Ill.)	922
Cleveland, C. C. & St. L., v. Ohio Postal Teleg. Cable Co. (Ohio)	941
Detroit, Ft. W. & B. I., v. Osborn (Mich.)	149
Shreveport Belt, Crisman v. (La.)	747
Southern, Aiken v. (Ga.)	666
Texas & P., v. White (C. C. App. 5th C.)	90
Raymond v. Yarrington (Tex.)	962
Read v. Toledo Loan Co. (Ohio)	790
Reed v. Maley (Ky.)	900
Republic Iron & Steel Co. v. State (Ind.)	136
Rice v. Eureka Paper Co. (N. Y.)	611
Ring v. Ring (Ga.)	878
Rogers, Pennsylvania R. Co., v. (W. Va.)	178

S.

St. Louis Transit Co., Eckrich v. (Mo.)	911
Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co. (Md.)	795
S. Blaisdell, Jr., Co. v. Citizens' Nat. Bank (Tex.)	968
Schaffer, New York, C. & St. L. R. Co. v. (Ohio)	931
Scott v. Astoria & C. River R. Co. (Or.)	543
Sears v. Boston Street Comrs. (Mass.)	144
Second Nat. Bank v. Fitzpatrick (Ky.)	599
Sehon, Young v. (W. Va.)	499
Selden, First Nat. Bank v. (C. C. App. 7th C.)	559
Shreveport Belt R. Co., Crisman v. (La.)	747
South Penn Oil Co., McNeeley v. (W. Va.)	562
Southern Exp. Co. v. Goldberg (Va.)	669
Southern R. Co., Aiken v. (Ga.)	666
Spalding, University of Illinois v. (N. H.)	817
Standard Life & Acci. Ins. Co., Munz v. (Utah)	485
State v. Burt (S. D.)	172
v. Cook (Tenn.)	174
Hipp v. (Tex.)	973
v. Layton (Mo.)	163
Republic Iron & Steel Co. v. (Ind.)	136
State <i>ex rel.</i> Durner v. Aikens (Wis.)	700
Brown v. Brown (Wash.)	974
Durner v. Hoyt (Wis.)	700
Durner v. Huegin (Wis.)	700
Stevenson v. Law & Order Club (Ill.)	884
Stevenson, State <i>ex rel.</i> , v. Law & Order Club (Ill.)	884

T.		Wand, Burnside v. (Mo.).....	427
Taylor v. Commercial Bank (N. Y.)	783	Waring, Equitable Loan & Security Co.	
Texas & P. R. Co. v. White (C. C. App.		v. (Ga.)	93
5th C.).....	90	West Coast Improv. Co., West Coast	
Thompson v. Brown (Ky.).....	398	Mfg. & Investment Co. v.	
v. New South Coal Co. (Ala.)	551	(Wash.)	763
Todd, Wicomico County Supers. of		West Coast Mfg. & Investment Co. v.	
Elections v. (Md.)	809	. West Coast Improv. Co.	
Toledo Loan Co., Read v. (Ohio)....	790	(Wash.).....	763
Tompkins v. Pacific Mut. L. Ins. Co.		White, Texas & P. R. Co. v. (C. C. App.	
(W. Va.)	489	5th C.)	90
U.		Wicomico County Supers. of Elections	
Union L. Ins. Co. v. Parker (Neb.)..	390	v. Todd (Md.)	809
United States Sav. & L. Co. v. Beck-		Wilde v. Mahaney (Mass.).....	813
ley (Ala.)	33	Williams v. Miles (Neb.).....	383
University of Illinois v. Spalding (N.		Winne, Kinkel v. (Kan.)	596
H.)	817	Y.	
V.		Yarrington, Raymond v. (Tex.).....	962
Veazey v. Allen (N. Y.).....	362	Young v. Sehon (W. Va.).....	499
W.		Z.	
Walter, Holmes v. (Wis.).....	980	Zabriskie v. Greater America Exposi-	
62 L. R. A.		tion Co. (Neb.).....	369

CITATIONS

IN OPINIONS OF THE JUDGES CONTAINED IN THIS BOOK.

A.

Abbott v. Cottage City, 143 Mass. 521, 58 Am. Rep. 143, 10 N. E. 325...	148
Adams v. Field, 21 Vt. 256...	820
Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 86...	647
Adkins v. Spurlock, 48 W. Va. 139, 33 S. E. 121...	567, 568, 572, 573
Ahrens v. Jones, 169 N. Y. 555, 62 N. E. 666	645
Ake v. Mason, 101 Pa. 17...	769, 770
Albany & E. Iron & S. Co. v. Southern Agri. Works, 76 Ga. 135...	110
Albert v. State, 66 Md. 325, 59 Am. Rep. 159, 7 Atl. 697...	911
Alden v. Springfield, 121 Mass. 27...	147
Alexander v. Germania F. Ins. Co. 66 N. Y. 464, 23 Am. Rep. 76...	783
Allen v. Charleston, 109 Mass. 243...	148
v. Flood [1898] A. C. 1...	688, 744, 960
v. Merchants' Bank, 22 Wend. 215, 34 Am. Dec. 289...	928
v. Watson, 16 Johns. 205...	462
Alvord v. Luckenbach, 106 Wis. 537, 82 N. W. 535...	984
American Nat. Bank v. Hammond, 25 Colo. 367, 55 Pac. 1090...	789
American Surety Case. See American Surety Co. v. Pauly, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552...	785, 786
Amick v. Woodworth, 58 Ohio St. 86, 50 N. E. 437...	794
Anders v. Supreme Lodge K. of H. 51 N. J. L. 175, 17 Atl. 119...	779
Anderson v. Rome, W. & O. R. Co. 54 N. Y. 334...	787
Andreae v. Redfield, 98 U. S. 225, 25 L. ed. 158...	397
Andrews v. Clarke, Carthew, 25...	184
Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240...	699, 966
Arnold v. Bunnell, 42 W. Va. 473, 20 S. E. 359...	567, 571, 573
v. Jack, 24 Pa. 57...	131
Arnot v. Pittston & E. Coal Co. 68 N. Y. 558, 23 Am. Rep. 190...	647
Arpin v. Owens, 140 Mass. 144, 3 N. E. 25...	760
Arthur v. Griswold, 55 N. Y. 400...	785
Ashworth v. Kiltbridge, 12 Cush. 193, 59 Am. Dec. 178...	549
Askam v. King County, 9 Wash. 1, 36 Pac. 1097...	142
Atcheson v. Mallon, 43 N. Y. 147, 3 Am. Rep. 678...	367
Atchison v. Peterson, 20 Wall. 507, 22 L. ed. 414...	594
Atchison, T. & S. F. R. Co. v. Koehler, 37 Kan. 463, 15 Pac. 567...	416
Atkinson v. Newton, 169 Mass. 240, 47 N. E. 1029...	148
Atlas Bank v. Nahant Bank, 3 Met. 581...	100
Atty. Gen. v. Douley, 2 Eq. Cas. Abr. 194...	400
Audubon v. Shufeldt, 181 U. S. 575, 48 L. ed. 1009, 21 Sup. Ct. Rep. 735...	757
Austin v. Brown, 37 W. Va. 634, 17 S. E. 207...	567, 568, 571, 573

B.

Bacon v. Michigan C. R. Co. 66 Mich. 166, 33 N. W. 181...	926
Bailey v. People, 190 Ill. 28, 54 L. R. A. 838, 60 N. E. 98...	894
62 L. R. A.	

Baker, Re, 96 Fed. 954...	757
v. Morris, 10 Leigh, 285...	448
v. Stewart, 40 Kan. 442, 2 L. R. A. 434, 18 Pac. 904...	569
Baldwin v. Franks, 120 U. S. 685-690, 32 L. ed. 768, 769, 7 Sup. Ct. Rep. 656, 763...	418, 419, 420
Ballard v. Burton, 64 Vt. 387, 16 L. R. A. 604, 24 Atl. 769...	505
Ballock v. State, 73 Md. 1, 8 L. R. A. 671, 20 Atl. 184...	98, 108, 124
Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 505, 44 L. ed. 564, 20 Sup. Ct. Rep. 385...	143
Baltimore Base Ball Club v. Pickett, 78 Md. 387, 22 L. R. A. 690, 28 Atl. 279...	804
Bank of Antigo v. Union Trust Co. 149 Ill. 343, 23 L. R. A. 611, 36 N. E. 1029...	561
Bank of Huntington v. Hysell, 22 W. Va. 142...	502
Bank of Missouri v. Anderson, 1 Mo. 244...	916, 920
Bank of Stockham v. Alter, 61 Neb. 359, 85 N. W. 300...	394
Bank of Tomah v. Warren, 94 Wis. 151, 68 N. W. 540...	87
Banks v. McDivitt, 13 Blatchf. 103...	611
Barksdale v. Hopkins, 23 Ga. 332...	386, 387
Barlow v. Delaney, 40 Fed. 97...	769
Barnard v. Crossman, 54 Hun. 53, 7 N. Y. Supp. 275...	991
Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298...	884
Barr v. Gibson, 3 Mees. & W. 390...	598
Barre v. Fleming, 29 W. Va. 314, 1 S. E. 731...	769, 770
Barthrop v. Tucker, 29 Wash. 666, 70 Pac. 120...	980
Bartlett v. Hoppock, 34 N. Y. 118, 88 Am. Dec. 428...	598
Barwick v. English Joint Stock Bank, L. R. 2 Exch. 259...	787, 789
Barwick Case. See Barwick v. English Joint Stock Bank, L. R. 2 Exch. 259...	
Basket v. Hassell, 107 U. S. 602, 27 L. ed. 500, 2 Sup. Ct. Rep. 415...	983
Bassett v. Salisbury Mfg. Co. 43 N. H. 569, 82 Am. Dec. 179...	592, 604, 606
v. United States, 137 U. S. 496, 34 L. ed. 762, 11 Sup. Ct. Rep. 185...	173
Bateman v. Robinson, 12 Neb. 508, 11 N. W. 736...	109
Bates v. Swiger, 40 W. Va. 420, 21 S. E. 874...	577
Baumgartel v. Providence Washington Ins. Co. 136 N. Y. 547, 32 N. E. 990...	783
Baxter v. State, 34 Tex. Crim. Rep. 516, 31 S. W. 394...	173
v. Vincent, 6 Vt. 614...	182
Bayard v. Lombard, 9 How. 530, 13 L. ed. 245...	720
Bayley v. McCoy, 8 Or. 259...	768
Beach v. Barous, 13 Barb. 305...	462
Beakes v. Phoenix Ins. Co. 143 N. Y. 402, 26 L. R. A. 267, 38 N. E. 453...	656
Beaman v. Whitney, 20 Me. 413...	784
Bean v. Bowen, 47 How. Pr. 306...	980
Beasley v. Lineham Transfer Co. 148 Mo. 414, 50 S. W. 87...	477
v. Rldout, 94 Md. 641, 52 Atl. 61...	812
Beattie v. Whipple, 154 Ill. 273, 40 N. E. 340...	568
Beaumont v. Keim, 50 Mo. 28...	386
Becker, Ex parte, 86 Cal. 402, 25 Pac. 9...	737
v. Chester, 115 Wis. 90, 91 N. W. 87...	991

- Beckman v. Birchard, 48 Neb. 805, 67 N. W. 784 762
- Bedford v. Bedford, 99 Ky. 273, 35 S. W. 928 404
- Bedsole v. Peters, 79 Ala. 136 374
- Beckman v. Benson, 23 N. Y. 298, 80 Am. Dec. 269 401
- Behrens v. Behrens, 47 Ohio St. 323, 25 N. E. 209 365
- Belrne v. Rosser, 26 Gratt. 538 185
- Belding v. Cushing, 1 Gray. 576 372
- Belkin v. Rhodes, 76 Mo. 652 467
- Belknap v. Schlld, 161 U. S. 17, 40 L. ed. 601, 16 Sup. Ct. Rep. 443 940
- Bell v. Coats, 56 Miss. 776 572
- Belshaw v. Chitwood, 141 Ind. 377, 40 N. E. 908 388
- Benedict, Re. 37 Misc. 230, 75 N. Y. Supp. 165 758
- v. Potts, 88 Md. 52, 41 L. R. A. 478, 40 Atl. 1067 877
- Bennett v. Eastern Bldg. & L. Assn. 177 Pa. 233, 34 L. R. A. 595, 35 Atl. 684 39
- v. Garlock, 79 N. Y. 302, 35 Am. Rep. 517 989
- v. McIntire, 121 Ind. 231, 6 L. R. A. 736, 23 N. E. 78 902
- v. Pierce, 50 W. Va. 604, 40 S. E. 395 572
- v. St. Paul F. & M. Ins. Co. 55 N. J. L. 377, 27 Atl. 641 781
- v. Sweet, 171 Mass. 600, 51 N. E. 183 816
- Benson v. Christian, 129 Ind. 535, 29 N. E. 26 141
- Benton v. Patterson, 8 Ga. 146 131
- v. Pratt, 2 Wend. 385, 20 Am. Dec. 623 099
- Berberet v. Berberet, 131 Mo. 399, 33 S. W. 81 888
- Berg v. Damkoehler, 112 Wis. 587, 88 N. W. 606 984
- Berlin & J. Envelope Co. Case, 166 N. Y. 292, 59 N. E. 906 638
- Berry v. American Cent. Ins. Co. 182 N. Y. 49, 30 N. E. 254 783
- v. Cooper, 28 Ga. 543 111
- Bertles v. Nunan, 92 N. Y. 152, 44 Am. Rep. 361 570
- Besozzi v. Harris, 1 Post. & F. 92 134
- Bettman v. Harness, 42 W. Va. 433, 36 L. R. A. 568, 26 S. E. 271 577
- Biemel v. State, 71 Wis. 444, 37 N. W. 244 729
- Birmingham v. Kirwan, 2 Sch. & Lef. 444 425
- v. Lesan, 77 Me. 494, 1 Atl. 151 899
- Blah v. Hawkeye Ins. Co. 69 Iowa, 184, 28 N. W. 553 398
- Bissell v. Ryan, 23 Ill. 567 928
- Blackwell Durham Tobacco Co. v. McElwee, 96 N. C. 71, 60 Am. Rep. 404, 1 S. E. 676 607
- Blanchard v. Baker, 8 Me. 253, 23 Am. Dec. 504 587
- v. Hodgkins, 62 Me. 121 607
- Bliss v. Rice, 17 Pick. 23 587
- Bloom v. Warder, 13 Neb. 476, 14 N. W. 395 957
- Bloomington v. Shrock, 110 Ill. 219, 51 Am. Rep. 679 550
- Blue Stone Case. See Cummings v. Union Blue Stone Co. 164 N. Y. 401, 52 L. R. A. 262, 58 N. E. 525 525
- Bluestone Coal Co. v. Bell, 38 W. Va. 297, 18 S. E. 493 899
- Blume v. Gilbert, 124 Mass. 215 816
- Robel v. People, 173 Ill. 19, 50 N. E. 322 576
- Bohanon v. Walcott, 1 How. (Miss.) 336, 29 Am. Dec. 631 387
- Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 21 L. R. A. 337, 55 N. W. 1119 935
- v. Northwestern Lumbermen's Assn. 54 Minn. 223, 21 L. R. A. 337, 55 N. W. 1119 935
- Bolleau v. Rutlin, 2 Exch. 665 188
- Boiling v. Munchus, 65 Ala. 558 553
- Bollman, Ex parte, 4 Cranch, 75, 2 L. ed. 554 736
- Bonomi v. Backhouse, El. Bl. & El. 622 806
- Booth, Re, 3 Wis. 1 730
- Borradalle v. Hunter, 5 Mann. & G. 639 753
- Boston & W. R. Corp. v. Old Colony R. Corp. 12 Cush. 805, 3 Allen, 142 152
- Boswell v. Flockheart, 8 Leigh, 364 794
- Bourlier Bros. v. Macauley, 91 Ky. 135, 11 L. R. A. 550, 15 S. W. 60 967
- Boutwell v. Marr, 71 Vt. 1, 43 L. R. A. 803, 42 Atl. 607 648
- Boutwell Case. See Boutwell v. Marr, 71 Vt. 1, 43 L. R. A. 803, 42 Atl. 607 949
- Bowditch v. New England Mut. L. Ins. Co. 141 Mass. 292, 55 Am. Rep. 474, 4 N. E. 798 109
- Bowen v. Hall, L. R. 6 Q. B. Div. 333 967
- Bowman v. Lewis, 101 U. S. 22, 25 L. ed. 989 515
- v. Sanborn, 25 N. H. 87 820-822, 824, 830
- Royd v. Spencer, 103 Ga. 828, 30 S. E. 841 688
- Boylan v. Meeker, 28 N. J. L. 274 388
- Boyle v. Boyle, 158 Ill. 228, 42 N. E. 140 385
- v. State, 57 Wis. 472, 46 Am. Rep. 41, 15 N. W. 827, 61 Wis. 440, 21 N. W. 289 548
- Boyson v. Thorn, 98 Cal. 578, 21 L. R. A. 233, 33 Pac. 492 967
- Braceville Coal Co. v. People, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62 144
- Brackett v. Griswold, 112 N. Y. 454, 20 N. E. 376 785
- Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co. 60 Ohio St. 560, 45 L. R. A. 658, 54 N. E. 528 952
- Bradshaw v. South Boston R. Co. 135 Mass. 407, 46 Am. Rep. 481 360
- Bragg v. Colwell, 19 Ohio St. 407 831
- Bramwell v. Bramwell, 3 Hagg. Eccl. Rep. 618 883
- Branham v. Stallings, 21 Colo. 211, 40 Pac. 396 109
- Branigan, Ex parte, 19 Cal. 133 733
- Brant v. Willson, 8 Cow. 56 389
- Bratt v. Swift, 99 Wis. 579, 75 N. W. 411 745
- Breasted v. Farmers' Loan & T. Co. 8 N. Y. 209, 39 Am. Dec. 482 753
- Brechbill v. Randall, 102 Ind. 528, 52 Am. Rep. 695, 1 N. E. 362 176
- Breitung's Estate, 78 Wis. 33, 46 N. W. 891, 47 N. W. 17 984
- Brewster v. C. Miller's Sons Co. 101 Ky. 368, 38 L. R. A. 505, 41 S. W. 301 935
- Bridal Vell Lumbering Co. v. Johnson, 30 Or. 205, 34 L. R. A. 368, 46 Pac. 700 517
- Bridges v. Stephens, 132 Mo. 524, 34 S. W. 555 398
- v. Williamson, 2 Strange. 814, 461 471
- v. Winters, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598 394
- Briggs v. North American & M. Ins. Co. 53 N. Y. 446 655, 656, 657
- Briggs Case. See Briggs v. North American & M. Ins. Co. 53 N. Y. 446 762
- Brigham v. Dana, 29 Vt. 1 787
- v. Peters, 1 Gray, 139 787
- Broder v. Conklin, 98 Cal. 360, 33 Pac. 211 981
- Bromage v. Prosser, 4 Barn. & C. 247 481
- v. Rice, 7 Car. & F. 548 819
- Bronson v. Kimpton, 8 Wall. 444, 19 L. ed. 433 394
- Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443 518
- Brown v. Brown, 8 El. & Bl. 876 387
- v. Brown, L. R. 1 Prob. & Div. 46 883
- v. Com. 76 Pa. 319 307
- v. Edington, 2 Mann. & G. 279 598
- v. Fraternal Accl. Assn. 18 Utah, 265, 55 Pac. 63 487
- v. Jacobs' Pharmacy Co. 115 Ga. 429, 57 L. R. A. 547, 41 S. E. 553 648, 649
- v. Marlon Nat. Bank, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390 600
- v. Maryland, 12 Wheat. 419, 446, 6 L. ed. 678, 688 672
- v. Providence, W. & B. R. Co. 5 Gray. 35 148
- v. Straw, 6 Neb. 536, 20 Am. Rep. 369 394
- v. Thorndike, 15 Pick. 388 388
- Brown's Case, 91 Va. 772, 28 L. R. A. 410, 21 S. E. 357 576

Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625.....	87	Cecil v. Henderson, 121 N. C. 244, 28 S. E. 481.....	397, 398
Browne v. Turner, 176 Mass. 9, 56 N. E. 969.....	148	v. Mix, 6 Ind. 478.....	505
Brownfield v. Chicago, R. I. & P. R. Co. 107 Iowa, 254, 77 N. W. 1038.....	136	Celluloid Mfg. Co. v. Cellonite Mfg. Co. 32 Fed. 94.....	89
Browning v. Morris, 2 Cowp. 790.....	109	Central Land Co. v. Laidley, 32 W. Va. 134, 3 L. R. A. 826, 9 S. E. 61.....	569, 571
Broyles v. State, 47 Ind. 251.....	607	Central R. Co. v. Mitchell, 63 Ga. 173.....	549
Bruce v. Baxter, 7 Lea. 477.....	627	v. Murphey, 113 Ga. 514, 53 L. R. A. 720, 38 S. E. 970.....	111
Bruch v. Carter, 32 N. J. L. 554.....	496	Chaddock v. Vanness, 35 N. J. L. 517, 10 Am. Rep. 256.....	505
Bryan v. Averett, 21 Ga. 402, 68 Am. Dec. 464.....	130	Chalmers v. M'Murdo, 5 Munf. 252, 7 Am. Dec. 684.....	504
Bryant v. Thompson, 128 N. Y. 427, 13 L. R. A. 745, 28 N. E. 522.....	732	Chancy Park Land Co. v. Hart, 104 Iowa, 592, 73 N. W. 1059.....	107
Buchanan v. Smith, 43 Miss. 90.....	374	Chandler v. Cheney, 37 Ind. 413.....	569
Buckholts v. Buckholts, 24 Ga. 238.....	880	v. Simmons, 97 Mass. 508, 98 Am. Dec. 117.....	755
Bucklin v. Powell, 60 N. H. 119.....	815	Chanter v. Hopkins, 4 Mees. & W. 390.....	598
Bullard v. Boston & M. R. Co. 64 N. H. 27, 5 Atl. 838.....	818	Chapman v. McIlwraith, 77 Mo. 38, 46 Am. Rep. 1.....	983
Burdick v. Cheadle, 26 Ohio St. 393, 20 Am. Rep. 787.....	911, 954	v. Western U. Teleg. Co. 90 Ky. 265, 13 S. W. 880.....	901, 902
Burg v. Chicago, R. I. & P. R. Co. 90 Iowa, 108, 57 N. W. 680.....	549	Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L. R. A. 42, 39 N. E. 490.....	89
Burke v. Child, 21 Wall. 441, 22 L. ed. 623.....	368	Charlotte, C. & A. R. Co. v. Gibbs, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 253.....	154
v. Smith, 69 Mich. 380, 37 N. W. 838.....	604, 605	Chase v. Hamilton Ins. Co. 20 N. Y. 52.....	783
Burlington & M. River R. Co. v. Thompson, 31 Kan. 180, 47 Am. Rep. 497, 1 Pac. 622.....	184	v. New York C. R. Co. 24 Barb. 273.....	93
Burnham v. Butler, 58 N. H. 568.....	818	v. New York C. R. Co. 26 N. Y. 523.....	361
Burns v. Hays, 44 W. Va. 503, 30 S. E. 101.....	575	v. Redding, 13 Gray, 418.....	983
Burroughs v. Saterlee, 67 Iowa, 396, 56 Am. Rep. 350, 25 N. W. 808.....	593	v. Silverstone, 62 Me. 175, 16 Am. Rep. 419.....	604
Burton v. Hansford, 10 W. Va. 470, 27 Am. Rep. 571.....	502, 503, 507	v. Springfield, 119 Mass. 556.....	147
Butler v. Butler, 162 Mass. 524, 30 N. E. 182.....	514	Chatfield v. Wilson, 28 Vt. 49.....	604
v. Chicago, B. & Q. R. Co. 87 Iowa, 206, 54 N. W. 208.....	787	Cheever v. North, 106 Mich. 390, 37 L. R. A. 561, 64 N. W. 455.....	386
v. State, 97 Ind. 378.....	141	Chesapeake & O. R. Co. v. Wright, 50 W. Va. 653, 41 S. E. 147.....	186
v. Washburn, 25 N. H. 257.....	909	Chesapeake Bank v. Swain, 29 Md. 501.....	928
Buttler v. Rosenblath, 42 N. J. Eq. 651, 59 Am. Rep. 52, 9 Atl. 695.....	570	Chesebrough v. Conover, 140 N. Y. 382, 35 N. E. 633.....	368
Buzard v. McAnulty, 77 Tex. 438, 14 S. W. 138.....	188	Chesley v. King, 74 Me. 164, 43 Am. Rep. 569.....	593, 604
C.		Chicago & A. R. Co. v. Joliet, L. & A. R. Co. 105 Ill. 388, 44 Am. Rep. 799.....	152
Cabell v. Arnold (Tex. Civ. App.) 22 S. W. 62.....	909	Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. Street R. Co. 139 Ind. 297, 26 L. R. A. 337, 38 N. E. 604.....	154, 156, 158
Callaway v. Milledgeville, 48 Ga. 311.....	109	Chicago Anderson Pressed Brick Co. v. Sobkowlak, 148 Ill. 578, 36 N. E. 572.....	614
Capes v. Burgess, 135 Ill. 61, 25 N. E. 1000.....	815	Chicago & G. T. R. Co. v. Hough, 61 Mich. 507, 28 N. W. 532.....	151, 156
Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287.....	698, 745	Chicago & N. R. Co. v. Traves, 17 Ill. App. 136.....	547
Carnahan v. Tousey, 93 Ind. 561.....	900	Chicago & W. T. E. Co. v. Englewood Connecting R. Co. 115 Ill. 375, 56 Am. Rep. 173, 4 N. E. 246.....	152
Carpenter v. German American Ins. Co. 135 N. Y. 298, 31 N. E. 1015.....	489	Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.....	515, 516, 946, 960
Carper v. McDowell, 5 Gratt. 212.....	794	v. Griffin, 68 Ill. 499.....	
Carr v. Clough, 26 N. H. 280, 59 Am. Dec. 345.....	756	v. Jones, 149 Ill. 361, 24 L. R. A. 141, 4 Inters. Com. Rep. 683, 37 N. E. 247.....	419
Carrington v. Taylor, 11 East, 571.....	696	v. Otoe County, 16 Wall. 667, 21 L. ed. 375.....	148
Carroll v. Bird, 3 Esp. 201.....	925	v. Steel, 47 Neb. 741, 66 N. W. 830.....	154, 158
Carson v. Jersey City Ins. Co. 43 N. J. L. 300, 39 Am. Rep. 584.....	780	v. West Chicago Street R. Co. 156 Ill. 255, 29 L. R. A. 485, 40 N. E. 1008.....	154, 156
Caraswell v. Schley, 56 Ga. 101.....	130	Chicago, K. & W. R. Co. v. Pontious, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585.....	416, 417
Carter v. Jackson, 58 N. H. 156.....	820, 824, 830	Chicago, R. I. & P. R. Co. v. Austin, 69 Ill. 426.....	920
v. State, 2 Ind. 617.....	549	v. Stanley, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363.....	417
Carter County v. Sinton, 120 U. S. 517, 30 L. ed. 701, 7 Sup. Ct. Rep. 650.....	576	v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797.....	184
Cary v. Faden, 5 Ves. Jr. 24.....	610	Chisholm v. Ben, 7 B. Mon. 408.....	385
v. Western U. Teleg. Co. 20 Abb. N. C. 337.....	368	v. National Capitol L. Ins. Co. 52 Mo. 213, 14 Am. Rep. 414.....	983
Case v. Hoffman, 100 Wis. 814, 44 L. R. A. 728, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945.....	594	Christian v. Vance, 41 W. Va. 754, 24 S. E. 596.....	567
Case of Election Super. 114 Mass. 249, 19 Am. Rep. 341.....	813	Citizens' Gaslight & Heating Co. v. O'Brien, 118 Ill. 174, 8 N. E. 310.....	549
Case of Gholston, 31 Ga. 625.....	880, 881		
Case of McLaughlin, 64 Fed. 908.....	101		
Casey v. Cincinnati Typographical Union No. 3, 12 L. R. A. 193, 45 Fed. 135, 146.....	648, 649		
Casey Case. See Casey v. Cincinnati Typographical Union No. 3, 12 L. R. A. 193, 45 Fed. 135, 146.....	176		
Castle v. Hutchinson, 25 Fed. 394.....	496		
Cate v. Cate, 44 N. H. 211.....	779		
Catolr v. American L. Ins. & T. Co. 33 N. J. L. 487.....	558		
Catron v. Old, 23 Colo. 483, 48 Pac. 687.....	513		
Cavasos v. Trevino, 6 Wall. 773, 18 L. ed. 813.....	502		
62 L. R. A.			

Citizens' Nat. Bank v. Forman, 28 Ky. L. Rep. 613, 56 L. E. A. 873, 63 S. W. 454, 757.....	601	Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.....	421
City Electric R. Co. v. Shropshire, 101 Ga. 33, 28 S. E. 508.....	512	Conroy v. Vulcan Iron Works, 62 Mo. 35.....	615
Clancey v. Onondaga Fine Salt Mfg. Co. 62 Barb. 395.....	647	Considine v. Metropolitan L. Ins. Co. 165 Mass. 462, 43 N. E. 201.....	149
Clancy v. Byrne, 56 N. Y. 129, 15 Am. Rep. 391.....	911	Consolidated Wyoming Gold Min. Co. v. Champlon Min. Co. 63 Fed. 545.....	558
Clanton v. Scruggs, 95 Ala. 279, 10 So. 757.....	554	Cook v. Pennsylvania, 97 U. S. 566, 574, 24 L. ed. 1013, 1018.....	672
Clark v. Devoe, 124 N. Y. 120, 26 N. E. 275.....	788	v. Sherman, 4 McCrary, 20, 20 Fed. 167.....	108
v. Durand, 12 Wis. 223.....	984	v. State, 110 Ala. 40, 20 So. 360.....	170
v. Gardner, 123 Mass. 358.....	814	Coon v. Pruden, 25 Minn. 105.....	505
v. Holtou, 57 Ind. 564.....	900	Cooper v. Cooper, 76 Ill. 57.....	569
v. Turner, 50 Neb. 290, 38 L. R. A. 433, 69 N. W. 843, 846.....	385, 387, 388, 389	v. Cooper, L. R. 7 H. L. 67.....	426
Clarke v. Brown, 77 Ga. 606.....	108	v. Massachusetts Mut. L. Ins. Co. 102 Mass. 227, 3 Am. Rep. 451.....	753, 754
v. McClure, 10 Gratt. 310.....	570	v. Robinson, 10 Mees. & W. 694.....	502
Cleveland, C. C. & St. L. R. Co. v. Jenkins, 174 Ill. 402, 51 N. E. 811.....	936	Copeland v. McAdory, 100 Ala. 553, 13 So. 545.....	769
Cleveland Terminal & Valley R. Co. v. Marsh, 63 Ohio St. 236, 52 L. R. A. 142, 58 N. E. 821.....	952	Copperman v. People, 56 N. Y. 591.....	245, 306
Clifford v. Brandon, 2 Campb. 358.....	696, 744	Core v. Faupel, 24 W. Va. 239.....	570, 571
Clift v. Schwabe, 3 C. B. 437.....	753	Corser v. Paul, 41 N. H. 24, 77 Am. Dec. 753.....	607
Clyne v. Helmes, 61 N. J. L. 366, 39 Atl. 767.....	910, 911	Cory v. Cory, 86 Ind. 567.....	900
Coatsworth v. Lehigh Valley R. Co. 156 N. Y. 451, 51 N. E. 301.....	645	Costello v. Crowell, 133 Mass. 352.....	291
Cobbett v. Kilminster, 4 Fost. & F. 490.....	291	Costelo v. Crowell, 139 Mass. 588, 2 N. E. 698.....	831
Coburn v. Ilarvey, 18 Wis. 147.....	594	Cothram v. Western U. Teleg. Co. 83 Ga. 25, 9 S. E. 836.....	108
Coddington v. Beebe, 31 N. J. L. 477.....	372	Counsell v. Hall, 145 Mass. 468, 14 N. E. 530.....	615
Coffey's Case, 4 N. Y. City Hall Rec. 52 245, 309	309	Cowart v. Perrine, 21 N. J. Eq. 101.....	398
Cohen v. Berlin & J. Envelope Co. 166 N. Y. 292, 59 N. E. 906.....	647, 648	Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386.....	627
v. Meyers, 42 Ga. 46.....	110	Craft v. McCounoughy, 79 Ill. 346, 22 Am. Rep. 171.....	647
Cohen Case. See Cohen v. Berlin & J. Envelope Co. 166 N. Y. 292, 59 N. E. 906		Crane v. French, 38 Miss. 503.....	337
Coleman v. People, 58 N. Y. 555.....	237, 245, 306	Cranson v. Smith, 37 Mich. 309, 20 Am. Rep. 514.....	176
v. Putnam, 13 Lea. 114.....	626	Cravens v. New York L. Ins. Co. 148 Mo. 583, 53 L. R. A. 305, 50 S. W. 519.....	661, 663, 665
v. Simpson, 5 Car. & P. 73.....	549	Crawford v. Boston Store Mercantile Co. 67 Mo. App. 39.....	785
Collins v. Brackett, 34 Minn. 329, 25 N. W. 708.....	733, 734	v. Thomas, 21 Ky. L. Rep. 1100, 54 S. W. 197.....	403
v. Collins, 2 Burr. 820.....	458, 459, 460, 461, 462, 465	Cree v. Sherfy, 138 Ind. 354, 37 N. E. 787.....	900
Collyer v. Collyer, 110 N. Y. 481, 18 N. E. 110.....	385	Creve Cœur Lake Ice Co. v. Tamm, 138 Mo. 388, 39 S. W. 791.....	921
Colon v. Lisk, 153 N. Y. 188, 47 N. E. 302.....	142	Crittenden v. Phoenix Mut. L. Ins. Co. 41 Mich. 442, 2 N. W. 657.....	985
Columbia Nat. Bank v. Baldwin (Neb.) 90 N. W. 890.....	389	v. White, 23 Minn. 24, 23 Am. Rep. 678.....	176
Colvin v. Warford, 20 Md. 357.....	386	Crockett v. Crockett, 2 Phill. Ct. 553.....	991
Com. v. Bigelow, 8 Met. 235.....	245, 306	Cromie v. Louisville Orphans' Soc. 3 Bush, 374.....	401
v. Boston & M. R. Co. 3 Cush. 25.....	152	Cronin v. Foster, 13 R. I. 196.....	182
v. Choate, 105 Mass. 451.....	270, 307	Crook v. First Nat. Bank, 83 Wis. 31, 52 N. W. 1131.....	983, 984
v. Coe, 115 Mass. 481.....	831	Crookston v. Polk County, 79 Minn. 283, 82 N. W. 586.....	576
v. Crompton, 137 Pa. 136, 20 Atl. 417.....	983	Cross v. Burke, 146 U. S. 82, 36 L. ed. 896, 13 Sup. Ct. Rep. 22.....	730
v. Huntley, 156 Mass. 236, 15 L. R. A. 839, 30 N. E. 1127.....	170	v. Carson, 8 Blackf. 138, 44 Am. Dec. 743.....	900
v. Isenberg, 4 Pa. Dist. R. 579.....	144	v. National F. Ins. Co. 182 N. Y. 133, 30 N. E. 390.....	788
v. Jackson, 132 Mass. 16.....	44	v. Plymouth County, 125 Mass. 557.....	148
Rep. 299.....	239, 245, 306	Crozer v. Chambers, 20 N. J. L. 256.....	505
v. Johnson, 133 Pa. 293, 19 Atl. 402.....	245, 307	Crump, Re, 84 Va. 927, 6 S. E. 620.....	745
v. Kenney, 12 Met. 235, 46 Am. Dec. 672.....	607	Cuddy, Ex parte, 40 Fed. 62.....	732
v. McCarthy, 119 Mass. 354.....	307	Cummings v. Kent, 44 Ohio St. 92, 4 N. E. 710, 58 Am. Rep. 796.....	506
v. Miller, 3 Cush. 244.....	307	v. Union Blue Stone Co. 164 N. Y. 401, 52 L. R. A. 262, 58 N. E. 525.....	647
v. Petty, 96 Ky. 452, 29 L. R. A. 786, 29 S. W. 201.....	177	Cunningham, Re, 38 Minn. 169, 36 N. W. 269.....	387
v. Russell, 156 Mass. 196, 30 N. E. 763.....	246, 307	Curling v. Curling, 8 Dana, 38, 33 Am. Dec. 475.....	404
v. Smith, 102 Mass. 144.....	887	Curran v. Galen, 152 N. Y. 33, 37 L. R. A. 802, 46 N. E. 297.....	647, 649
v. Stone, 4 Met. 43.....	245, 306	Cutts v. Rock County, 58 Wis. 642, 17 N. W. 636.....	730
v. Sturdivant, 117 Mass. 122, 19 Am. Rep. 401.....	549		
v. Thacher, 97 Mass. 583, 93 Am. Dec. 125.....	100, 124		
v. Tibbs, 1 Dana, 524.....	904		
v. Waterman, 122 Mass. 57.....	745		
v. Willard, 22 Pick. 470.....	904		
Com. ex rel. Chew v. Carlisle, Brightly (Pa.) 36.....	745		
Wilson v. Fourteen Hogs, 10 Serg. & R. 393.....	134		
O'Hara v. Smith, 4 Binn. 117.....	171		
Comstock v. Grout, 17 Vt. 512.....	758		
Condee v. Barton, 62 Cal. 1.....	980		
Congress & E. Spring Co. v. Edgar, 99 U. S. 651, 25 L. ed. 488.....	134		
Connecticut Mut. L. Ins. Co. v. Ellis, 80 Ill. 516.....	550		
62 L. R. A.			

- Farmers' Loan & T. Co. v. Northern P. R.** Co. 25 L. R. A. 414, note, 4 Inters. Com. Rep. 744, note, 60 Fed. 803 745, 746
- Farmers' Nat. Bank v. Woodell,** 38 Or. 294, 61 Pac. 837, 65 Pac. 520 546, 549
- Farmers' Sav. & Bldg. & L. Asso. v. Kent,** 131 Ala. 246, 30 So. 874 39
- Farmville v. Walker (Va.)** 61 L. R. A. 125, 43 S. E. 558 771, 772
- Farrington v. Bullard,** 40 Barb. 512 785
- Fay v. Sears,** 111 Mass. 154 816
- Federal Oil Co. v. Western Oil Co.** 112 Fed. 373 890, 900
- Fellows v. Duncan,** 13 Met. 332 815
- Ferriss v. Berlin Mach. Works,** 90 Wis. 541, 63 N. W. 234 614
- Feurer v. Stewart,** 83 Fed. 793 769, 770
- Filburn v. People's Palace & Aquarium Co.** L. R. 25 Q. B. Div. 258 134
- Flach v. Board of Education,** 30 Ohio St. 37, 27 Am. Rep. 414 939, 940
- F. v. Gregg,** 126 N. C. 176, 49 L. R. A. 678, 35 S. E. 251, 759, 760, 971, 973
- Finn v. Metropolitan L. Ins. Co.** 67 N. J. L. 17, 50 Atl. 580 779
- Firestone v. Rice,** 71 Mich. 377, 38 N. W. 885 909
- First Nat. Bank v. Marshall & I. Bank,** 28 C. C. A. 42, 54 U. S. App. 510, 83 Fed. 725 785
- v. Ocean Nat. Bank,** 60 N. Y. 278, 19 Am. Rep. 181 786
- v. Stockwell,** 92 Tenn. 252, 20 L. R. A. 605, 21 S. W. 523 176
- Fisher v. Thirkell,** 21 Mich. 14, 4 Am. Rep. 422 911
- Fisherdick v. Hutton,** 44 Neb. 122, 62 N. W. 488 394
- Fitzgerald v. Clark,** 71 Mont. 100, 30 L. R. A. 803, 42 Pac. 273, Affirmed in 171 U. S. 92, 43 L. ed. 87, 18 Sup. Ct. Rep. 941 558
- Flaherty v. Moran,** 81 Mich. 52, 8 L. R. A. 183, 45 N. W. 381 605
- Flentham v. Steward,** 45 Neb. 640, 63 N. W. 924 958
- Flint & P. M. R. Co. v. Detroit & B. C. R. Co.** 64 Mich. 350, 31 N. W. 151, 157
- Flynn v. Equitable L. Ins. Co.** 78 N. Y. 568, 34 Am. Rep. 561 783
- Foley v. Emerald & P. Brewing Co.** 61 N. J. L. 428, 30 Atl. 650 505
- v. Mason,** 6 Md. 37 804
- Forbell v. New York,** 164 N. Y. 522, 51 L. R. A. 693, 58 N. E. 644 593
- Forbes v. Mosquito Fleet Yacht Club,** 175 Mass. 430, 56 N. E. 615 373
- v. Scannell,** 13 Cal. 242 386
- Ford v. Chicago Milk Shippers' Asso.** 155 Ill. 166, 27 L. R. A. 298, 39 N. E. 651 742
- v. Ford,** 104 Mass. 198 822
- v. Harrington,** 16 N. Y. 285 109
- Ft. Wayne v. Coombs,** 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743 549
- Forward v. Continental Ins. Co.** 142 N. Y. 382, 25 L. R. A. 637, 37 N. E. 615 783
- Fosdick v. Hempstead,** 125 N. Y. 581, 11 L. R. A. 715, 26 N. E. 801 981
- Foster v. Elk Fork Oil Co.** 32 C. C. A. 560, 61 U. S. App. 576, 90 Fed. 178 900
- Fourth Street Nat. Bank v. Yardley,** 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439 561
- Fowle v. Park,** 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 638 639
- Fowler v. Metropolitan L. Ins. Co.** 116 N. Y. 389, 5 L. R. A. 805, 22 N. E. 576 783
- Fowles v. Briggs,** 116 Mich. 425, 40 L. R. A. 528, 74 N. W. 1046 911
- Fox, Re,** 52 N. Y. 535, 11 Am. Rep. 751 769
- Franklin v. Durgree,** 71 N. H. 186, 58 L. R. A. 112, 51 Atl. 911 604
- Franklin F. Ins. Co. v. Martin,** 40 N. J. L. 568, 29 Am. Rep. 271 780
- Franks Case.** See Baldwin v. Franks, 120 U. S. 685-690, 32 L. ed. 768, 769, 7 Sup. Ct. Rep. 658, 763
- Frazier v. Frazer Lubricator Co.** 121 Ill. 147, 13 N. E. 639 89
- Frazier v. Kanawha & M. R. Co.** 40 W. Va. 224, 21 S. E. 723 186
- Frederick v. Douglas County,** 96 Wis. 411, 71 N. W. 798 730
- v. Marquette, H. & O. R. Co.** 37 Mich. 342, 26 Am. Rep. 531 390
- Free v. Stuart,** 39 Neb. 220, 57 N. W. 891 376
- Freight Asso. Case.** See United States v. Trans-Missouri Freight Asso. 106 U. S. 290, 322, 41 L. ed. 1007, 1021, 17 Sup. Ct. Rep. 540
- Freeport v. Isbell,** 83 Ill. 440, 25 Am. Rep. 407 929
- French, Re,** 81 Wis. 597, 51 N. W. 960 737
- Friedlander v. Ryder,** 30 Neb. 783, 9 L. R. A. 700, 47 N. W. 83 376
- Friel v. Plumer,** 69 N. H. 498, 43 Atl. 618 605
- Friend v. Friend,** 53 Mich. 543, 51 Am. Rep. 181, 19 N. W. 176 883
- Frombols v. Jackson,** 8 Cow. 589, 18 Am. Dec. 463 572
- Fuchs v. St. Louis,** 107 Mo. 620, loc. cit. 645, 57 L. R. A. 136, 67 S. W. 010 477

G.

- Gage v. Pittsfield Twp.** 120 Mich. 436, 79 N. W. 087 151
- Gale v. Lincoln,** 11 Vt. 152 607
- Gallager v. Brunel,** 8 Cow. 347 785
- Gallagher v. Dodge,** 48 Conn. 387, 40 Am. Rep. 182 603
- v. Gallagher,** 31 W. Va. 9, 5 S. E. 297 574
- v. Market Street R. Co.** 67 Cal. 13, 50 Am. Rep. 713, 6 Pac. 869 549
- Gamble v. Daugherty,** 71 Mo. 599 467
- Gardner v. Gardner,** 177 Pa. 118, 35 Atl. 558 385
- Garland v. Towne,** 65 N. H. 55, 20 Am. Rep. 164 605
- Garner v. Mangam,** 93 N. Y. 642 786
- Garret v. Taylor, Cro. Jac.** 567 696
- Garst v. Harris,** 177 Mass. 72, 58 N. E. 174 639
- Gass v. Wilhite,** 2 Dana, 170, 26 Am. Dec. 446 403, 404
- Gatzow v. Buening,** 106 Wis. 1, 49 L. R. A. 475, 81 N. W. 1003 745
- Gaylord v. Van Loan,** 15 Wend. 308, 397, 398
- Georgia R. & Bkg. Co. v. Hopkins,** 108 Ga. 324, 34 S. E. 963 512
- v. Smith,** 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47 154
- German Bank v. American Ins. Co.** 83 Iowa, 491, 50 N. W. 53 183
- German F. Ins. Co. v. Root,** 55 Ohio St. 581, 36 L. R. A. 236, 45 N. E. 1907 635
- Gibbons v. Ogden,** 9 Wheat. 1, 6 L. ed. 23 670
- Gibbs v. McNeeley,** 102 Fed. 594 742
- Gibney v. Curtis,** 61 Md. 201 804
- Gibson v. Hammang,** 63 Neb. 349, 88 N. W. 501 388
- v. Leonard,** 143 Ill. 182, 17 L. R. A. 588, 32 N. E. 182 135
- v. Parlin,** 13 Neb. 292, 13 N. W. 405 958
- Gilbert v. State (Ga.)** 43 S. E. 47 130
- Glass v. Wynn,** 76 Ga. 319 881
- Gleason v. Gleason,** 16 Neb. 15, 19 N. W. 784 883
- v. Waukesha County,** 108 Wis. 225, 79 N. W. 249 148
- Globe Accl. Ins. Co. v. Gerlich,** 163 Ill. 625, 45 N. E. 563 489
- Gloucester v. Wood,** 3 Hare, 131 990
- Gloucester Ferry Co. v. Pennsylvania,** 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826 671
- Glutting v. Metropolitan L. Ins. Co.** 50 N. J. L. 287, 13 Atl. 4 779
- Godcharles v. Wigeman,** 113 Pa. 431, 6 Atl. 354 144
- Godefroy v. Jay,** 7 Bing. 413 626, 627
- Godefroy Case.** See Godefroy v. Jay, 7 Bing. 413
- Goersen v. Com. 99 Pa.** 388 254, 258, 307
- Goetz v. Bank of Kansas City,** 119 U. S. 551, 30 L. ed. 515, 7 Sup. Ct. Rep. 318 971
- Goff v. Miller,** 41 W. Va. 683, 24 S. E. 643 502
- Good v. Martin,** 95 U. S. 90, 24 L. ed. 341 502
- Goodrich v. Milwaukee,** 24 Wis. 422, 980, 991

- Goodright ex dem. Glazier v. Glazier, 4 Burr. 2512 386
 Rolfe v. Harwood, 3 Wils. 497 389
 Gould, Re, 72 Vt. 316, 47 Atl. 1082 387
 Goulds v. Brophy, 42 Minn. 109, 6 L. R. A. 392, 43 N. W. 834 598
 Graft v. Evans, L. R. 8 Q. B. Div. 373 887
 Grafton Bank v. Kent, 4 N. H. 221, 17 Am. Dec. 414 503
 Graham, Re, 76 Wis. 366, 44 N. W. 1105 737
 Grand Junction R. & Depot Co. v. Middlesex County, 14 Gray. 553 152
 Grand Rapids v. Bennett, 106 Mich. 528, 64 N. W. 583 151, 153, 156
 v. Grand Rapids & I. R. Co. 58 Mich. 641, 647, 26 N. W. 159 151, 156
 Grand Rapids & I. R. Co. v. Helsel, 38 Mich. 62, 31 Am. Rep. 306 154, 155
 Grant v. Grant, 1 Sandf. Ch. 235 389
 Grattan v. Metropolitan L. Ins. Co. 80 N. Y. 281, 36 Am. Rep. 617, 92 N. Y. 274, 44 Am. Rep. 372 783
 Gray v. Bailey, 117 N. C. 439, 23 S. E. 318 567
 v. Berryman, 4 Munf. 181 490
 Green v. Button, 2 Crompt. M. & R. 707 699
 v. Farmers' & C. Bank, 25 Conn. 452 182
 v. Irving, 54 Miss. 450, 28 Am. Rep. 360 768, 771
 Greenfield v. Kennett, 69 N. H. 419, 45 Atl. 233 818
 Greenleaf v. Dubuque & S. C. R. Co. 33 Iowa, 52 614
 v. Francis, 18 Pick. 117 593
 Greensboro v. Ehrenreich, 80 Ala. 579, 60 Am. Rep. 130, 2 So. 725 894
 Greer v. Mitchell, 42 W. Va. 494, 26 S. E. 302 577
 Gregory v. Brunswick, 6 Mann. & G. 205 696, 744
 Griffen v. Manice, 166 N. Y. 186, 52 L. R. A. 922, 59 N. E. 925 876
 Griffith v. Ivory, 11 Ad. & El. 322 819
 Groesbeck v. Seeley, 13 Mich. 345 794
 Groome, Ex parte, 1 Att. 118 461, 471
 Guernsey v. Lazaar, 51 W. Va. 328, 41 S. E. 403 567
 Guffy v. Hukill, 34 W. Va. 49, 8 L. R. A. 759, 11 S. E. 754 899, 900
 Gulf, C. & S. F. R. Co. v. Donnelly, 70 Tex. 371, 8 S. E. 52 615
 Gwinnell v. Eamer, L. R. 10 C. P. 658 910
- H.
- Haley v. Colcord, 59 N. H. 7, 47 Am. Rep. 176 606
 Hall v. Casenove, 4 East, 477 502
 v. Coe [1898] 1 Q. B. 198 131
 v. De Cuir, 95 U. S. 485, 24 L. ed. 547 671
 v. Memphis & C. R. Co. 15 Fed. 57 360
 Halsey v. Warden, 28 Kan. 128 759
 Hamilton County v. Mighels, 7 Ohio St. 103 939, 940
 Hankins v. State (Tex. Crim. App.) 72 S. W. 101 973
 Hannigan v. Smith, 28 App. Div. 178, 50 N. Y. Supp. 845 616
 Hannon v. Hannah, 9 Gratt. 146 574
 Harblson v. Knoxville Iron Co. 103 Tenn. 439, 56 L. R. A. 316, 53 S. W. 955 175
 v. White, 46 Conn. 106 603
 Hardigan, Re, 57 Vt. 100 737
 Harding v. People, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624 894
 Hardwick v. Brookover, 48 Kan. 609, 30 Pac. 21 895
 Hardy v. Bern, 5 T. R. 636 460
 Harkins v. Forsyth, 11 Leigh. 294 794
 Harmon v. Dedrick, 3 Barb. 192 462
 v. Hagerty, 88 Tenn. 705, 13 S. W. 690 176
 Harratt v. Harratt, 7 N. H. 196, 26 Am. Dec. 730 883
 Harring v. Allen, 25 Mich. 505 385
 Harris v. Hewitt, 64 Minn. 54, 65 N. W. 1085 614
 v. McReynolds, 10 Colo. App. 532, 51 Pac. 1016 909
 Harris Case. See United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601.
- Harrison v. Harrison, 105 Ga. 520, 31 S. E. 455 130
 Hart v. Anthony, 15 Pick. 445 182
 v. Baltimore & O. R. Co. 6 W. Va. 336 184
 v. Cole, 156 Mass. 475, 16 L. R. A. 557, 31 N. E. 644 135
 v. Jamaica Pond Aqueduct Corp. 133 Mass. 488 593
 v. Walker, 100 Mich. 406, 59 N. W. 174 547
 Hartnett v. Plumbers' Supply Asso. 160 Mass. 229, 38 L. R. A. 194, 47 N. E. 1002 697
 Harvard College v. Boston, 104 Mass. 470 148
 Harvey v. Great Northern R. Co. 50 Minn. 405, 17 L. R. A. 84, 52 N. W. 905 184
 Harwell v. Lively, 30 Ga. 315, 76 Am. Dec. 649 387
 Harwood v. Goodright, 1 Cowp. 89, 91 386, 389
 Haseltine v. Central Nat. Bank, 155 Mo. 66, 56 S. W. 895 601
 Haskell v. Haskell, 54 Cal. 262 883
 v. Jones, 86 Pa. 173 176
 Hatch v. Squires, 11 Mich. 185 787
 Hathaway v. Davis, 32 Kan. 693, 5 Pac. 29 375
 Hawarden v. Youghiogheny & L. Coal Co. 111 Wis. 545, 55 L. R. A. 828, 87 N. W. 472 647
 Hawes v. Cooksey, 13 Ohio, 242 757
 v. State, 88 Ala. 37, 7 So. 302, 243, 306
 Hawkins v. Pepper, 117 N. C. 407, 23 S. E. 434 899
 Hayden v. Weldon, 43 N. J. L. 128, 38 Am. Rep. 551 505
 Hayes v. Southern Home Bldg. & L. Asso. 124 Ala. 609, 26 So. 530 40
 Hayner v. Cowden, 27 Ohio St. 292, 22 Am. Rep. 303 481
 Hazelton Boiler Co. v. Hazelton Tripod Boiler Co. 142 Ill. 404, 30 N. E. 339 89
 Head v. Head, 2 Ga. 191 879, 880
 Heald v. Concord & M. R. 68 N. H. 49, 44 Atl. 77 818
 Healy v. Ryan, 25 N. Y. Week. Dig. 23, Affirmed without opinion in 116 N. Y. 657, 22 N. E. 1130 615
 Heard v. Dubuque County Bank, 8 Neb. 10, 30 Am. Rep. 811 958
 Heavener v. Godfrey, 3 W. Va. 426 577
 Hefflebower v. Detrick, 27 W. Va. 16 185
 Heffron v. Kittanning Ins. Co. 132 Pa. 586, 20 Atl. 700 656
 Hedlin v. Milton, 69 Ala. 357 354
 Helm v. First Nat. Bank, 43 Ind. 167, 13 Am. Rep. 395 176
 Helm's Case, 1 N. Y. City Hall Rec. 46 245, 306
 Helmer v. Commercial Bank, 28 Neb. 474, 44 N. W. 482 958
 Henderson v. Clayton, 22 Ky. L. Rep. 288, 53 L. R. A. 145, 57 S. W. 1, 903, 905
 Hendrickson v. People, 10 N. Y. 14, 61 Am. Dec. 721 293
 Henn v. Metropolitan L. Ins. Co. 67 N. J. L. 810, 51 Atl. 689 779
 Henry, Re, 13 Misc. 734, 35 N. Y. Supp. 210
 Henry & C. Co. v. Fisherdick, 37 Neb. 207, 55 N. W. 643 374
 Herdic v. Roessler, 109 N. Y. 127, 16 N. E. 198 176
 Herring v. Skaggs, 73 Ala. 446 928
 Herrington v. Clark, 56 Kan. 644, 44 Pac. 624 771
 Hersey v. Barton, 23 Vt. 685 607
 Hester v. Com. 85 Pa. 139 307
 Heuer v. North Western Nat. Ins. Co. 144 Ill. 303, 19 L. R. A. 594, 33 N. E. 411 656
 Hewins v. Baker, 161 Mass. 320, 37 N. E. 441 985
 Hickory v. United States, 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. Rep. 334, 286, 291, 819, 833
 Hicks Bros. v. Swift Creek Mill Co. 133 Ala. 411, 57 L. R. A. 720, 31 So. 947 554
 Hiles v. Fisher, 144 N. Y. 308, 30 L. R. A. 305, 39 N. E. 337 570
 Hillson Co. v. Foster, 80 Fed. 896, 901 611
 Hittson v. Davenport, 4 Colo. 169 394
 Hoar v. Wood, 3 Met. 193 481
 Hoffman v. National City Bank, 12 Wall. 181, 20 L. ed. 366 972
- 62 L. R. A.

King v. Donahue, 110 Mass. 155, 14 Am. Rep. 589	833	Leonard v. Poole, 114 N. Y. 371, 4 L. R. A. 728, 21 N. E. 707	847, 742
v. Higgins, 2 East. 5	904	Le Page Co. v. Russia Cement Co. 17 L. R. A. 354, 2 C. C. A. 555, 5 U. S. App. 586	782
Kingsville Preserving Co. v. Frank, 87 Ill. App. 586	782	Leslie v. Leslie, Jr. Rep. 6 Eq. 332	87
Kinney v. Louisville & N. R. Co. 99 Ky. 59, 34 S. W. 1066	406	Letts v. Kessler, 54 Ohio St. 73, 40 L. R. A. 177, 42 N. E. 765	804, 806
Kirby v. Estill, 75 Tex. 484, 12 S. W. 807	92	Lewis, Re, 51 Wis. 101, 7 N. W. 829	388
Kirkwood v. Finegan, 95 Mich. 543, 55 N. W. 457	604	v. Lewis, 13 Pa. 79, 53 Am. Dec. 443	426
Kittredge v. North Brookfield, 138 Mass. 286	148	v. State, 148 Ind. 346, 47 N. E. 875	141
Klein v. New York L. Ins. Co. 104 U. S. 88, 26 L. ed. 662	120	Lexington & St. L. R. Co. v. Mockbee, 63 Mo. 348	463, 468
Kleppner v. Lemon, 176 Pa. 502, 35 Atl. 109	899	Lexow v. Julian, 21 Hun, 577, Affirmed, 86 N. Y. 638	785
Knight v. Denman (Neb.) 90 N. W. 863	391	Lilley v. Parkinson, 91 Cal. 655, 27 Pac. 1091	549
Knott v. Raleigh & G. R. Co. 98 N. C. 73, 3 S. E. 735	547	Lincoln v. Boston Street Comrs. 176 Mass. 210, 57 N. E. 356	147, 148
Kohn v. Koehler, 96 N. Y. 362, 48 Am. Rep. 628	108	Lininger & M. Co. v. Wheat, 49 Neb. 567, 68 N. W. 941	959
Konrad v. Union Casualty & Surety Co. 49 La. Ann. 636, 21 So. 721	488	Link v. Sheldon, 45 N. Y. S. R. 165, 18 N. Y. Supp. 815	549
Kosciusko v. Slomberg, 68 Miss. 469, 12 L. R. A. 528, 9 So. 297	804	Linn v. McLean, 85 Ala. 250, 4 So. 777	553
Kramer v. Com. 87 Pa. 301	260, 307	Linton v. Hurley, 104 Mass. 353	816
Krnavak v. State, 38 Tex. Crim. Rep. 44, 41 S. W. 612	887	Lippincott v. Supreme Council, Royal Arcanum, 64 N. J. L. 309, 45 Atl. 774	779
Kruger v. Geer, 26 Misc. 772, 56 N. Y. Supp. 1015	762	List Pub. Co. v. Keller, 30 Fed. 772	609
Krumm v. Beach, 96 N. Y. 398	786	Little v. Phoenix Ins. Co. 123 Mass. 380, 25 Am. Rep. 96	398
Kuhn v. Brownfield, 34 W. Va. 252, 11 L. R. A. 700, 12 S. E. 519	495, 497	Locks & Canals v. Nashua & L. R. Corp. 10 Cush. 885	152
Kutz v. McCune, 22 Wis. 628, 99 Am. Dec. 65	770	Long v. Campbell, 37 W. Va. 665, 17 S. E. 197	502, 503, 507
L			
Laclede Bank v. Schuler, 120 U. S. 511, 30 L. ed. 704, 7 Sup. Ct. Rep. 644	561, 562	Loomis v. Bedel, 11 N. H. 75	768, 771
Ladd v. Anderson, 58 Wis. 591, 17 N. W. 320	988	Lord v. Langdon, 91 Me. 221, 39 Atl. 552	603
v. Granite State Brick Co. 68 N. H. 185, 37 Atl. 1041	606	v. State, 17 Neb. 526, 23 N. W. 507	173
La Frombois Case, The, 8 Cow. 589, 18 Am. Dec. 463	572	Louisville, N. A. & C. R. Co. v. Bodenschats-Bedford Stone Co. 141 Ind. 251, 39 N. E. 703	899
Laidlaw v. Sage, 158 N. Y. 73, 44 L. R. A. 216, 52 N. E. 679	788	Love v. Stidham, 18 App. D. C. 306, 53 L. R. A. 397	965
Laing v. Fidgeon, 4 Campb. 169, 6 Taunt. 108	598	Lovejoy v. Albee, 33 Me. 414, 54 Am. Dec. 630	182
Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co. 80 Ohio St. 804	152, 153, 159	Lovell v. Noyes, 69 N. H. 263, 46 Atl. 25	603
Land v. Harris, 1 Strange, 515	461, 471	Low v. Peers, Wilmot's Notes, 378	396
Landa v. Lattin Bros. 19 Tex. Civ. App. 246, 46 S. W. 48	759, 760, 971, 793	Lowe v. Brooks, 23 Ga. 325	130
Lander v. Beaver, 32 Vt. 120, 76 Am. Dec. 156	163	Lowell v. Spaulding, 4 Cuah. 277, 50 Am. Dec. 775	911
Lane v. Concord, 70 N. H. 485, 49 Atl. 687	606	Luessen v. Oshkosh Electric Light & P. Co. 109 Wis. 94, 85 N. W. 124	585, 586
v. Hill, 68 N. H. 275, 44 Atl. 393	389	Luessen Case. See Luessen v. Oshkosh, Electric Light & P. Co. 109 Wis. 94, 85 N. W. 124	
v. Snow, 66 Iowa, 544, 24 N. W. 35	373, 375	Lukens v. Frelund, 27 Kan. 664, 41 Am. Rep. 429	598
Langford v. Jones, 18 Or. 307, 22 Pac. 1064	546	Lumley v. Gye, 2 El. & Bl. 216	687, 696, 699, 966, 967
Laverone v. Mangianti, 41 Cal. 138, 10 Am. Rep. 269	134	Luxton v. North River Bridge Co. 153 U. S. 529, 38 L. ed. 810, 14 Sup. Ct. Rep. 891	939
Lawrence v. Smith, 45 N. H. 533, 86 Am. Dec. 183	182	Lynch v. Livingston, 6 N. Y. 434	795
v. Winifrede Coal Co. 48 W. Va. 139, 35 S. E. 925	492	Lytle v. Chicago & W. M. R. Co. 84 Mich. 289, 47 N. W. 571	614
Lawson v. Conway, 37 W. Va. 159, 18 L. R. A. 627, 16 S. E. 564	497	M	
Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499	142	McAllister v. Long, 33 Or. 368, 54 Pac. 194	546
Lawyer v. Smith, 8 Mich. 411, 77 Am. Dec. 460	385	Macauley Bros. v. Tierney, 19 R. I. 255, 37 L. R. A. 455, 33 Atl. 1	935
Lea v. Pope County Copper Co. 21 How. 493, 16 L. ed. 203	389	McAulich v. Mississippi & M. R. Co. 20 Iowa, 338	414, 417
Leach v. Leach, 4 Ind. 628, 58 Am. Dec. 642	899	McBride v. Pierce County, 44 Fed. 17	769
Leeds v. Shaw, 82 Ky. 82	401	McCarthy v. Washburn, 42 App. Div. 252, 58 N. Y. Supp. 1125	616
Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75	417, 420	McCarty v. Ashland County, 61 Wis. 1, 20 N. W. 654	732
Leep Case. See Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75	385, 387	McClave v. Mutual Reserve Fund Life Assn. 55 N. J. L. 187, 26 Atl. 78	779
Legare v. Ashe, 1 Bay. 464	671	McClellan v. Coffin, 93 Ind. 456	899
Lelsy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681	671	McClure v. McClure, 66 Tenn. 173, 6 S. W. 44	387
Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825	516	McCoy, Re (Neb.) 89 N. W. 605	388
Lents v. Lents, 2 Phila. 117	131	M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579	939
62 L. R. A.		M'Cune v. House, 8 Ohio 144, 31 Am. Dec. 438	388
		McCurdy v. Canning, 64 Pa. 41	569

McDonald v. McDonald, 142 Ind. 55, 41 N. E. 336.....	385	Marchant v. Pennsylvania R. Co. 153 U. S. 380, 388, 38 L. ed. 751, 756, 14 Sup. Ct. Rep. 694.....	515
v. Milwaukee County, 41 Wis. 642.....	730	Marcus v. St. Louis Mut. L. Ins. Co. 68 N. Y. 625.....	985
v. United States, 12 C. C. A. 339, 24 U. S. App. 25, 63 Fed. 427, 99.....	124	Marle v. Garrison, 83 N. Y. 14.....	945
McDonough v. Jolly Bros. 165 Pa. 542, 30 Atl. 1048.....	598	Marmont v. State, 48 Ind. 21.....	887
McDuff v. Beauchamp, 50 Miss. 531.....	569	Marsh v. Chickering, 101 N. Y. 400, 5 N. E. 56.....	615
McEldowney v. Wyatt, 44 W. Va. 711, 45 L. R. A. 609, 30 S. E. 239.....	576	v. Low, 55 Ind. 271.....	971
McElroy v. John Hancock Mut. L. Ins. Co. 88 Md. 137, 41 Atl. 112.....	488	Marshall v. Brown, 50 Mich. 148, 15 N. W. 55.....	550
McFarland v. United States Mut. Acci. Asso. 124 Mo. 204, 27 S. W. 430.....	488	Martens v. Reilly, 109 Wis. 464, 84 N. W. 840.....	743
McGarry v. Nicklin, 110 Ala. 559, 17 So. 726.....	39	Martin v. Farnham, 25 N. H. 195.....	606
McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456.....	771	v. State, 24 Tex. 62.....	770
McGoon v. Shirk, 54 Ill. 408, 5 Am. Rep. 122.....	394	Martin Case. See Franklin F. Ins. Co. v. Martin, 40 N. J. L. 568, 29 Am. Rep. 271.....	472
McGowan v. Supreme Court, I. O. of F. 104 Wis. 173, 80 N. W. 603.....	984	Masfen v. Touchet, 2 W. Bl. 706.....	598
McHugh v. McCole, 97 Wis. 160, 40 L. R. A. 724, 72 N. W. 631.....	990	Mason v. Chappell, 15 Gratt. 572.....	586
McKay v. Lasher, 121 N. Y. 477, 24 N. E. 711.....	290	v. Hill, 3 Barn. & Ad. 304.....	585
McKenna Case. See Old Dominion S. S. Co. v. McKenna, 30 Fed. 48.....		v. McLeod, 57 Kan. 105, 41 L. R. A. 548, 45 Pac. 76.....	176, 177
Mackey Case. See Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.....	958	Massachusetts C. R. Co. v. Boston, C. & F. R. Co. 121 Mass. 124.....	152
McKibben v. Ripley, 95 N. W. 1048.....	958	Matlock v. Wheeler, 29 Or. 64, 40 Pac. 5, 43 Pac. 867.....	546
McKnight v. Manufacturers' Natural Gas Co. 146 Pa. 185, 23 Atl. 164.....	809	May v. Burdett, 9 Q. B. 111.....	134, 135
McLaughlin v. Cowley, 127 Mass. 316.....	431	Mayer v. People, 80 N. Y. 364.....	306
v. National Mut. Bond & Invest. Co. 64 Fed. 908.....	100, 110, 123	Meacham v. Fitchburg R. Co. 4 Cush. 291.....	148
McMillan v. Equitable Loan & Secur. Co. 102 Ga. 575, 27 S. E. 668.....	110	Mead v. West Pub. Co. 80 Fed. 380.....	909
McNally v. Phoenix Ins. Co. 137 N. Y. 389, 33 N. E. 475.....	489, 783	Meggett, Re, 105 Wis. 291, 81 N. W. 419.....	737
McQuaid v. Ross, 85 Wis. 492, 22 L. R. A. 187, 55 N. W. 705.....	598	Meguire v. Corwine, 101 U. S. 108, 25 L. ed. 899.....	368
McWilliams v. Gough, 116 Wis. 576, 93 N. W. 550.....	991	Melen v. Andrews, Moody & M. 336.....	607
Maderio's Appeal, 17 W. N. C. 202, 4 Atl. 908.....	985	Mendel v. Fink, 8 Ill. App. 378.....	911
Magdalen College Case, 11 Coke, 71b.....	102	Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008.....	786
Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 294, 42 L. ed. 1043, 18 Sup. Ct. Rep. 594.....	412	Mercler v. Mercler, 50 Ga. 546, 15 Am. Rep. 694.....	106
Magoun Case. See Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 293, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594.....	412	Merritt v. Campbell, 79 N. Y. 625.....	291
Mahan v. Brown, 13 Wend. 261, 28 Am. Dec. 461.....	604	v. Hughes, 36 W. Va. 356, 15 S. E. 56.....	573
Mahaney v. Kephart, 15 W. Va. 609.....	184, 185, 189	Meservey v. Snell, 94 Iowa, 222, 62 N. W. 767.....	771
Mahon v. Surerus, 9 N. D. 57, 81 N. W. 64.....	373	Metropolitan L. Ins. Co. v. McGrath, 52 N. J. L. 358, 19 Atl. 386.....	779
Maine C. R. Co. v. Waterville & F. R. & Light Co. 89 Me. 328, 36 Atl. 453.....	155, 159	v. McTague, 49 N. J. L. 587, 60 Am. Rep. 661, 9 Atl. 766.....	779
Makin v. Atty. Gen. 17 Cox C. C. 704 252.....	307	Metropolitan Nat. Bank v. Jones, 137 Ill. 634, 12 L. R. A. 492, 27 N. E. 533.....	561
Mandeville v. Guernsey, 51 Barb. 99.....	908	Metzger v. Hochrein, 107 Wis. 267, 50 L. R. A. 305, 83 N. W. 308.....	593
Manger Bros. v. Shipman, 30 Neb. 352, 46 N. W. 527.....	134	Meyer v. Dr. B. L. Bull Vegetable Medicine Co. 7 C. C. A. 558, 18 U. S. App. 372, 58 Fed. 884.....	87
Manhattan L. Ins. Co. v. Broughton, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. Rep. 99.....	753	v. State, 112 Ga. 20, 51 L. R. A. 496, 37 S. E. 98.....	99, 121, 123
v. Forty-second Street & G. Street Ferry R. Co. 139 N. Y. 146, 34 N. E. 776.....	787	Milburn, Re, 59 Wis. 34, 17 N. W. 965.....	737
Manhattan Medicine Co. v. Wood, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436.....	611	Miles v. Loomis, 75 N. Y. 288, 31 Am. Rep. 470.....	287, 288
Manitowoc County v. Sullivan, 51 Wis. 115, 8 N. W. 12.....	730	v. State, 58 Ala. 390.....	739
Mann v. Eckford, 15 Wend. 502, 514.....	462	Miller v. Clendenin, 42 W. Va. 416, 26 S. E. 512.....	502, 503
Manning v. Keyes, 9 R. I. 224, 11 Am. Rep. 249.....	758	v. London & L. F. Ins. Co. 41 Ill. App. 495.....	655
v. Pippen, 95 Ala. 537, 11 So. 56.....	534	v. Miller, 78 N. C. 108.....	882
Manuel v. Norfolk & W. R. Co. 99 Va. 188, 37 S. E. 957.....	491	Mills v. Mills, 40 N. Y. 546, 100 Am. Dec. 535.....	367
Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co. 155 Ind. 401, 50 L. R. A. 768, 57 N. E. 912.....	596	Milwaukee Masons' & Builders' Asso. v. Niezerowski, 95 Wis. 129, 37 L. R. A. 127, 70 N. W. 166.....	745
Mapes v. Second Nat. Bank, 80 Pa. 163 785.....	786	Minkler v. Minkler, 14 Vt. 125.....	385
Mapes Case. See Mapes v. Second Nat. Bank, 80 Pa. 163.....		Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 583, 9 Sup. Ct. Rep. 207.....	154
Marbury v. Cole, 49 Md. 402, 33 Am. Rep. 260.....	569	v. Emmons, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. Rep. 870.....	154
v. Madison, 1 Cranch, 137, 2 L. ed. 60.....	168	v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176.....	417
		Missouri v. Lewis, 101 U. S. 22, 25 L. ed. 989.....	514
		Missouri Furnace Co. v. Abend, 107 Ill. 44, 47 Am. Rep. 425.....	614
		Missouri K. & E. R. Co. v. Holschlag, 144 Mo. loc. cit. 256, 45 S. W. 1101.....	467
		Missouri P. R. Co. v. B. F. Coombs & Bro. Commission Co. 71 Mo. App. 299.....	398
		v. Haley, 25 Kan. 35.....	416
		v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.....	411, 412, 420

Missouri P. R. Co. v. Sharitt, 43 Kan. 375, 8 L. R. A. 385, 23 Pac. 430....	184	N.	
Mitchum v. Dunlap, 98 Mo. 418, 11 S. W. 989.....	787	Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28.....	154
Moan, Ex parte, 65 Cal. 216, 3 Pac. 644....	733	National Bank v. Conway, 1 Hughes, 37.....	794
Mobile & O. R. Co. v. Barnhill, 91 Tenn. 395, 19 S. W. 21.....	184	v. Dorset Marble Co. 61 Vt. 106, 2 L. R. A. 428, 17 Atl. 42.....	505
v. Postal Tele. Cable Co. 101 Tenn. 62, 41 L. R. A. 403, 46 S. W. 571	946	v. Johnson, 104 U. S. 271, 26 L. ed. 742.....	601
Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238.....	671	National F. Ins. Co. v. Chambers, 53 N. J. Eq. 468, 32 Atl. 663.....	184
Moede v. Stearns County, 43 Minn. 312, 45 N. W. 435.....	732	National Harrow Co. v. Bement & Sons, 21 App. Div. 290, 47 N. Y. Supp. 462.....	650
Moffatt v. Gill, 86 L. T. N. S. 465.....	609	v. Hench, 39 L. R. A. 209, 27 C. C. A. 340, 55 U. S. App. 53, 83 Fed. 36, 38, 76 Fed. 667.....	650
Mogridge v. Thackwell, 7 Ves. Jr. 36.....	399	National Indemnity & E. Co., Re, 142 Pa. 450, 21 Atl. 879.....	100, 123
Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 598.....	745	National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L. R. A. 135, 63 N. E. 369.....	638, 640, 641
Mogul S. S. Co. Case. See Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 598.		National Protective Asso. Case. See National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L. R. A. 135, 63 N. E. 369.	
Molyneux v. Seymour, 30 Ga. 440, 76 Am. Dec. 662.....	183	Nelson v. Bostwick, 5 Hill, loc. cit. 40, 40 Am. Dec. 310.....	462
Monard v. Boston & M. R. Co. 150 Mass. 386, 23 N. E. 214.....	753	v. Liverpool Brewery Co. L. R. 2 C. P. Div. 313.....	910
Montclair Twp. v. Ramsdell, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. Rep. 391.....	576, 770	v. McGilfert, 3 Barb. Ch. 158, 49 Am. Dec. 170.....	387, 389
Montgomery v. Reed, 69 Me. 510.....	769	v. Shelby Mfg. & Improv. Co. 96 Ala. 515, 11 So. 605.....	553, 554
Moody v. Rowell, 17 Pick. 490, 28 Am. Dec. 317.....	820	Nester v. Continental Brewing Co. 161 Pa. 473, 24 L. R. A. 247, 29 Atl. 102	742
Mooney v. Buford & G. Mfg. Co. 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 32.....	183, 547	New v. Walker, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386.....	176, 389
v. Holcomb, 15 Or. 639, 16 Pac. 710	547	Newell v. Homer, 120 Mass. 277.....	902
v. Union P. R. Co. 60 Iowa, 346, 14 N. W. 343.....	183	v. Whitcher, 53 Vt. 589, 38 Am. Rep. 703.....	
Moore v. Hanover F. Ins. Co. 141 N. Y. 219, 36 N. E. 191.....	783	Newton Wagon Co. v. Diers, 10 Neb. 284, 4 N. W. 995.....	957, 958
v. H. Gaus & Sons Mfg. Co. 113 Mo. 98, 20 S. W. 975.....	547	New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437.....	154, 156
v. McNutt, 41 W. Va. 695, 24 S. E. 682.....	567	New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 36 L. ed. 71, 12 Sup. Ct. Rep. 356.....	360
v. Moore, 4 Dana, 364, 29 Am. Dec. 417.....	400, 402, 911	New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837.....	781
v. Steljes, 69 Fed. 519.....	404	v. Statham, 93 U. S. 30, 23 L. ed. 791.....	120
v. United States, 91 U. S. 270, 23 L. ed. 346.....	819	New York, N. H. & H. R. Co. v. Blacker, 178 Mass. 386, 59 N. E. 1020.....	148
v. Vaughan, 42 Neb. 696, 60 N. W. 914.....	874	Ney v. Dubuque & S. C. R. Co. 20 Iowa, 347	414
Moore v. State, 63 Neb. 345, 88 N. W. 514	484	Nichols v. Ann Arbor & Y. Street R. Co. 87 Mich. 361, 369, 16 L. R. A. 371, 49 N. W. 588.....	154, 156
Moorman v. Wood, 117 Ind. 144, 19 N. E. 739.....	626	v. Parsons, 6 N. H. 80, 23 Am. Dec. 706.....	503, 734
Moors v. Goddard, 147 Mass. 287, 17 N. E. 532.....	814	v. State, 35 Wis. 308.....	
Morasse v. Brochu, 151 Mass. 567, 8 L. R. A. 524, 25 N. E. 74.....	697	Nishimura Ekiu v. United States, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336.....	735
More v. More, 92 Ill. App. 465.....	388	Noble v. Portsmouth, 67 N. H. 183, 30 Atl. 419.....	818
Morey v. Brown, 42 N. H. 373.....	603	Norfolk & W. R. Co. v. Perdue, 40 W. Va. 442, 21 S. E. 755.....	577
Morgan v. Neville, 74 Pa. 52.....	183	Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 808, 46 L. ed. 213, 22 Sup. Ct. Rep. 183.....	781
Morgan Park v. Wiswall, 155 Ill. 262, 40 N. E. 611.....	148	Nye v. Liscombe, 21 Pick. 263.....	182
Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114.....	773		
Morrant v. Gough, 7 Barn. & C. 206.....	458	O.	
Morris v. Morris, 14 Cal. 76.....	883	O'Brien v. Cunard S. S. Co. 154 Mass. 272, 13 L. R. A. 329, 28 N. E. 266.....	409
v. Wright, L. R. 5 Ch. 287.....	609	v. Home Ben. Soc. 117 N. Y. 310, 22 N. E. 954.....	783
Moss v. Partridge, 9 Ill. App. 490.....	134	Ochs v. People, 124 Ill. 399, 16 N. E. 662	739, 740
Mott v. Dawson, 46 Iowa, 533.....	926	O'Connor v. Illinois C. R. Co. 44 La. Ann. 339, 10 So. 678.....	135
Mount v. Walte, 7 Johns. 434.....	109	Odum v. Odum, 36 Ga. 286.....	881
Mugler v. Kansas, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 297.....	142, 167	Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606.....	171
Muller v. McKesson, 73 N. Y. 195, 29 Am. Rep. 123.....	134	Ogilvie v. Foley, 2 W. Bl. 1111.....	459
Munn v. Burch, 25 Ill. 35.....	501	Ohio & M. R. Co. v. Kasson, 37 N. Y. 224.....	925
Munroe v. Armstrong, 96 Pa. 307.....	900		
Murdy v. Skyles, 101 Iowa, 549, 70 N. W. 714.....	192		
Murphy v. State, 108 Wis. 111, 83 N. W. 1112.....	734		
Murray v. Kilnzing, 64 Conn. 78, 29 Atl. 244.....	394		
v. Stair, 2 Barn. & C. 82.....	461, 472		
Mutual L. Ins. Co. v. Sulter, 131 N. Y. 557, 29 N. E. 822.....	284		
v. Terry, 15 Wall. 580, 21 L. ed. 236	753		
Myers v. Toscan, 3 N. H. 47.....	820, 821, 824, 829		
Myrick v. Myrick, 67 Ga. 771.....	880, 881		
oz L. R. A.			

- Ohio Gas Fuel Co. v. Andrews, 50 Ohio St. 695, 29 L. R. A. 377, 35 N. E. 1059 952
- Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576 593
- Old Colony & F. River R. Co. v. Plymouth, 14 Gray, 155 148, 152
- Old Dominion S. S. Co. v. McKenna, 30 Fed. 48 648, 649
- O'Leary v. Delaney, 63 Me. 585 911
- Oliver v. Hawley, 5 Neb. 439 394
- Ollivant v. Bayley, 5 Q. B. 288 598
- Olmstead v. Dunn, 72 Ga. 850 131
- Olmsted v. Keyes, 85 N. Y. 593 985
- Omboy v. Jones, 19 N. Y. 234 374, 377
- Ontario Bank v. Ontario Bank, 21 N. Y. 490 100
- Opinion of the Justices, 163 Mass. 592, 28 L. R. A. 344, 40 N. E. 713 144
- Orient Ins. Co. v. Daggs, 172 U. S. 562, 43 L. ed. 554, 19 Sup. Ct. Rep. 281 141, 178
- Ormond v. Martin, 37 Ala. 598 571
- Orton v. Madden, 75 Ga. 83 110
- Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204 939
- Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539 368
- Osterman v. Baldwin, 6 Wall. 116, 18 L. ed. 730 571
- Otelza y Cortes, Re, 136 U. S. 330, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031 735
- Owens v. State, 32 Neb. 167, 49 N. W. 226 173
- Owings v. Jones, 9 Md. 108 911
- Oxford Bank v. Haynes, 8 Pick. 423, 19 Am. Dec. 334 957
- P.
- Pacific Exp. Co. v. Selbert, 142 U. S. 852, 35 L. ed. 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250 421
- Packard v. Van Schoick, 58 Ill. 79 928
- Paine v. Chase, 14 Wis. 653 731
- Papin v. Goodrich, 103 Ill. 86 928
- Parish Fork Oil Co. v. Bridgewater Gas Co. 51 W. Va. 583, 59 L. R. A. 566, 42 S. E. 655 899
- Parker v. Brast, 45 W. Va. 399, 32 S. E. 269 574
- Parkersburg v. Brown, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442, 109, 110 508
- Parkinson v. Lee, 2 East, 314 508
- Parks v. Hampden County, 120 Mass. 395 148
- Parrott v. Edmondson, 64 Ga. 332 131
- Passaic Print Works v. Ely & W. Dry-Goods Co. 44 C. C. A. 426, 103 Fed. 163 744
- Patterson v. Augusta & S. R. Co. 94 Ga. 140, 21 S. E. 283 608
- v. Kentucky, 97 U. S. 501, 24 L. ed. 1115 176, 177
- v. Pittsburg & C. R. Co. 76 Pa. 389, 18 Am. Rep. 412 615
- Paul Case. See St. Louis, I. M. & S. R. Co. v. Paul, 64 Ark. 83, 37 L. R. A. 504, 40 S. W. 705 910, 911
- Payne v. Rogers, 2 H. Bl. 350 910, 911
- Peabody v. Satterlee, 166 N. Y. 179, 52 L. R. A. 956, 59 N. E. 818 657
- Pearl v. West End Street R. Co. 176 Mass. 177, 49 L. R. A. 826, 57 N. E. 339 497, 499
- Pearson v. Zehr, 138 Ill. 48, 29 N. E. 854 893
- Peavy v. Georgia R. & Bkg. Co. 81 Ga. 485, 8 S. E. 70 512
- Peck v. Barnum, 24 Vt. 75 182
- v. Callaghan, 95 N. Y. 73 280, 281, 282
- Peck's Appeal, 50 Conn. 562, 47 Am. Rep. 685 387
- Peck Bros. & Co. v. Stratton, 118 Mass. 406 814, 816
- Peltz v. Supreme Chamber, O. of F. U. (N. J. Eq.) 19 Atl. 668 100, 110, 120
- Peninsular Bank v. Hammer, 14 Mich. 208 786
- Pennington v. Yell, 11 Ark. 212, 62 Am. Dec. 262 626
- People v. Adelphi Club, 149 N. Y. 5, 31 L. R. A. 510, 43 N. E. 410 887
- v. Arensberg, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277 169
- v. Chapleau, 121 N. Y. 267, 24 N. E. 469 293
- v. Clipperly, 37 Hun. 324 171
- v. Corey, 148 N. Y. 476, 42 N. E. 1066 284
- People v. Dimick, 107 N. Y. 13, 14 N. E. 178 306, 318
- v. Duke, 19 Misc. 292, 44 N. Y. Supp. 336 650
- v. Elliott, 74 Mich. 284, 3 L. R. A. 403, 41 N. W. 916 100
- v. Everhardt, 104 N. Y. 501, 11 N. E. 62 246, 306
- v. Fisher, 14 Wend. 9, 14, 28 Am. Dec. 501 647, 648
- v. Foley, 64 Mich. 148, 31 N. W. 94 261, 307
- v. Fox, 121 N. Y. 449, 24 N. E. 923 293
- v. Gray, 67 How. Pr. 456 734
- v. Harris, 136 N. Y. 443, 33 N. E. 65 243, 306
- v. Johnson, 86 Mich. 175, 13 L. R. A. 163, 48 N. W. 870 908
- v. Johnson, 110 N. Y. 134, 17 N. E. 684 734
- v. Kennedy, 164 N. Y. 449, 58 N. E. 652 284
- v. Lake Shore & M. S. R. Co. 52 Mich. 277, 17 N. W. 841 151
- v. Langtree, 64 Cal. 256, 30 Pac. 813 173
- v. McLure, 148 N. Y. 95, 42 N. E. 523 245, 306
- v. McLaughlin, 150 N. Y. 303, 44 N. E. 1017 306, 311
- v. McLean, 68 Mich. 480, 36 N. W. 231 908
- v. Martin, 1 Park. Crim. Rep. 187 737, 738
- v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29 169, 170, 171
- v. Milk Exchange, 145 N. Y. 207, 27 L. R. A. 437, 39 N. E. 1062 647, 742
- v. Mondon, 103 N. Y. 211, 57 Am. Rep. 709, 8 N. E. 406 292
- v. Murphy, 135 N. Y. 451, 32 N. E. 138 260, 306, 309
- v. North River Sugar Ref. Co. 54 Hun. 354, 5 L. R. A. 386, 7 N. Y. Supp. 406, 54 Hun. 355, note, 2 L. R. A. 33, 3 N. Y. Supp. 401, Affirmed in 121 N. Y. 582, 9 L. R. A. 33, 24 N. E. 834 648
- v. Otis, 4 N. Y. Crim. Rep. 149 243, 306
- v. Place, 157 N. Y. 585, 52 N. E. 576 306, 310
- v. Richardson, 18 How. Pr. 92 738
- v. Rogers, 71 Cal. 565, 12 Pac. 679 269, 307
- v. Seaman, 107 Mich. 348, 65 N. W. 203 254, 307
- v. Sharp, 107 N. Y. 467, 14 N. E. 344 237, 258, 268, 309
- v. Shea, 147 N. Y. 78, 41 N. E. 505 238
- v. Sheldon, 139 N. Y. 251, 23 L. R. A. 221, 34 N. E. 735 646, 647, 742
- v. Sliney, 137 N. Y. 570, 33 N. E. 150 284
- v. Thacker, 108 Mich. 652, 66 N. W. 562 549
- v. Tompkins, 1 Park. Crim. Rep. 224 738
- v. Van Tassel, 156 N. Y. 561, 51 N. E. 274 306, 310
- v. Wabash, St. L. & P. R. Co. 104 Ill. 476 672
- v. Wood, 3 Park. Crim. Rep. 681 244, 306
- v. Zucker, 20 App. Div. 363, 46 N. Y. Supp. 766, Affirmed, 154 N. Y. 770, 49 N. E. 1102 259, 306
- ex rel. Lawrence v. Brady, 56 N. Y. 182 732
- Edison Electric Illuminating Co. v. Brooklyn, 156 N. Y. 417, 42 L. R. A. 290, 51 N. E. 269 177
- Peabody v. Chicago Gas Trust Co. 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798 647
- Rodgers v. Coler, 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716 142
- Morrison v. Cregler, 138 Ill. 401, 28 N. E. 812 886
- Zunze v. Fort Wayne & E. R. Co. 92 Mich. 522, 16 L. R. A. 752, 52 N. W. 1010 156
- Burnham v. Jones, 110 N. Y. 507, 18 N. E. 432 732
- 62 L. R. A.

People ex rel. Breslin v. Lawrence, 107 N. Y. 607, 15 N. E. 187.....	732	Poulin v. Canadian P. R. Co. 17 L. R. A. 800, 3 C. C. A. 23, 6 U. S. App. 298, 52 Fed. 197.....	360
Van Riper v. New York Catholic Pro- tective, 106 N. Y. 604, 13 N. E. 435.....	738	Powell v. Com. 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913, Affirmed in 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992.....	109
Morse v. Nussbaum, 32 Misc. 1, 66 N. Y. Supp. 129.....	742	Power v. Kitching, 10 N. D. 254, 86 N. W. 737.....	572
Tyroler v. Warden of City Prison, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006.....	647	Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257.....	961
Peoria & P. U. R. Co. v. Peoria & F. R. Co. 105 Ill. 110.....	152	v. Hibbard, 114 Mich. 533, 72 N. W. 339.....	588
Perdue v. Caswell Creek Coal & Coke Co. 40 W. Va. 372, 21 S. E. 870.....	576	Pratt v. Pioneer-Press Co. 35 Minn. 251, 28 N. W. 708.....	481
Perkins v. Headley, 49 Mo. App. 556.....	762	Pray v. Stebbins, 141 Mass. 219, 55 Am. Rep. 462, 4 N. E. 824.....	569
Perry v. Keene, 56 N. H. 514.....	171	Preston v. Bosworth, 153 Ind. 458, 55 N. E. 224.....	900
v. McLendon, 62 Ga. 598.....	732	Pretty v. Bickmore, L. R. 8 C. P. 401.....	910
v. Perry, 1 Barb. Ch. 516.....	883	Prince v. Crocker, 166 Mass. 347, 32 L. R. A. 610, 44 N. E. 446.....	148
v. Simpson Waterproof Mfg. Co. 40 Conn. 313.....	188	Pritchard v. Austin, 80 N. H. 367, 46 Atl. 188.....	818
v. State, 9 Wis. 19.....	921	Providence Tool Co. v. Norris, 2 Wall. 54, 17 L. ed. 870.....	308
Peters v. Bain, 133 U. S. 695, 33 L. ed. 706, 10 Sup. Ct. Rep. 354.....	425	Provident Life Ins. & Invest. Co. v. Baum, 29 Ind. 236.....	489
v. Rogers, 5 Mason, 555, Fed. Cas. No. 11,033.....	182	Pullman Palace Car Co. v. Bluhm, 109 Ill. 20, 50 Am. Rep. 601.....	93
Petit v. Minnesota, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666.....	177	Pythian Life Asso. v. Preston, 47 Neb. 390, v. Leatham [1901] A. C. 495.....	966
Petroleum Co. v. Coal, Coke, & Mfg. Co. 89 Tenn. 381, 18 S. W. 65.....	899	Q.	
Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93.....	604	Quareles v. Seattle, 26 Wash. 226, 66 Pac. 389.....	980
Phoenix Ins. Co. v. La Pointe, 118 Ill. 384, 8 N. E. 353.....	499	Quarrier v. Quarrier, 36 W. Va. 310, 15 S. E. 154.....	502
Philadelphia & S. Mail S. S. Co. v. Pennsylv- ania, 122 U. S. 326, 30 L. ed. 1200, 7 Sup. Ct. Rep. 1118.....	671	Quay v. Lucas, 25 Mo. App. 7.....	911
Phillips v. Adams, 70 Ala. 373.....	553	Queen v. Whitchurch, L. R. 24 Q. B. Div. 420.....	739
v. Burlington Library Co. 55 N. J. L. 307, 27 Atl. 478.....	910	Quick v. Corlies, 39 N. J. L. 11.....	397
v. Dugan, 21 Ohio St. 466, 8 Am. Rep. 66.....	394	Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469.....	668
v. Southern R. Co. 124 N. C. 123, 45 L. R. A. 163, 32 S. E. 388.....	406	Quinlan v. Providence Washington Ins. Co. 133 N. Y. 356, 31 N. E. 31.....	783
v. United States Benev. Soc. 120 Mich. 142, 79 N. W. 1.....	489	Quinn, Re, 2 App. Div. 103, 37 N. Y. Supp. 534.....	732
Pickens v. Davis, 134 Mass. 252, 45 Am. Rep. 322.....	387	v. Leatham [1901] A. C. 495.....	966
v. Plattsmouth Land & Invest. Co. 31 Neb. 585, 45 N. W. 473.....	875	R.	
Pierce, Re, 44 Wis. 411.....	730	Raabe v. Squier, 148 N. Y. 81, 42 N. E. 516.....	306
Pierce v. Irvine, 1 Minn. 369, 511. 272.....	505	Raikes v. Ward, 1 Hare, 445.....	991
Pierson v. Garnet, 2 Bro. Ch. 226.....	990	Raleigh & G. R. Co. v. Swanson, 102 Ga. 754, 39 L. R. A. 275, 28 S. E. 601.....	108
v. People, 79 N. Y. 424, 35 Am. Rep. 524.....	242	Randall v. Beatty, 31 N. J. Eq. 643.....	387
Pike v. Nicholas, L. R. Ch. 203.....	609	Randolph v. Casey, 43 W. Va. 289, 27 S. E. 231.....	567
Pikulik, Re, 81 Wis. 158, 51 N. W. 261.....	737	v. Loughlin, 48 N. Y. 456.....	279
Pillsbury v. Pillsbury-Washburne Flour Mills Co. 12 C. C. A. 432, 24 U. S. App. 305, 64 Fed. 841.....	87	Randon v. Toby, 11 How. 493, 519, 13 L. ed. 784, 795.....	398
Pimney v. Cahill, 48 Mich. 584, 12 N. W. 862.....	550	Rawson v. Milwaukee Mut. L. Ins. Co. 115 Wis. 641, 92 N. W. 378.....	984
Pioneer Sav. & Loan Co. v. Nonnemacher, 127 Ala. 545, 30 So. 87.....	36	Ray v. Ray, 106 Ga. 260, 32 S. E. 91.....	881
Pittsburg Carbon Co. v. McMullin, 119 N. Y. 46, 7 L. R. A. 46, 23 N. E. 530.....	647	v. Underwood, 3 Pick. 302.....	182
Pittsburg C. C. & St. L. R. Co. v. Bemis, 64 Ohio St. 26, 59 N. E. 745.....	491	v. Western Pennsylvania Natural Gas Co. 138 Pa. 576, 12 L. R. A. 290, 20 Atl. 1065.....	899
Pittsburgh, C. C. & St. L. R. Co. v. Mont- gomery, 152 Ind. 1, 49 N. E. 582.....	419	Reed v. Copeland, 50 Conn. 472, 47 Am. Rep. 663.....	983
Pittsburgh, Ft. W. & C. R. Co. v. Bingham, 29 Ohio St. 369, 23 Am. Rep. 751.....	606	v. Spaulding, 42 N. H. 114.....	820
Place v. Hayward, 117 N. Y. 487, 23 N. E. 25.....	366	Rees v. Morgan, 3 T. R. 349.....	463
Platt v. Farney, 16 Ill. App. 216.....	911	Reese Case. See United States v. Reese, 92 U. S. 221, 23 L. ed. 566.....	176
Plummer v. Dill, 156 Mass. 426, 31 N. E. 128.....	135	Rees v. Corning, 51 Fed. 774.....	739
Pollard v. Huff, 44 Neb. 892, 63 N. W. 58.....	959	Reg. v. Boulton, 12 Cox C. C. 87.....	246
Pomeroy v. Rand, McN. & Co. 157 Ill. 176, 41 N. E. 636.....	183	v. Colclough, 15 Cox C. C. 92.....	307
Pontius v. People, 82 N. Y. 339.....	306	v. Cotton, 12 Cox C. C. 400 250, 307 v. Crouch, 4 Cox C. C. 163.....	286
Poor v. Poor, 8 N. H. 807, 29 Am. Dec. 664	883	v. Dodds, 4 Ont. Rep. 390.....	131
Portage County v. Wisconsin C. R. Co. 121 Mass. 460.....	148	v. Drufft, 10 Cox C. C. 593.....	746
Postal Teleg. Cable Co. v. Oregon Short Line R. Co. 104 Fed. 623.....	946	v. Flannagan, 15 Cox C. C. 403.....	307
v. Oregon Short Line R. Co. 23 Utah, 474, 65 Pac. 735.....	946	v. Garner, 3 Post & F. 681.....	250
Pottiltzer v. Wesson, 8 Ind. App. 472, 35 N. E. 1030.....	762	v. Geering, 18 L. J. M. C. N. S. 215.....	251
Potts v. Breen, 167 Ill. 67, 39 L. R. A. 152, 47 N. E. 81.....	893	v. Harris, 10 Cox C. C. 352.....	100
62 L. R. A.			124

- Sinking-Fund Cases, 99 U. S. 700, 25 L. ed. 496 167, 171
- Skinner v. Garnett Gold-Min. Co. 96 Fed. 735 144
- Skobles v. Ferge, 102 Wis. 122, 78 N. W. 426 984
- Slater v. Jewett, 85 N. Y. 61, 39 Am. Rep. 627 924
- Slayton v. Barry, 175 Mass. 513, 49 L. R. A. 560, 56 N. E. 574 756
- Smith, Re, 146 N. Y. 68, 28 L. R. A. 820, 40 N. E. 497 891, 893, 894
- v. Clark, 53 N. J. L. 197, 21 Atl. 491 908
- v. Com. 54 Pa. 209, 93 Am. Dec. 686 904
- v. Eaton, 36 Me. 307, 58 Am. Dec. 746 182
- v. Howard, 28 Iowa, 51 481
- v. Louisville & N. R. Co. 75 Ala. 449 413
- v. McCheaney, 15 N. J. Eq. 359 389
- v. McNeal, 109 U. S. 428, 27 L. ed. 986, 3 Sup. Ct. Rep. 319 491
- v. People, 25 Ill. 17, 76 Am. Dec. 780 745
- v. Potter, 46 Mich. 258, 41 Am. Rep. 161, 9 N. W. 273 924
- v. St. Paul F. & M. Ins. Co. 106 Iowa, 225, 76 N. W. 676 373
- v. Smith, 84 Ga. 440, 8 L. R. A. 362, 11 S. E. 406 879
- v. Yager, 85 Iowa, 706, 50 N. W. 224 626
- Smith's Case, 1 N. Y. City Hall Rec. 49 245, 307
- Smiltson v. Southern P. Co. 37 Or. 74, 60 Pac. 907 546
- Snell, Re, 31 Minn. 110, 16 N. W. 692 737
- Snowbery v. Nelson-Spencer Paper Co. 43 Minn. 532, 45 N. W. 1131 614
- Solomon v. Continental F. Ins. Co. 160 N. Y. 595, 46 L. R. A. 682, 55 N. E. 279 488
- Sontag v. O'Hare, 73 Ill. App. 432 911
- Soon Hing v. Crowley, 113 U. S. 708, 709, 28 L. ed. 1146, 1147, 5 Sup. Ct. Rep. 733 412
- Soquet v. State, 72 Wis. 659, 40 N. W. 391 548
- Southern R. Co. v. Watson, 110 Ga. 682, 36 S. E. 209 510, 668
- Southworth v. Adams, 11 Biss. 256, Fed. Cas. No. 13,194 389
- Spaulding v. St. Joseph's Industrial School, 107 Ky. 382, 54 S. W. 200 401, 402, 404, 405
- Spangler v. Sellers, 5 Fed. 882 626
- Spaulding v. Millard, 17 Wend. 331 462
- v. Smith, 102 Mass. 543, 39 N. E. 189 603
- Spencer v. Worthington, 44 App. Div. 496, 60 N. Y. Supp. 873 616
- Sperry v. Sanders, 50 W. Va. 70, 40 S. E. 327 188
- Sprague v. Holland Purchase Ins. Co. 69 N. Y. 128 783
- Squair v. Shea, 26 Ohio St. 645 182
- Standard Fashion Co. v. Slegel-Cooper Co. 157 N. Y. 60, 43 L. R. A. 854, 51 N. E. 408 645
- Standard Oil Co. v. Helmick, 148 Ind. 460, 47 N. E. 14 615
- Stanley v. Schwalby, 147 U. S. 508, 37 L. ed. 259, 13 Sup. Ct. Rep. 418 939
- v. Western Ins. Co. L. R. 3 Exch. 71 650
- Stanton v. Allen, 5 Denio, 434, 49 Am. Dec. 282 647
- Stanwood v. Malden, 157 Mass. 17, 16 L. R. A. 591, 31 N. E. 702 149
- State v. Addington, 77 Mo. 110, 168, 169, 170
- v. Anderson, 10 Or. 448 549
- v. Armstrong, 4 Minn. 335, Gil. 251 173
- v. Avery, 7 Conn. 260, 18 Am. Dec. 105 904
- v. Bloom, 17 Wis. 521 735
- v. Bockstruck, 136 Mo. 356, 38 S. W. 317 168
- v. Bonell, 42 La. Ann. 1110, 10 L. R. A. 60, 8 So. 298 100, 124
- v. Boswell, 104 Ind. 541, 4 N. E. 675 141
- v. Buchanan, 5 Harr. & J. 317, 9 Am. Dec. 534 745
- v. Butler, 3 Lea, 222 177
- v. Butler, 25 L. R. A. 434 904
- State v. Chambers, 87 Iowa, 1, 53 N. W. 1090 173
- v. Chase, 5 Harr. & J. 297 811, 812
- v. Clark, 54 N. H. 456 820, 823
- v. Clarke, 33 N. H. 320, 66 Am. Dec. 723 100, 123
- v. Duff, 83 Wis. 291, 53 N. W. 446 729, 730
- v. Everett, Dud. L. 295 733
- v. Farmers' Social, L. & M. Club, 73 Md. 98, 10 L. R. A. 64, 20 Atl. 783 887
- v. Ferguson, 104 La. 249, 28 So. 917 576
- v. Fire Creek Coal & Coke Co. 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288 144
- v. Gerhardt, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469 142
- v. Glidden, 55 Conn. 46, 8 Atl. 890 745
- v. Hamer, 168 Mo. 167, 57 L. R. A. 846, 67 S. W. 620 916, 920, 921
- v. Hastings, 53 N. H. 452 820-824, 829
- v. Hawkins, 95 Md. 133, 51 Atl. 850 131
- v. Hayden, 35 Minn. 283, 28 N. W. 659 737
- v. Herold, 9 Kan. 194 770
- v. Jeffers, 64 Mo. 376 467
- v. Keyes, 8 Vt. 57, 30 Am. Dec. 450 904
- v. Killet, 2 Ball. L. 280 731, 734
- v. Loomis, 115 Mo. 807, 21 L. R. A. 789, 22 S. W. 350 144
- v. McDaniel, 39 Or. 161, 65 Pac. 520 547
- v. Magers, 35 Or. 520, 57 Pac. 107 549
- v. Marshall, 64 N. H. 549, 1 L. R. A. 51, 15 Atl. 210 170
- v. Mince, 38 W. Va. 125, 18 S. E. 470 575, 576
- v. Moren, 48 Minn. 553, 51 N. W. 618 100, 124
- v. Nebraska Distilling Co. 29 Neb. 700, 46 N. W. 155 647
- v. Nels. 108 N. C. 787, 2 L. R. A. 412, 13 S. E. 225 887
- v. Nelson, 66 Minn. 166, 34 L. R. A. 318, 68 N. W. 1066 773
- v. Nelson, 52 Ohio St. 88, 26 L. R. A. 317, 39 N. E. 22 171
- v. New Orleans Debenture Redemption Co. 51 La. Ann. 1827, 26 So. 586 100, 101, 120
- v. Norton, 23 N. J. L. 33 745
- v. Ohio Oil Co. 150 Ind. 21, 47 L. R. A. 627, 49 N. E. 809 595
- v. Rich, 20 Mo. 396 171
- v. Reinhart, 26 Or. 466, 38 Pac. 822 548
- v. Repp, 104 Iowa, 305, 40 L. R. A. 687, 73 N. W. 829 135
- v. Scott, 45 Mo. 302 177, 287
- v. Shinborn, 46 N. H. 497, 88 Am. Dec. 224 820, 822, 824, 830
- v. Shorts, 32 N. J. L. 398, 90 Am. Dec. 668 101, 124
- v. Shumate, 44 W. Va. 490, 29 S. E. 1001 887
- v. Simons, 39 Or. 111, 65 Pac. 595 548, 549
- v. Sloan, 55 Iowa, 217, 7 N. W. 516 173
- v. Snell, 21 R. I. 232, 42 Atl. 869 895
- v. Sprague, 4 R. I. 257 739
- v. Stewart, 59 Vt. 273, 59 Am. Rep. 810, 9 Atl. 550 745
- v. Terrell, 12 Rich. L. 321 549
- v. Thompson, 80 Me. 194, 13 Atl. 892 830
- v. Ward, 39 Vt. 225 830
- v. White, 64 N. H. 45, 5 Atl. 828 603
- ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L. R. A. 265, 55 S. W. 627 142
- Curtis v. Brown & S. Mfg. Co. 18 R. I. 10, 17 L. R. A. 856, 25 Atl. 246 144
- Adams v. Burdge, 95 Wis. 390, 37 L. R. A. 157, 70 N. W. 347 891, 894
- Wood County v. Dodge County, 56 Wis. 70, 13 N. W. 680 737
- Weideman v. Horgan, 55 Minn. 183, 56 N. W. 688 170

State ex rel. Atty. Gen. v. Interstate Sav. Invest. Co. 64 Ohio St. 283, 52 L. R. A. 530, 60 N. E. 220 100, 101, 106, 120	Strong v. Gordon, 96 Wis. 476, 71 N. W. 886 989	
Green Bay & M. R. Co. v. Jennings, 50 Wis. 113, 14 N. W. 28 731	Strother v. Lucas, 6 Pet. 703, 8 L. ed. 573 819	
Kellogg v. Kansas Mercantile Asso. 45 Kan. 351, 11 L. E. A. 430, 25 Pac. 984 100, 124	Stuart v. F. G. Stewart Co. 33 C. C. A. 480, 93 U. S. App. 561, 91 Fed. 243 87	
Zillmer v. Kreutzberg, 114 Wis. 530, 58 L. R. A. 748, 90 N. W. 1098 595	Sturm v. Fleming, 31 W. Va. 701, 8 S. E. 263 575	
Helier v. Lawler, 103 Wis. 460, 79 N. W. 777 737	v. Sawyer, 2 Pa. Super. Ct. 254 131	
Columbia Club v. McMaster, 35 S. C. 1, 14 S. E. 290 887	Sturtevant v. Randall, 53 Me. 149 504	
Smyth v. Magney, 52 Neb. 508, 72 N. W. 1006 484	Sudlow v. Warshing, 108 N. Y. 520, 15 N. E. 532 284	
Dunn v. Noyes, 87 Wis. 340, 27 L. R. A. 776, 58 N. W. 386 730	Sullivan v. Bruhling, 66 Wis. 472, 29 N. W. 211 989	
Larkin v. Ryan, 70 Wis. 676, 36 N. W. 823 730	Sunderlin v. Bradstreet, 46 N. Y. 188, 7 Am. Rep. 322 926	
Astor v. Schiltz Brewing Co. 104 Tenn. 731, 59 S. W. 1033 177	Supreme Conclave R. A. v. Cappella, 41 Fed. 1 984	
Kansas City & S. R. Co. v. Slover, 134 Mo. 607, 36 S. W. 50 916	Susquehanna Fertilizer Co. v. White, 66 Md. 456, 59 Am. Rep. 186, 7 Atl. 802 804	
McCaslin v. Smith, 65 Wis. 93, 26 N. W. 258 781	Suttle v. Richmond, F. & P. R. Co. 76 Va. 284 572	
Moreland v. Whitford, 54 Wis. 150, 11 N. W. 424 737	Suydam v. Vance, 2 McLean, 99 627	
St. Louis, K. & N. W. R. Co. v. Withrow, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43 916	Swann v. Thayer, 36 W. Va. 46, 14 S. E. 423 572	
School Dist. No. 2 v. Wolfrom, 25 Wis. 468 732	Sweeney v. Berlin & J. Envelope Co. 101 N. Y. 525, 54 Am. Rep. 722, 5 N. E. 358 615	
State, Newark, Prosecutor, v. Essex Club, 53 N. J. L. 99, 29 Atl. 799 887	Sweet v. Electric Light Co. 97 Tenn. 252, 36 S. W. 1090 491	
State, Waterbury, Prosecutor, v. Newton, 50 N. J. L. 534, 2 Inters. Com. Rep. 63, 14 Atl. 604 170	Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276 592, 604, 787	
State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146 671	Swift v. Jewsbury, L. R. 9 Q. B. 301 787	
State Loan & T. Co. v. Cochran, 130 Cal. 245, 62 Pac. 466 397	Swift & Co. v. Madden, 163 Ill. 41, 45 N. E. 979 614	
State Sav. Bank v. Shaffer, 9 Neb. 1, 31 Am. Rep. 394, 1 N. W. 980 394	v. O'Neill, 187 Ill. 337, 58 N. E. 416 614	
State Trust Co. v. Sheldon, 68 Vt. 259, 35 Atl. 177 397	Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295 911	
Steedman v. Hilliard, 3 Rich. L. 101 576	Sykes v. Beadon, L. R. 11 Ch. Div. 170, 197 100, 109, 124	
Steele v. Gellatly, 41 Ill. 39 578	Sylvester v. Downer, 20 Vt. 355, 49 Am. Dec. 786 505	
Sterger v. Van Sicken, 132 N. Y. 499, 16 L. R. A. 640, 30 N. E. 987 911	T.	
Sternaman v. Metropolitan L. Ins. Co. 170 N. Y. 13, 57 L. R. A. 318, 62 N. E. 763 782, 783	Tabb v. Cabell, 17 Gratt. 160 188	
Sternaman Case. See Sternaman v. Metropolitan L. Ins. Co. 170 N. Y. 13, 57 L. R. A. 318, 62 N. E. 763	Talbott v. Woodford, 48 W. Va. 449, 37 S. E. 580 567, 573	
Stevens v. Brown, 20 W. Va. 450 184	Tallaferro v. Pryor, 12 Gratt. 277 794	
v. Hampton, 46 Mo. 404 795	Tally v. Ayres, 3 Sneed, 677 496	
v. Hope, 52 Mich. 65, 17 N. W. 698 387	Tarleton v. McGawley, Peake, N. P. Cas. pt. 1, p. 207 695	
v. Wingham, 1 Pick. 318, 11 Am. Dec. 178 568	Tasker v. Stanley, 153 Mass. 148, 10 L. R. A. 468, 28 N. E. 417 699	
Stewart v. Comer, 100 Ga. 754, 28 S. E. 461 672	Taylor v. Mueller, 30 Minn. 343, 15 N. W. 413 928	
Stillwell v. South Louisville Land Co. 22 Ky. L. Rep. 785, 52 L. R. A. 325, 58 S. W. 696 911	v. Ohio River R. Co. 35 W. Va. 328, 13 S. E. 1009 186	
Stivers v. Baker, 87 Ky. 508, 9 S. W. 401 901	v. Smith, 116 N. C. 531, 21 S. E. 202 131	
Stoddart v. Argus Printing Co. [1901] 2 K. B. 474 131	v. Taylor, 2 Nott & M'C. 482 387	
Stokes v. United States, 157 U. S. 187, 39 L. ed. 667, 15 Sup. Ct. Rep. 617 819	v. Travelers' Ins. Co. 15 Tex. Civ. App. 254, 39 S. W. 185 985	
Stolz v. Thompson, 44 Minn. 271, 46 N. W. 410 170	Tazewell v. Saunders, 13 Gratt. 354 448	
Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L. R. A. 794, 51 N. E. 1 477	Teachout v. People, 41 N. Y. 7 293	
Stout v. People, 4 Park. Crim. Rep. 132 306	Tellier v. Pelland, 5 Rev. Leg. 61 135	
Stoutenburgh v. Dow, G. H. Co. 82 Iowa, 179, 47 N. W. 1039 614	Temperton v. Russell [1893] 1 Q. B. 715 966, 967	
Stovall v. Border Grange Bank, 78 Va. 194 504	v. Russell, 62 L. J. Q. B. N. S. 412 698	
Streathfield v. Streathfield, 1 White & T. Lead. Cas. in Eq. p. 546 425	Tenant v. Elliott, 1 Bos. & P. 3 108	
Street v. Varney Electrical Supply Co. (Ind.) 61 L. R. A. 154, 66 N. E. 895 142	Tennant v. Gray, 5 Munf. 494 448	
Streeter v. Frank, 3 Pinney (Wis.) 386 735	Tennessee Club v. Dwyer, 11 Lea, 452, 47 Am. Rep. 298 887	
Streich v. Fehleisen, 112 Iowa, 612, 51 L. R. A. 412, 84 N. W. 715 965	Texas & P. R. Co. v. Patton, 9 C. C. A. 487, 23 U. S. App. 333, 61 Fed. 259 92	
Strike v. Wisconsin Odd Fellows Mut. L. Ins. Co. 95 Wis. 583, 70 N. W. 819 984	v. Southern P. Co. 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10 517	
Stringham v. St. Nicholas Ins. Co. 4 Abb. App. Dec. 315 787	Thayer v. Southwick, 8 Gray, 229 810	
62 L. R. A.	Theresa Drainage Dist. Re, 90 Wis. 301, 63 N. W. 288 595	
	Thiedemann v. Goldschmidt, 1 DeG. F. & J. 4 971	
	Thomas v. Linn, 40 W. Va. 122, 20 S. E. 878 502	
	v. Owens, 4 Md. 225 811	
	v. People, 59 Ill. 160 101, 102, 123	
	v. Richmond, 12 Wall. 349, 20 L. ed. 453 109	
	Thompson v. Androsoggin River Improv. Co. 54 N. H. 545 605, 606	
	v. Thompson, 9 Ind. 323, 68 Am. Dec. 638 900	
	Thomson v. Thomson, 55 How. Fr. 494 989	

Thorington v. Montgomery, 147 U. S. 490, 37 L. ed. 252, 13 Sup. Ct. Rep. 594	141
Thornton v. Thornton, 3 Rand. (Va.) 179 ..	566
Thorpe v. Rutland & B. R. Co. 27 Vt. 150, 62 Am. Dec. 625	154
Thurston v. Blanchard, 22 Pick. 18, 33 Am. Dec. 700	756
Tiffin v. McCormack, 34 Ohio St. 638, 32 Am. Rep. 408	952
Tilson v. Garling, 60 Ark. 114, 29 S. W. 35	176
v. Thompson, 10 Pick. 359	568
Tingley v. Bateman, 10 Mass. 346	182
Tod v. Wick Bros. 36 Ohio St. 370	176
Todd v. Flight, 9 C. B. N. S. 377	910
Tolerton & S. Co. v. Anglo-California Bank, 112 Iowa, 706, 60 L. R. A. 777, 84 N. W. 930	759
Tome v. Hampton, 129 Ill. 379, 21 N. E. 800	961
Tom Tong, Ex parte, 108 U. S. 556, 27 L. ed. 826, 2 Sup. Ct. Rep. 871	730
Topping v. Jennette (Neb.) 90 N. W. 911 ..	389
Totten v. Nighbert, 41 W. Va. 800, 24 S. E. 627	575
Towle v. American Bldg. Loan & Invest. Soc. 81 Fed. 447	97
Townsend v. New York C. & H. R. R. Co. 56 N. Y. 295, 15 Am. Rep. 419 ..	360
v. State, 147 Ind. 624, 37 L. R. A. 294, 47 N. E. 19	595
Travelers' Ins. Co. v. Grant, 54 N. J. Eq. 208, 33 Atl. 1060	985
Treacy v. Hecker, 51 How. Pr. 69	785
Tribble v. Taul, 7 T. B. Mon. 456	403
Tripp v. Provident Fund Soc. 140 N. Y. 23, 22 L. R. A. 432, 35 N. E. 316 ..	480
Trist v. Child, 21 Wall. 441, 22 L. ed. 623 ..	368
Truman v. Lore, 14 Ohio St. 151	13
Tryon v. Merrill, 116 Mass. 209	816
Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 102, 20 Sup. Ct. Rep. 136	414, 415, 416, 418, 419, 420
Tullis Case. See Tullis v. Lake Erie & W. R. Co. 175 N. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136 ..	928
Turner v. Dawson, 50 Ill. 85	794
v. Stip. 1 Wash. (Va.) 319	87
Tussaud v. Tussaud, L. R. 44 Ch. Div. 678 ..	145
Tuttle v. George H. Gilbert Mfg. Co. 145 Mass. 175, 13 N. E. 465	911
Tyler Min. Co. v. Last Chance Min. Co. 71 Fed. 848	558

U.

Ulbricht v. Eufaula Water Co. 86 Ala. 587, 4 L. R. A. 572, 6 So. 78	587
Union Blue Stone Co. Case, 164 N. Y. 301, 52 L. R. A. 262, 58 N. E. 525 ..	638
Union Invest. Asso. v. Lutz, 50 Ill. App. 176	105, 120
Union Mfg. Co. v. Morrissey, 40 Ohio St. 148, 48 Am. Rep. 669	614
Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617	781
Union P. R. Co. v. Harris, 33 Kan. 416, 6 Pac. 571	416
Union Stove Works v. Klingman, 20 App. Div. 448, 46 N. Y. Supp. 721 ..	377
United States v. Addyston Pipe & Steel Co. 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271 ..	742
v. Bayer, 4 Dill. 407	739
v. Boyden, 1 Low. Dec. 266	739
v. Duval, Gilpin, 356 Fed. Cas. No. 15,015	927
v. Fox, 94 U. S. 315-321, 24 L. ed. 192, 193	769
v. Fulkerson, 74 Fed. 619	99, 100, 124
v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601	418, 419, 420
v. Jellico Mountain Coke & Coal Co. 12 L. R. A. 753, 8 Inters. Com. Rep. 628, 46 Fed. 432	647
v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25	647

United States v. Lyles, 4 Cranch C. C. 469, Fed. Cas. No. 15,646	904
v. McDonald, 59 Fed. 563, 12 C. C. A. 359, 24 U. S. App. 25, 63 Fed. 426	100, 106
v. Martin, 4 Cliff. 156	730
v. Politzer, 59 Fed. 273	99, 123
v. Reese, 92 U. S. 221, 23 L. ed. 566	418, 419, 420
v. Rindskopf, 6 Blas. 250	739
v. Rosenblum, 121 Fed. 180	131
v. Stevens, 44 Fed. 132	739
v. Trans-Missouri Freight Asso. 166 U. S. 290, 322, 41 L. ed. 1007, 1021, 17 Sup. Ct. Rep. 540 ..	647, 648, 742
v. Wallis, 58 Fed. 942	97, 99, 124
v. Zelsler, 30 Fed. 499	124
United States Nat. Bank v. Bonacum, 33 Neb. 820, 51 N. W. 233	376
United States Sav. & Loan Co. v. Miller (Tenn. Ch. App.) 47 S. W. 17 ..	39
Upham v. Worcester, 113 Mass. 97	148
Upton v. South Reading Branch R. Co. 8 Cush. 600	148
Uticke v. Bawden, 2 Add. Eccl. Rep. 116 ..	386
Utica Ins. Co. v. Bloodgood, 4 Wend. 652 897	398

V.

Van Horn v. Van Horn, 52 N. J. L. 284, 10 L. R. A. 184, 20 Atl. 485 ..	698
Van Scholck v. Niagara F. Ins. Co. 68 N. Y. 434	783
Van Sandau v. —, 1 Barn. & Ald. 214 461, 472	473
Van Sandau Case. See Van Sandau v. —, 1 Barn. & Ald. 214 ..	270
Van Wyck v. McIntosh, 14 N. Y. 439	916, 920
Vaughn v. Scade, 30 Mo. 800	916, 920
Vegelahn v. Guntner, 187 Mass. 108, 35 L. R. A. 722, 44 N. E. 1079	935
Venable, Re, 127 N. C. 344, 37 S. E. 465 ..	389
Venture Oil Co. v. Fretts, 152 Pa. 451, 25 Atl. 732	899
Vernon v. Vernon, 53 N. Y. 351	991
Vicksburg & M. R. Co. v. Putnam, 118 U. S. 554, 30 L. ed. 258, 7 Sup. Ct. Rep. 1	550
Vore v. Hurst, 13 Ind. 551, 74 Am. Dec. 268	505
Vredenburg v. Beham, 33 La. Ann. 627 ..	134
Vulcan Powder Co. v. Hercules Powder Co. 96 Cal. 510, 31 Pac. 581	650

W.

W— v. W—, 141 Mass. 495, 55 Am. Rep. 491, 6 N. E. 541	883
Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 In- ters. Com. Rep. 31, 7 Sup. Ct. Rep. 4	671
Wadge, Re, 21 Blatchf. 300, 16 Fed. 332 ..	735
Walling v. Toll, 9 Johns. 141	191
Walcot v. Goulding, 8 T. R. 126	460, 461, 402
Waldron v. Waldron, 85 Cal. 251, 9 L. R. A. 487, 24 Pac. 649	884
Walker v. Cronin, 107 Mass. 555	604, 687, 696, 697, 699, 756
v. Davis, 1 Gray. 506	394
Walkup v. Houston, 65 N. C. 501	936
Wallace v. Georgia, C. & N. R. Co. 94 Ga. 732, 22 S. E. 579	883
Wallscourt v. Wallscourt, 11 Jur. 134 ..	733
Walpole, Ex parte, 85 Cal. 362, 24 Pac. 657	557
Walrath v. Champion Min. Co. 171 U. S. 293, 297, 308, 43 L. ed. 170, 172, 176, 18 Sup. Ct. Rep. 900 ..	639
Walsh v. Dwight, 40 App. Div. 513, 58 N. Y. Supp. 91	394
Walton Plow Co. v. Campbell, 35 Neb. 173, 16 L. R. A. 468, 52 N. W. 883 ..	980
Ward v. Ward, 105 N. Y. 68, 11 N. E. 373 ..	87
Warren v. Warren Thread Co. 134 Mass. 247	883
Waskam v. Waskam, 31 Miss. 154	374
Waterman v. Stout, 38 Neb. 396, 50 N. W. 987	

Waters Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518.....	418, 419, 420
Watson v. Hurt, 6 Gratt. 633.....	502, 507
Webb v. Portland Mfg. Co. 3 Summ. 189.....	587
Weeber v. Virginia, 103 U. S. 344, 26 L. ed. 565.....	177
Weber Wagon Co. v. Kehl, 40 Ill. App. 584, Affirmed in 139 Ill. 644, 29 N. E. 714.....	614
Webster v. Lowell, 2 Allen, 123.....	815
v. Morris, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353.....	990
Weed v. People, 56 N. Y. 628.....	310
Weltz v. Wolf, 28 Neb. 500, 44 N. W. 485.....	958
Welch v. Ireland, 6 East, 613.....	462
Wellington, Re, 16 Pick. 87, 26 Am. Dec. 631.....	171
Welsh v. Ebersole, 75 Va. 651.....	502
v. Morris, 81 Tex. 159, 16 S. W. 744.....	965, 968
Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347.....	671
Wentworth v. Whittemore, 1 Mass. 471.....	815
Wesson v. Washburn Iron Co. 13 Allen, 95, 90 Am. Dec. 181.....	148
Western & A. R. Co. v. Bishop, 50 Ga. 472.....	106
Western Assur. Co. v. J. H. Mohlman Co. 40 L. R. A. 561, 28 C. C. A. 157, 51 U. S. App. 577, 83 Fed. 811.....	550
Western Granite & M. Co. v. Knickerbocker, 103 Cal. 111, 37 Pac. 192.....	603
Western Min. & Mfg. Co. v. Peytona Cannel Coal Co. 8 W. Va. 406.....	877
Westmeath v. Westmeath, 2 Hagg. Eccl. Rep. 653.....	880, 881
Whallon v. Kaufman, 19 Johns. 97.....	768
Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec. 721.....	593
Wheelock v. Freeman, 13 Pick. 168, 23 Am. Dec. 674.....	394
v. Jacobs, 70 Vt. 162, 43 L. R. A. 105, 40 Atl. 41.....	592
White v. Breen, 106 Ala. 159, 32 L. R. A. 127, 19 So. 59.....	553
v. Franklin Bank, 22 Pick. 181.....	109
v. Levy, 93 Ala. 484, 9 So. 164.....	554
Whited v. Germania F. Ins. Co. 76 N. Y. 415, 32 Am. Rep. 330.....	783
Whitehouse v. Hanson, 42 N. H. 9.....	502, 503
Whitman v. Boston & M. R. Co. 7 Allen, 313.....	148
Whittenton Mfg. Co. v. Memphis & O. River Packet Co. 21 Fed. 896.....	668
Whitwell, Ex parte, 98 Cal. 73, 19 L. R. A. 727, 32 Pac. 870.....	142
Wiesmann v. Brighton, 83 Wis. 550, 53 N. W. 911.....	986
Wiggins v. King, 91 Hun, 343, 36 N. Y. Supp. 768.....	360
Wilder v. Bailey, 3 Mass. 289.....	815
Wildes v. Savage, 1 Story, 22, Fed. Cas. No. 17,653.....	957
Wilkes' Case, 2 Wils. 153.....	734
Willcox v. Hines, 100 Tenn. 583, 41 L. R. A. 278, 46 S. W. 297.....	911
Williams v. Bosson, 11 Ohio, 62.....	506
Williams v. Conger, 125 U. S. 397, 31 L. ed. 778, 8 Sup. Ct. Rep. 933.....	819
v. Guildie, 117 N. Y. 343, 6 L. R. A. 360, 22 N. E. 1071.....	985
v. Miles, 63 Neb. 859, 89 N. W. 451.....	384
v. Morland, 2 Barn. & C. 910.....	585
v. Snidow, 4 Leigh, 14.....	570
v. Williams, 142 Mass. 515, 8 N. E. 424.....	387
Williamson v. Carskadden, 36 Ohio St. 664.....	795
v. Jones, 43 W. Va. 571, 38 L. R. A. 694, 27 S. E. 411.....	577
v. Paxton, 18 Gratt. 475.....	572
Willis v. Lance, 28 Or. 371, 43 Pac. 384.....	547
v. Perry, 92 Iowa, 297, 26 L. R. A. 124, 60 N. W. 727.....	593
Willoughby, Ex parte, 14 Nev. 451.....	734, 737
v. Swinton, 6 East, 550.....	460, 461, 462
Wilson v. Alabama G. S. R. Co. 77 Miss. 714, 52 L. R. A. 357, 28 So. 567.....	892, 894
v. Bauman, 80 Ill. 493.....	928
v. Carpenter, 17 Wis. 516.....	984
v. Traer, 20 Iowa, 231.....	794
v. Winona & St. P. R. Co. 37 Minn. 326, 33 N. W. 908.....	615
Wire Cloth Case, 19 N. Y. Supp. 413.....	650
Wisconsin Red Pressed-Brick Co. v. Hood, 54 Minn. 543, 56 N. W. 165.....	598
Withers v. Baird, 7 Watts, 228, 32 Am. Dec. 754.....	794
Wolcott v. Hodge, 15 Gray, 547, 77 Am. Dec. 381.....	758
Wolfe v. Claffin, 81 Ga. 64, 6 S. E. 599.....	110
Wood v. American F. Ins. Co. 149 N. Y. 382, 44 N. E. 80.....	783
v. Wood, 3 Wend. 454.....	462
Woodman v. Dana, 52 Me. 9.....	820
Woodmen Acci. Asso. v. Pratt, 62 Neb. 673, 55 L. R. A. 291, 87 N. W. 546.....	488
Woodsworth v. Western U. Teleg. Co. 86 Tenn. 695, 8 S. W. 574.....	902
Woodruff v. Catlin, 54 Conn. 277, 6 Atl. 853.....	154, 156
Woolen v. Banker, 2 Flipp. 33, 6 Am. Law Record, 236, Fed. Cas. No. 18,030, 22 Am. Rep. 69.....	176
Woolridge v. Quinn, 70 Mo. 371.....	467
Wright v. Farmers' Mut. Live-Stock Ins. Asso. 96 Iowa, 360, 65 N. W. 308.....	626
v. Wright, 74 Wis. 439, 43 N. W. 145.....	737
Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co. 127 Mo. 242, 27 L. R. A. 651, 29 S. W. 1010.....	184
Y.	
Young v. Ross, 31 N. H. 201.....	182
v. Young, 165 Mo. 624, 65 S. W. 1016.....	467
Yunker v. Nichols, 1 Colo. 551.....	594
Z.	
Zoldoske v. State, 82 Wis. 581, 52 N. W. 778.....	253, 548

STATUTES AND CONSTITUTIONS CITED, CONSTRUED, ETC.

England.

Statutes.

13 Eliz. Chap. 5. Fraudulent conveyance..	686
43 Eliz. chap. 4. Charitable uses.....	401
Wm. II. chap. 38. Selecting jury.....	916
8 & 9 Wm. III. chap. 11. Bonds.....	451
4 & 5 Anne, chap. 16. Penal bonds.....	447
37 Geo. III. chap. 98, § 21. Prohibiting use of alum in bread.....	170
6 Geo. IV. chap. 50, § 34. Jury act.....	917
17 & 18 Vict. chap. 125, §§ 27, 103. Comparison of handwriting.....	280, 820

62 L. R. A.

28 & 29 Vict. chap. 18. Comparison of handwriting..... 280

United States.

Constitution.

Art. 1, § 8, cl. 3. Power of Congress to regulate commerce.....	670
Art. 1, § 8, cl. 8. Promotion of science.....	173
Art. 1, § 10. Impairment of contracts.....	141
Amend. 5. Protection of liberty and property.....	141
Amend. 7. Right of trial by jury.....	516, 913

Amend. 14. Equal protection of the laws.	141, 412, 514, 577
Amend. 14, § 1. Due process of law.	141, 177, 913

Statutes.

1802, April 29. Special juries.	922
1812, June 4. Organic law.	915
1820, March 6. Admission of Missouri into the Union.	918
1898, July 1. Bankruptcy act.	757
1903, Feb. 5. Bankruptcy act.	758

Statutes at Large.

Vol. 2, p. 167, chap. 31, § 30. Special juries.	922
Vol. 2, p. 746, chap. 95. Organic law.	917
Vol. 30, chap. 541, pp. 550, 551. Bankruptcy act.	757
Vol. 32, p. 798, chap. 487, § 5. Bankruptcy act.	758

Revised Statutes.

§ 709. Writ of error.	515
§ 2322. Mining claims.	550
§§ 4883-4936. Patents.	175

Compiled Statutes, 1901.

P. 575. Writ of error.	515
P. 626. Special juries.	922
P. 1425. Mining claims.	550
Pp. 3381-3400. Patents.	175
P. 3428. Bankruptcy act.	757

Alabama.**Code.**

§§ 3440, 3444. Liens.	374
Code, 1896.	
§ 2152. Contract for sale of lands.	553

California.**Code of Civil Procedure.**

§ 1881. Husband and wife as witnesses.	173
Penal Code.	
§ 1322. Husband and wife as witnesses.	173

Dakota.**Compiled Laws, 1887.**

§ 5260. Witnesses.	173
--------------------	-----

Delaware.**Revised Code, 1874.**

P. 661, chap. 109, § 18. Special juries.	921
--	-----

Georgia.**Statutes.**

1850, Feb. 22. Grounds for divorce.	879
Civil Code.	

§ 2049. Method of estimating value of life policies.	105
§§ 2428 et seq. Grounds for divorce.	879
§ 3142. Abolishment of joint tenancy.	105
§ 3668. Contracts contrary to public policy.	108
§ 3811. Remedies for injury.	668
§ 3937. Treatment in equity where both parties in fault.	100
§ 4601. When auditor's report not excepted to.	95
§ 4833. Equitable or legal rights.	110
§ 4842. Filing petition on behalf of others.	110
§§ 4900, 4904. Receivers.	110

Penal Code.

§§ 406, 407. Lotteries prohibited.	97
------------------------------------	----

Illinois.**Hurd's Revised Statutes, 1899.**

Chap. 8, p. 155. Suppression of contagious disease among live stock.	891
--	-----

62 L. R. A.

Hurd's Revised Statutes, 1901.

P. 750. Dram-shop act.	886
------------------------	-----

Indiana.**Constitution.**

Art. 1, § 1. Inalienable rights of men.	144
Art. 1, § 24. Impairment of contracts.	141
Art. 4, § 10. Act to embrace but one subject.	141

Statutes.

1890, Feb. 28, p. 103, chap. 124. Weekly wage law.	140
--	-----

Revised Statutes, 1876.

Vol. 2, p. 159, § 1, note. Special juries.	921
--	-----

Iowa.**Code, 1897.**

§ 3089. Mechanic's liens.	373
§ 3447, subd. 3. Limitation of actions.	396

Kansas.**Statutes.**

1891, chap. 133, pp. 223, et seq. Rights in water.	594
--	-----

Kentucky.**Statutes.**

1893, May 12. Charitable uses.	402
Stanton's Revised Statutes, 1852.	

Vol. 1, p. 235. Charitable uses.	401
Morhead & Brown's Statutes.	

Vol. 1, p. 308. Charitable uses.	401
General Statutes.	

Chap. 13, § 2. Charitable uses.	401
Statutes, 1899.	

§ 317. Charitable uses.	402
§ 318. Charitable uses.	401
§ 466. Recovery for violation of statute.	903
§ 784. Open ticket office.	406
§ 1271. Use of abusive language.	904
§ 1320. Adultery.	904

Maine.**Statutes.**

1895, chap. 72. Railroads.	156
----------------------------	-----

Maryland.**Bill of Rights, 1776.**

Art. 6. Distribution of powers of government.	811
---	-----

Bill of Rights, 1851.

Art. 6. Distribution of powers of government.	812
Art. 30. Judge not to hold other office.	812

Bill of Rights, 1864.

Art. 8. Distribution of powers of government.	812
Art. 33. Judge not to hold other office.	812

Bill of Rights, 1867.

Art. 8. Distribution of powers of government.	812
Art. 33. Judge not to hold other office.	812

Statutes.

1896, p. 314, chap. 195. Duty of circuit court to order elections.	810
1896, pp. 327, 355, chap. 202. Powers of supervisors of election.	811

Massachusetts.**Statutes.**

1890, chap. 173, p. 142. Signals at railroad crossings.	753
---	-----

1896, chap. 516, § 14. Construction of union station..... 146

General Statutes.

Chap. 150. Mechanic's liens..... 373

Public Statute.

Chap. 112, § 163. Signals at railroad crossings..... 753

Chap. 191. Mechanic's liens..... 873

Revised Laws.

Chap. 189, §§ 10-15. Appearance and answer of trustee..... 810

Chap. 189, §§ 19, 23. Property liable to attachment..... 814, 815

Chap. 189, § 32. Adverse claimant..... 814

Chap. 189, § 43. Judgment against trustee..... 815

Michigan.

Statutes.

1893, No. 171. Railroads..... 150

Compiled Laws, 1871.

§ 6005. Special juries..... 921

Minnesota.

Statutes.

1899, chap. 262, p. 306. Discharge of judgment..... 757

General Statutes, 1866.

Chap. 17, §§ 6, 7. Support of child..... 757

General Statutes, 1894.

§§ 2044, 2045. Support of child..... 757

Mississippi.

Constitution.

§ 61. Method of amending statute..... 414

§ 193. Rights and remedies of railroad employees..... 410

Statutes.

1896, chap. 87, p. 97. Rights and remedies of injured employees..... 410

1898, chap. 65, p. 82. Actions for injuries causing death..... 421

1898, chap. 66, p. 85. Rights and remedies of injured employees..... 410

Code, 1892.

§ 663. Actions for injuries causing death..... 421

§ 3559. Rights and remedies of injured employees..... 410

Missouri.

Constitution, 1820.

Art. 13, § 8. Right of trial by jury..... 915

Constitution, 1865.

Art. 1, § 1, ¶ 7. Right of trial by jury..... 915

Constitution, 1875.

Art. 2, § 4. Constitutional government..... 167

Art. 2, § 10. Courts of justice open to every person..... 913

Art. 2, § 28. Right of trial by jury..... 913

Art. 2, § 30. Due process of law..... 167, 913

Art. 4, § 28. Bills to contain but one subject..... 167

Territorial Laws, 1804-24.

Vol. 1, p. 12, chap. 4. Organic law..... 917

Vol. 1, p. 61, chap. 13, § 13. Juries..... 917

Vol. 1, p. 198, chap. 60. Juries..... 917

Vol. 1, p. 238, chap. 74. Juries..... 917

Vol. 1, p. 276, chap. 93. Special jury..... 916

Vol. 1, p. 345, chap. 125. Circuit courts..... 918

Vol. 1, p. 444, chap. 159. Superior courts..... 918

Vol. 1, p. 632, chap. 252. Consent to admission of state..... 918

Vol. 1, p. 841, chap. 363. Practice act..... 918

Territorial Laws, 1824-36.

Vol. 2, p. 53, chap. 52. Jurors..... 918

62 L. R. A.

Statutes.

1804, Oct. 1. Juries..... 917

1808, Oct. 28. Juries..... 917

1810, Oct. 25. Juries..... 917

1813, Aug. 20. Special jury..... 916

1815, Jan. 4. Circuit courts..... 918

1816, Jan. 21. Superior courts..... 918

1822, Jan. 11. Practice act..... 918

1826, Dec. 28. Jurors..... 918

1835, March 17. Jurors..... 918

1873, March 15, pp. 46, 47. Selection of grand and petit juries..... 918

1874, March 28, p. 97. Selection of grand and petit juries..... 919

1875, March 15, p. 80. Selection of petit jurors..... 919

1879, April 11, p. 28. Appointment of jury commissioner..... 919

1891, March 24. Manufacture or sale of imitation butter..... 168

1885, March 17, p. 74. Special juries..... 919

1895, p. 27. Manufacture or sale of imitation butter..... 169

1895, p. 197. Insurance: applicability of act..... 661

1899, May 11, p. 170. Use of chemicals in food products..... 167

Revised Statutes, 1825.

Vol. 2, pp. 615, 616. Penal bonds..... 454

Revised Statutes, 1835.

P. 342. Jurors..... 918

P. 430. Penal bonds..... 454

Revised Statutes, 1845.

Pp. 627, 628, chap. 91. Jurors..... 918

Revised Statutes, 1855.

P. 910, chap. 68, § 2. Jurors..... 918

P. 912, § 24. Special juries..... 918

Revised Statutes, 1879.

Chap. 43, §§ 2784, 2785, 2788. Selection of jurors..... 919

Chap. 43, § 2802. Special juries..... 919

§ 5983. Right to extended insurance..... 665

Revised Statutes, 1889.

Art. 1, chap. 22. Bonds..... 437

§§ 862-875. Penal bonds..... 467

§ 5856. Life insurance..... 660

§ 5857. Demand for paid-up policy..... 662

§ 5858. Rule of payment on commuted policy..... 663

§ 5859. Insurance: applicability of act..... 661

§ 6067-8. Selection of jurors..... 919

§ 6073. Selection of jurors..... 919

§ 6089. Special jury..... 919

Vol. 2, art. 21, p. 2169. Special juries..... 920

Revised Statutes, 1899.

Art. 1, chap. 6. Penal bonds..... 453

§§ 464-477. Penal bonds..... 449

§§ 3769, 3770. Selection of jurors..... 919

§ 3775. Selection of jurors..... 919

§ 3791. Special jury..... 919

§ 7900. Insurance: applicability of act..... 665

Art. 23, chap. 91, p. 1553, § 6566. Special jury in civil cases..... 915

General Statutes, 1865.

P. 509, chap. 146, §§ 19, 23. Special juries..... 918

Geyer's Digest.

P. 34. Organic law..... 917

P. 272. Juries..... 917

Nebraska.

Compiled Statutes.

Chap. 15a. Common law..... 885

Chap. 53, § 1. Liability for necessary family expense..... 191

Code of Civil Procedure.

§ 128. Conditions precedent..... 391

§ 320. Competency of witnesses..... 388

New Hampshire.*Bill of Rights.*

- Art. 2. Inherent rights..... 603
 Art. 12. Rights of members of community. 603

Constitution.

- Art. 5. Powers of legislation for benefit of state..... 604

Provincial Papers.

- Vol. 3, p. 176. Regulation of fences..... 603

Provincial Laws.

- Vol. 1, p. 200. Regulation of fences..... 603

Statutes.

- 1696-1725, p. 117. Regulation of fences.. 603
 1761, p. 225. Regulation of fences..... 603
 1791, Feb. 8. Regulation of fences..... 603
 1797, p. 331. Regulation of fences..... 603
 1883-87, chap. 91, p. 469. Penalty for maintaining illegal fence..... 603
 1901, March 10. Judiciary system..... 817

Revised Statutes.

- Chap. 136, p. 254, § 4. Requirements of sufficient fence..... 603

Public Statutes, 1901.

- Chap. 143, §§ 1, 5, 14. Maintenance of fence..... 603
 Chap. 143, §§ 28-30. Penalty for maintaining illegal fence. 602

New Jersey.*Revision, 1877.*

- P. 528, § 18. Special juries..... 921

Statutes.

- 1900, p. 870, § 26. Evidence..... 782

General Statutes.

- P. 1766, §§ 121, 122. Fire policies..... 780
 P. 2554, § 126. Performance of conditions. 776

New York.*Constitution.*

- Art. 1, § 2. Trial by jury..... 289

Statutes.

- 1857, chap. 185, p. 432. Prevention of extortion by railroad.. 361
 1857, chap. 228, p. 488. Keeping open ticket office..... 361
 1880, chap. 36. Comparison of handwriting..... 279
 1888, chap. 555. Comparison of handwriting..... 282
 1892, chap. 600, p. 1069, § 88. Surrender value of forfeited policies..... 660
 1897, chap. 383, p. 310, § 1. Act to prevent monopolies..... 647
 1902, chap. 600, p. 1748. Employers' liability act..... 610

Revised Statutes, 1829.

- P. 353, chap. 6, tit. 2, §§ 12, 13. Penal bonds. 454
 P. 375, chap. 6, tit. 6, art. 2. Penal bonds. 454

Revised Statutes.

- Vol. 2 (1st ed.) pt. 4, chap. 1, tit. 6, § 8, subd. 6. Conspiracy to commit injurious act..... 647

Code, 1876.

- § 1069. Special juries..... 921

Code of Criminal Procedure.

- § 188. Informing defendant of charge against him..... 292
 § 770. Attendance of witnesses at inquest. 295

Penal Code.

- § 168. Conspiracy to commit injurious act. 647
 62 L. R. A.

North Carolina.*Code.*

- § 1326. Survivorship abolished... 131

Ohio.*Statutes.*

- Vol. 31, p. 346, § 1. Execution of deed.... 793
 1849, March 9 (47 Ohio Laws, p. 205). Board of education.. 939
 1860, March 24. Railroads..... 154
 1865, March 31 (62 Ohio Laws, p. 72). Right of way for telegraph line.... 944

Swan & Critchfield's Revised Statutes.

- Vol. 1, p. 271. Corporations..... 153
 Vol. 1, p. 372a. Railroads..... 154

Revised Statutes, 1880.

- § 5189. Special juries..... 921

Revised Statutes, 1892.

- § 111. Banker not to act as notary..... 795
 §§ 3456-8. Appropriation of land for telegraph line..... 944
 § 3459. Appropriation of land for telegraph line..... 945
 § 3561a. Liability of gas company..... 952
 §§ 3878-3880. Rights of oil companies..... 951
 § 4106. Execution of mortgage..... 792
 § 4134. Recordation of deeds and mortgages..... 793
 § 5094. Proof of mitigating circumstances. 480
 § 5269. Officers who may take depositions. 795
 § 5271. Who can not take depositions.... 795
 § 6420. Appropriation of property..... 945

Bate's Annotated Statutes.

- § 4991. Time of commencing action..... 491

Oregon.*Bellinger & Cotton's Codes and Statutes.*

- § 136. Knowledge of the court..... 549
 § 680. Kinds of evidence..... 549
 § 703, subd. 5. Proof of contents of writing..... 547
 § 719. Evidence not necessary..... 549
 § 720. Judicial notice of facts..... 547
 § 770. Books and maps as evidence..... 549
 § 788, subd. 6. Presumption of higher evidence..... 547

Tennessee.*Constitution.*

- Art. 1, § 8. Law of the land..... 177
 Art. 11, § 8. Class legislation..... 177

Statutes.

- 1879, chap. 228. Sale of patent rights... 175
 1897, chap. 77, § 1. Sale of patent rights.. 175

Milliken & Vertrees' Code.

- § 2481. Note for patent rights..... 170
 § 3449. Time of commencing action..... 491

Shannon's Code.

- § 3216. Note for patent rights..... 176

Texas.*Statutes.*

- 1901, p. 26, arts. 379, 381. Gaming..... 973

Utah.*Constitution.*

- Art. 6, § 26. Special laws prohibited.... 484
 Art. 8, § 1. Judicial power..... 483
 Art. 8, § 8. Jurisdiction of justices of the peace..... 484

Statutes.

- 1901, chap. 106, p. 108. Justices of the peace..... 483
 1901, chap. 107, p. 109. Precinct officers. 483

Revised statutes, 1898.

§ 544. Precinct officers.....	483
§ 688. Civil jurisdiction of justices.....	483
P. 234, chap. 4. Justices' courts.....	484

Virginia.*Statutes.*

1895-96, chap. 625, p. 685. Forbidding tax on farm and domestic products.....	772
1897-98, chap. 14, p. 12. Penalty for charging excessive rates..	670

Code, 1849.

Chap. 116, § 18. Survivorship in estates by entirety.....	570
---	-----

Code, 1873.

Chap. 168, § 1. Payment before action brought.....	448
Chap. 173, §§ 16, 17. Recoveries of money.	447

Code, 1887.

§ 1219. Rates for delivery of freight.....	670
§ 1220. Penalty for charging excessive rates.....	670
§ 1215. Express charges.....	670
Chap. 160, § 3295. Payment before action brought.....	448
Chap. 166, §§ 3393, 3394. Recoveries of money.....	447

Washington.*Ballinger's Annotated Codes & Statutes.*

Vol. 2, § 5119. Entry of judgments.....	980
§ 6506. Penalty of appeal bond.....	766

West Virginia.*Constitution.*

Art. 6, § 30. Act to embrace but one subject.....	576
---	-----

Statutes.

1871, chap. 194, p. 247. Tax sales.....	575
1872-73, chap. 61, p. 152. Limitation of suits.....	574
1882, chap. 102, p. 298. Limitation of suits.	574

Code, 1868.

Chap. 66, § 3. Separate estates of married women.....	569
---	-----

62 L. R. A.

Chap. 71, § 18. Survivorship in estates by entirety.....	570
Chap. 104. Limitation of suits.....	574

Code, 1891.

Chap. 50, §§ 33, 35, 38. Service of process.	186
Chap. 50, § 197. Attachment of defendant's property.....	186

Code, 1899.

Chap. 31. Tax sales.....	575
Chap. 90, § 4. Ejectment.....	567
Chap. 90, § 20. Recovery by vendor.....	572
Chap. 98, cl. 6. Sale of real estate.....	572
Chap. 104, § 19. Time of commencing action.....	490

Wisconsin.*Constitution.*

Art. 14, § 13. Common law to remain in force.....	594
---	-----

Statutes.

1901, chap. 354, p. 502. Use of water from artesian wells.....	594
--	-----

Revised Statutes, 1898.

§ 163. Duties of attorney general.....	729
§ 752. Duties of district attorney.....	730
§ 2075. Trusts.....	989
§ 2081, subdiv. 5. Creation of express trusts.....	989
§ 2089, 2091. Trusts.....	991
§ 2594. Division of remedies.....	731
§ 2595. Defining "action".....	731
§ 2601. Designation of parties.....	731
§ 2603. Defendants in civil actions.....	731
§ 2629. Commencement of civil action.....	731
§ 2646. Contents of complaint.....	584
§ 3043. Writs of error.....	729
§ 3048. Appeal.....	729
Chap. 147. Habeas corpus.....	738
§ 3425. Return of writ.....	738
§ 3427. Remanding prisoner.....	738
§ 3429. Admitting party to bail.....	735
§ 3433. Notice to district attorney.....	730
§ 3436. Liability of sheriff.....	732
§ 3437. Habeas corpus; forbidding re-arrest.....	732
§ 4027. Removal of trustee.....	991
§ 4466a. Injury to business.....	733
§ 4568. Common-law conspiracy.....	746
§ 4740. Issuance of warrant.....	735
§ 4774. Form of commitment for trial..	733

LAWYERS' REPORTS

ANNOTATED.

ALABAMA SUPREME COURT.

UNITED STATES SAVINGS & LOAN
COMPANY, *Appt.*,

v.

William G. BECKLEY.

(.....Ala.....)

A note and mortgage are contracts of the state where the mortgagee resides, when they are executed in favor of a building and loan association upon an application addressed to it at its home office, where it was to be examined and passed upon by the company's officers, and, if approved, the necessary papers were to be filled out and forwarded for execution, after which they were to be returned to the home office for acceptance, while they expressly state that the con-

tract shall be governed by the laws of the residence of the mortgagee, although the land by which the note is secured is located in another state, where the application is signed and delivered to the agent of the mortgagee for transmission to the home office.

(*Haralson, J., dissents.*)

(February 28, 1903.)

A PPEAL by defendant from a judgment of the City Court of Birmingham in favor of complainant in a suit to adjust the amount due on a note and mortgage which were alleged to be usurious. *Reversed.*

The facts are stated in the opinion.

NOTE.—Conflict of laws as to interest and usury.

- I. General principles; intention of parties, 33.
- II. Contractual interest, 35.
- III. Interest as damages, 37.
- IV. Usury.

- a. Effect of penal or remedial character of foreign statute, 42.
- b. General principles governing choice of law; intention, 44.
- c. Rule that law upholding the contract will be applied.
 - 1. In general, 49.
 - 2. When contract usurious by *lex loci contractus*, but valid by *lex loci solutionis*, 51.
 - 3. When contract usurious by *lex loci solutionis*, but valid by *lex loci contractus*, 55.
 - 4. When claim of usury based on transaction with drawer or indorser, 59.
- d. When usurious by both *lex loci contractus* and *lex loci solutionis*, 60.
- e. Effect of mortgage security, 61.
- f. Place where money is to be used, 62.
- g. *Lex loci considerationis*, 63.
- h. Contracts of foreign building and loan associations, 64.
- i. Which contract to be regarded; contract of principal and surety, 73.
- j. Effect of restriction as to rate of interest in charter of corporation, 76.
- k. Applicability of *lex fort*, 76.
- l. Statute forbidding corporation to plead usury, 79.

V. Summary, 79.

- I. General principles; intention of parties.

There is one broad, fundamental principle
62 L. R. A.

that seems to pervade the cases (with the exception of those discussed in subdivision IV. b, *infra*) dealing with the conflict of laws with respect to interest and usury, and to lie at the foundation of the various rules that have been formulated on the subject. This principle is to accept, as the governing law, that law with reference to which the parties, acting in good faith and not for the purpose of evading the law of the real situs of the contract, intended to contract. In other words, the question what law governs is, in its last analysis, one as to the actual and bona fide intention of the parties. It will be observed that the qualification as to good faith restricts the operation of the general principle, and narrows the choice of laws to those prevailing at the places which are the situs of one or more of the important elements or significant circumstances of the transaction. In other words, effect can be given to the intention of the parties as to the governing law only so far as that intention is directed to the law of the place that has a real and vital, and not merely fictitious, connection with the transaction. Perhaps the general principle is more accurately stated in *Jackson v. American Mortg. Co.* 88 Ga. 756, 15 S. E. 812, where the court said that, in determining what law governs as to usury, it is necessary to arrive at the intention of the parties as to the real situs of the contract, and as to what state they had reference to in fixing the rate of interest. In the respect that the question as to the governing law as to interest and usury is one as to the bona fide intention of the parties, it is essentially and fundamentally different from questions as to the governing law respecting the formal requisites of the contract, the capacity of parties, and the like; for these matters are governed by a fixed law (*lex loci contractus*), and the intention of the parties is entirely immaterial, and entirely ineffectual to change the

Messrs. White & Howse, for appellant:

This contract is governed by the laws of Minnesota, because it was made in that state.

Ensley Lumber Co. v. Lewis, 121 Ala. 94, 25 So. 729; *Evans v. Kittrell*, 33 Ala. 449; *Hanrick v. Andrews*, 9 Port. (Ala.) 9; *Jones v. Jones*, 18 Ala. 248; *Hunt v. Hall*, 37 Ala. 702; *Cubbedge v. Napier*, 62 Ala. 518; *Nickels v. People's Bldg. Loan & Sav. Asso.* 93 Va. 380, 25 S. E. 8; *McGarry v. Nicklin*, 110 Ala. 559, 17 So. 726; *Ames v. Benjamin*, 74 Minn. 335, 77 N. W. 230; *Story, Conf. L.* §§ 442, 442a; *Story, Promissory Notes*, § 155.

A contract must be mutual, and no proposition or offer becomes a contract until it is accepted and approved by both parties, and

it is made at the time and place where it receives the sanction of both parties.

McGarry v. Nicklin, 110 Ala. 559, 17 So. 726; *Hyde v. Goodnow*, 3 N. Y. 266; *Bell v. Packard*, 60 Me. 105, 31 Am. Rep. 251; 1 Dan. Neg. Inst. 868; 2 Parsons, Contr. 3d ed. 95 et seq.; *Smith v. Anderson*, 70 Vt. 424, 41 Atl. 441; *Tobin v. McNab*, 53 S. C. 73, 30 S. E. 827.

A contract is governed, as to its validity, construction, etc., by the law of the place where, according to the agreement of the parties, it is to be performed, which, in the case of a note, is the place where it is payable.

Pioneer Sav. & Loan Co. v. Nonnemacher, 127 Ala. 521, 30 So. 87; *Hunt v. Hall*, 37 Ala. 702; *Cubbedge v. Napier*, 62 Ala. 518;

applicatory law. Professor Minor, in his work on Conflict of Laws, § 179, has made a very able argument designed to show that the question as to what law governs in respect to usury is, like all other questions affecting the validity of the contract, as distinguished from its interpretation, to be solved by ascertaining the situs of the element of the contract to which the matter of usury pertains. He supplements this position by a further argument designed to show that usury pertains to the consideration, as distinguished from the performance, of the contract, and, therefore, reaches the conclusion that the law of the situs of the consideration governs in respect to usury, irrespective of the intention of the parties. He says, in this connection: "Just as the validity of a note, made and payable in one state, given in payment for liquor sold, depends, not upon the *lex celebrationis* or *lex solutionis*, of the note, but upon the *lex loci considerationis* (the law of the situs of the sale), so, in this case [the case of usury] the validity of the note, or promise to repay the money borrowed will depend, not upon the *lex celebrationis* or *lex solutionis* of the note or other promise, but upon the *lex loci considerationis* (the law of the situs of the loan)." The analogy, however, seems to fall at a vital point when the contract attacked for usury is an original contract. In the case from which the analogy is drawn, the invalidity of the original contract or transaction (the sale of liquor), which was the purported consideration for the note, had been irrevocably fixed before the note was given, and could not be affected either by the note itself or by what the parties did in connection therewith. In that case, therefore, we start with the assumption that there was no legal consideration upon which the note could rest. The case of a note attacked for usury, however (assuming it to be the original contract), presents a different aspect. Here the character of the consideration is not (as it was in the other case) predetermined, but depends upon the very transaction in which the note is given; and Professor Minor himself admits, and cites authority to show, that the intention to exact usurious interest contrary to law is an essential ingredient of usury. In the case supposed, the intention of the parties is to be gathered from the transaction in which the note is given and if from the note, in connection with the surrounding circumstances, it is apparent that the parties intended in good faith to contract

with reference to the law of some place where the rate reserved is legal, is not an essential element of usury lacking, even if the rate reserved be usurious according to the law of the place where the consideration is received (the *lex loci considerationis*, as he terms it)? The analogy, however, seems to hold good in case of a note made and payable in one state, in renewal of a previous note made and payable in another state, and usurious by the law of the latter state. In this case, just as in the supposed case of a note given in one state in consideration of an illegal sale of liquor in another, the illegal character of the consideration of the new contract has been predetermined, and cannot be affected by the new transaction. Any effect that the intention of the parties might have had exhausted itself in the original transaction, and has been already discounted when we start with the assumption that the original contract was usurious. In such a case it seems difficult to avoid the conclusion that the new note must share the fate of the original contract; and, to this extent, it may be that the decisions support the proposition that the law of the situs of the consideration governs, irrespective of the intention of the parties at the time of, and as evidenced by, the new transaction. Beyond this, the cases lend but very little support to Professor Minor's view. With the exception of two or three of the cases, the most that can be said of those he cites in support of his position is that they reach the same result as if they had adopted his view, but, as he admits, they generally put the decision on other grounds. But, whether his view is sound upon principle, or not, the great majority of the cases, as already stated, make the intention of the parties, acting in good faith, the criterion by which to ascertain the governing law.

If this is the true criterion, it follows that, when the parties have, by the express terms of the contract designated the governing law, the only question for the court is, whether they acted in good faith, or in bad faith and for the purpose of evading the law of the place to which their contract was really referable. This question may involve a consideration of the nature of the contract and of the situs of its various elements, since it is apparent that it may be materially affected by the fact whether any, or certain, elements of the contract have their situs at the place whose law is so designated.

Hayes v. Southern Home Bldg. & L. Asso. 124 Ala. 663, 26 So. 527; *Story, Conf. L.* 5th ed. 280, 291; *Hanrick v. Andrews*, 9 Port. (Ala.) 10; *Hitchcock v. United States Bank*, 7 Ala. 433; *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 171, 13 L. R. A. 209, 9 So. 143.

When the parties to a contract reside in different states, they may lawfully contract that it shall be governed by the laws of either. They may certainly agree that it may be governed by the laws of the state where it is to be performed.

Hayes v. Southern Home Bldg. & L. Asso. 124 Ala. 663, 26 So. 527; *Pioneer Sav. & L. Co. v. Nonnemacher*, 127 Ala. 521, 30 So. 87; *Story, Conf. L.* §§ 280, 305; *American*

Freehold Land Mortg. Co. v. Sewell, 92 Ala. 171, 13 L. R. A. 209, 9 So. 143.

Making the contract payable in St. Paul, where the office and residence of the appellant were located, does not show that the contract was made in evasion of the laws of Alabama.

Pioneer Sav. & Loan Co. v. Nonnemacher, 127 Ala. 521, 30 So. 79; *Hayes v. Southern Home Bldg. & L. Asso.* 124 Ala. 663, 26 So. 527; *Southern Bldg. & L. Asso. v. Anniston Loan & T. Co.* 101 Ala. 582, 29 L. R. A. 120, 15 So. 123; *Gwin v. National Bldg. & L. Asso.* 121 Ala. 572, 25 So. 843; *Sheldon v. Birmingham Bldg. & L. Asso.* 121 Ala. 279, 25 So. 820.

Mr. Samuel Will John for respondent.

For example, if a borrower residing in one state and a lender in another enter into a contract in the latter state, making it payable in the former, and fix a rate of interest greater than that allowed by the law of either, but expressly stipulate that the contract shall be governed by the law of a third state where such rate is legal, it is obvious, in the absence of additional circumstances showing that some of the elements of the contract have their situs in that state, that the parties are acting in bad faith, and for the purpose of evading the usury laws of one of the other states. Assuming, however, that the express stipulation as to the governing law is made in good faith, it is, in this view, conclusive, and there is no necessity of resorting to the various principles and rules that have been formulated in cases in which there was no such express stipulation. Indeed, the true function and purpose of these principles and rules are to supply the omission of such a stipulation; in other words, they serve as guides to ascertain the unexpressed bona fide intention of the parties. Each rule rests upon an inference or presumption as to the intention of the parties, drawn from one or more of the terms of the contract or the circumstances attending the transaction. It is obvious, therefore, that it is not a hard and fast rule (like the rule that the *lex rei sitæ* determines the sufficiency of the acknowledgment of a deed of real property, for instance), but yields to additional circumstances indicating an intention contrary to the inferred or presumed intention upon which it rests. For example, the weight of authority has established the general rule that, when the rate of interest is not specified, the law of the place where the contract is payable, rather than that of the place where it was made, governs, if the two conflict, upon the ground that the parties will be presumed to have contracted with reference to the law of the place where the contract is payable, rather than that where it was made (*infra*, II.); but it is equally well established (*infra*, IV. c. 3) that, when the rate is stipulated, and exceeds that allowed by the law of the place of payment, but not that allowed by the law of the place where the contract was made, the latter will govern, upon the ground that the parties will be presumed to have intended to contract with reference to a law that will uphold, rather than one that will invalidate, the contract. (This rule is, of course, subject to the same qualification as to good faith that 62 L. R. A.

applies when the governing law is expressly designated by the contract.) The additional circumstance of a stipulation for a rate of interest lawful by the *lex loci contractus*, but unlawful by the *lex loci solutionis*, overcomes the presumption on which the first rule rests, namely, that the parties intended to contract with reference to the *lex loci solutionis*, and supplies a new presumption which becomes the basis of a new rule. The additional circumstance here referred to has been of such frequent occurrence that it has become the basis of a well-formulated rule; but there are other circumstances,—*e. g.*, the residence of the parties, the place where the money was received, the location of real property by which the loan is secured, the place where the money was used, and the like,—that may, when grouped in certain combinations, be sufficient to overcome the presumption on which the first rule rests, or, indeed, that upon which the second rule rests. It may be that a particular combination of circumstances is of such infrequent occurrence that it has never become the basis of a distinct formulated rule, and yet may be sufficient to overcome the presumption upon which a formulated rule rests, and therefore sufficient to displace that rule. It follows, therefore, that any principle or rule that has been formulated upon the subject must be narrowly confined to the precise set of circumstances upon which it rests, and before it is applied the case must be closely examined to ascertain whether there is any fact or circumstance (whether the basis of another distinctly formulated rule or not) that overcomes the presumption of intention on which the rule rests, either by showing that the parties had in mind some other law with reference to which they intended to contract, or that they acted in bad faith and for the purpose of evading the law of the place which was the real situs of the contract.

II. Contractual interest.

Whether a contract for the payment of money, which stipulates for interest, but does not specify the rate or designate the place of payment, be treated as payable generally, or at the place where it was made, in either case there is ordinarily no basis for a presumption that the parties intended to be governed by any other law than that of the place where the contract was made; and, therefore, that law governs as to the rate. *Butters v. Olds*, 11 Iowa, 1; *Holley v.*

Tyson, J., delivered the opinion of the court:

The issue presented by the pleadings in this cause is whether the note and mortgage executed by complainant to the respondent is an Alabama or a Minnesota contract. It is not contended in argument by complainant that the mortgage is usurious if it is a Minnesota contract; nor is it insisted by respondent that it is not usurious if it is an Alabama contract.

It is undoubtedly the law, as said in *Pioneer Sav. & Loan Co. v. Nonnemacher*, 127 Ala. 545, 30 So. 87, "that where a contract is made in one state, to be performed in another state, the parties may contract for the payment of the highest rate of interest allowed by either state, without offending

against the usury laws of the other; the exception to the rule being that this may not be done as a subterfuge and device, and where the purpose and intention of the parties are simply to evade the usury laws." Or, to state the proposition in the form in which it is stated in *Hayes v. Southern Home Bldg. & L. Assn.* 124 Ala. 669, 26 So. 530: "Under established rules, a note or bond made payable at a particular place, or which is expressly made with reference to the laws of a particular state, is governed, in respect to its obligation as to interest, by the law of the place so stipulated as the place of performance. . . . An exception to these rules is where such stipulations are found to be a mere device to evade the usury laws, in which case they will be held void as

Holley, Litt. Sel. Cas. 507, 12 Am. Dec. 342; Hawley v. Sloo, 12 La. Ann. 815; Hopkins v. Miller, 17 N. J. L. 185; Lewis v. Ingersoll, 1 Keyes, 347; Arrington v. Gee, 27 N. C. (5 Ired. L.) 594; Kavanaugh v. Day, 10 R. I. 393, 14 Am. Rep. 691. See also Varick v. Crane, 4 N. J. Eq. 128, *infra*, IV.

The correctness of this principle is so obvious that the courts have not often announced it in express terms. Indeed, there is no choice of laws presented except the *lex loci contractus* and the *lex fori*; and it is, of course, clear that the *lex fori* does not govern, though it may have been applied in some cases because the *lex loci contractus* was not proved. But it was held in *Quince v. Callender*, 1 Desauss. Eq. 160, that South Carolina interest is allowable upon a contract which, though made in North Carolina, has reference to lands in South Carolina.

When, however, a contract for the payment of money, which stipulates for interest, but does not specify the rate, is made (i. e., delivered so as to become binding) in one state or country, and is payable in another, the law of the place of payment generally determines the rate of interest. *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245 (*obiter*); *Fitch v. Remer*, 1 Biss. 337, Fed. Cas. No. 4,836; *Hunt v. Hall*, 37 Ala. 702; *New England Mortg. Secur. Co. v. McLaughlin*, 87 Ga. 1, 13 S. E. 81 (*obiter*); *Butler v. Myer*, 17 Ind. 77 (*obiter*); *Swett v. Dodge*, 4 Smedes & M. 667 (the court actually applied the *lex fori* because the *lex loci contractus* was not known); *Howard v. Branner*, 23 La. Ann. 369; *Scotfield v. Day*, 20 Johns. 102; *Bowen v. Bradley*, 9 Abb. Pr. N. S. 395; *Irvine v. Barrett*, 2 Grant Cas. 73; *Archer v. Dunn*, 2 Watts & S. 327; *Kavanaugh v. Day*, 10 R. I. 393, 14 Am. Rep. 691; *Bolton v. Street*, 3 Coldw. 31 (*obiter*); *Peck v. Mayo*, 14 Vt. 36, 39 Am. Dec. 205 (unless it appears that the parties intended to contract with reference to the law of some other place).

Butters v. Olds, 11 Iowa, 1, states the rule as follows: "Interest, whether due by express contract or given as damages by the law, is due according to the rate allowed by the law of the place where the contract is made; and this for the reason that, if not otherwise indicated, it will be presumed that the contract was to be performed there. But, if the contract is made with reference to the laws of another country, and to be performed there, interest is to be calculated according to the law of the place of per-

formance, unless it is otherwise stipulated in the contract."

In *Curtis v. Leavitt*, 15 N. Y. 9, the court said that the single circumstance that the interest on bonds is payable in London would have made the rate of interest in England prevail if the rate had not been specified.

So, the proposition of a seller that notes for the purchase money shall be payable at a particular place with interest must be taken to mean interest at the rate allowed by the law of that place, if different from the rate allowed by the law of the place where the proposition is made. *Summers v. Mills*, 21 Tex. 77.

In *French v. French*, 126 Mass. 380, it was held that the interest contemplated by a contract entered into in Massachusetts, whereby one party was to convey to the other certain mining property in Colorado whenever \$2,000 and interest from the sales of ore or other materials had been realized, was to be computed according to the Massachusetts rate. The court said that the rule of law was that interest was to be paid on contracts according to the law of the place where they were to be performed in all cases where interest was expressly or impliedly to be paid; that while, in the case at bar, a part of the contract was to be executed by the defendant in Colorado in managing the property in his hands, yet the implied promise of the plaintiff to pay was made, and was to be performed, in Massachusetts. It is not stated in this case where the parties resided, but apparently the defendant, who was to make the conveyance in the event contemplated, was a resident of Massachusetts.

So, the manner of computing interest upon a note specifying a rate of interest lawful both by the law of Massachusetts, where it was made, and the law of New Hampshire, where it was payable, is to be determined by the law of New Hampshire. *Little v. Riley*, 43 N. H. 109. The court applied the rule of New Hampshire, whereby, for the detention of annual interest, simple interest only is to be computed from the time such annual interest accrues, and all payments made are to be first applied to extinguish the interest due.

In *Anonymous*, 3 N. C. (2 Hayw.) 5, however, which was an action of debt upon a bond executed in North Carolina and payable to a person of South Carolina, the court said the bond was not payable in South Carolina, but, if it were, as it was executed in North Carolina, it

against public policy." Confessedly, these principles are only applicable to contracts made in one state, and to be performed in another, or where made in one state, and contain a stipulation that they shall be governed by the laws of another, where payable, and have no application when the contract is made and to be performed in the same state. In the latter case, the *locus contractus* and the *locus solutionis* being the same, if the contract is not usurious where made and to be performed, it will be enforced by the courts of this state, notwithstanding it would have offended the laws of this state against usury, had it been made here. Story, Conf. L. 8th ed. p. 397.

A careful examination of the evidence, we think, sustains the contention of the re-

spondent that the note and mortgage are Minnesota contracts. In addition to the note being made payable at the office of respondent's treasurer, in St. Paul, or to its trustee, in Minneapolis, Minnesota, there is a stipulation in both the note and mortgage that they are "understood to be made with reference to, and under the laws of, the state of Minnesota." Furthermore, the evidence shows that the respondent is a corporation organized under the laws of Minnesota, with a place of business in that state; that the written applications for the loan and to become a stockholder were each addressed to the company at St. Paul. Although signed in Birmingham, and delivered to one of respondent's agents for the purpose of transmitting them to the company, they had to

would only carry North Carolina interest, because a contract is to be interpreted according to the law of the country where made, and draws to it such legal consequences as the law of that country attaches to it. The court said that if the bond had been executed in South Carolina, and there payable, it would undergo a different consideration. This decision is against the clear weight of authority.

The rule above stated, to the effect that the law of the place of payment determines the rate of interest when not stipulated in the contract, is merely a *prima facie* rule; that is, it applies when it merely appears that the contract was made in one state and is payable in another, and there are no other circumstances rebutting the presumption that the parties intended to contract with reference to the *lex loci solutionis*, rather than the *lex loci contractus*. Judge Redfield, in *Peck v. Mayo*, 14 Vt. 36, 39 Am. Dec. 206, *supra*, states the principle as follows: If a contract entered into in one place, to be performed in another, stipulate for interest generally, it shall be the rate of interest of the place of payment, unless it appear that the parties intended to contract with reference to the law of the other place.

III. Interest as damages.

See also *Butters v. Olds*, 11 Iowa, 1, *supra*, II.

It has been shown, in a previous note (*Gray v. Western U. Teleg. Co.* [Tenn.] 56 L. R. A. 301), that, according to the great weight of authority, though there is some conflict, the question as to the right to, and the rate of, interest as damages for delay in payment of money due upon contract pertains to the substantive contract, rather than to the remedy, and is, therefore, governed by the law that governs the substantive contract, and not by the *lex fori*. The *lex fori* having thus been eliminated, it remains to be seen what law does govern. It would seem that it might be plausibly urged that this question is an exception to the general principle stated in division I., that the governing law depends upon the bona fide intention of the parties, since the nonpayment at maturity which creates the right to the interest was contrary to the intention of the parties as evidenced by the contract; and that, the interest being allowed by way of compensation for nonpayment, in accordance with the terms of the contract, the law of the place of payment named in the contract should govern, because that is where the obligee was entitled to receive his money. 62 L. R. A.

In *Coghlan v. South Carolina R. Co.* 142 U. S. 101, 35 L. ed. 951, 12 Sup. Ct. Rep. 150, however, the court, discussing the question whether the law of the place where a contract was made or was payable governed in respect to the interest allowable after maturity, said that all the terms of the contract must be examined in connection with the attendant circumstances to ascertain what law was in view of the parties when the contract was executed; citing the statement of Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253, that "in every forum a contract is governed by the law with a view to which it was made."

Whatever the basis of the rule, with the exception of a few cases which, as pointed out in the note to *Gray v. Western U. Teleg. Co.* (Tenn.) 56 L. R. A. 301, apply the *lex fori*, the cases are practically agreed that the law of the place where the contract was made governs unless the contract is performable elsewhere, in which case the law of the place of performance, which is ordinarily the place of payment, governs. The only practical difference it makes whether the rule is based upon the presumed intention of the parties or upon the ground that the law of the place where the breach occurred necessarily governs is that in the first case the rule would be *prima facie* merely, and liable to be defeated by other circumstances; while in the second case it would be an absolute rule.

Where parties enter into a contract without any stipulation for interest, but upon which, in default of prompt payment, interest accrues, its rate must be admeasured by the scale prescribed by the laws of the country where the contract was made, unless the parties contracted with reference to another jurisdiction, in which case the law of the place of payment will ascertain the *quantum* of interest. *Hanrick v. Andrews*, 9 Port. (Ala.) 9.

The place of payment controls the rate of interest when it is not specified in the contract. *Clarke v. Taylor*, 69 Ark. 612, 65 S. W. 110.

Interest from the maturity of a policy of life insurance, payable in Alabama, should be calculated at the rate prevailing in Alabama, though the action is brought in Mississippi. *Grangers' L. Ins. Co. v. Brown*, 57 Miss. 308, 34 Am. Rep. 446.

In an action to recover for services performed in Montana under a contract made in Michigan which does not fix the rate of interest, if the payment for services is refused after demand,

be examined and passed upon by the officers of the respondent at its place of business. After receiving their applications, the note and mortgage, certificate of stock, and its assignment were prepared in St. Paul by respondent's attorney, and forwarded to its attorneys in Birmingham to have properly signed, recorded, etc., but without authority to finally accept the note and mortgage and certificate of stock for the company. Their acceptance for the security for the loan was to be determined upon after a further examination of the abstract of title and other papers by the attorney of the company in St. Paul. In other words, the evidence shows that there was no delivery of the note and mortgage in Alabama, but that they were in fact delivered in the state of Minnesota.

Indeed, the draft drawn by the respondent on its depository for the amount of the loan, while sent to a bank in Birmingham, to be handed the complainant, was not to be paid until the papers, after examination by respondent's attorney in St. Paul, were approved. This method of payment was in accordance with the agreement made between the parties, as shown by the applications for the loan.

It is an elementary principle that a contract must be mutual, and no proposition or offer becomes a contract until it is accepted and approved by both parties. It is also the law that "where a contract is delivered or first becomes a binding obligation upon the parties is deemed the place of contract, for the purpose of distinguishing what law gov-

the rate of interest is that prescribed by the law of Montana. *Isaacs v. McAndrew*, 1 Mont. 437.

Where interest is given as damages for breach of a contract, the rate of interest allowed by the laws of the state where the contract is to be performed should govern. *Sutro Tunnel Co. v. Segregated Belcher Min. Co.* 15 Nev. 121, 7 Pac. 271. This was an action in Nevada for breach of a contract made in California for the performance of certain work in Nevada. It was held that the rate in Nevada prevailed, not because it was the *lex fori*, but because it was the law of the place of performance of the contract.

On general principles, in the absence of any agreement on the subject, money is payable where the creditor resides, and interest is to be computed at the rate allowed by the law of the country where the contract was made or is to be performed. *Stewart v. Ellice*, 2 Paige, 604.

Where a contract for the payment of money is made in one place, and payment provided for in another, and no interest is expressed in the contract, the interest is to be governed by the law of the place where it is payable. *Pomeroy v. Ainsworth*, 22 Barb. 118.

If a contract be made in one place for money payable at a place on a day certain, and no interest be stipulated, and payment be delayed, interest by way of damages shall be allowed according to the law of the place of payment. *Bolton v. Street*, 3 Coldw. 31.

If the contract be entered into at one place for money payable at another on a day certain, and no interest be stipulated, and payment be delayed, interest, by way of damages, shall be allowed according to the law of the place of payment, where the money may be supposed to have been required by the creditor for use, and where he might be supposed to have borrowed money to supply the deficiency thus occurring, and to have paid the rate of interest in that country. *Peck v. Mayo*, 14 Vt. 36, 39 Am. Dec. 205.

But whether interest can be recovered, and to what extent, upon a contract made in one state to be executed in another, depends, in the absence of express stipulation, upon the law of the place where the contract is to be executed, and not upon the custom of the merchants of that place. *Cooper v. Sanford*, 4 Yerg. 452, 26 Am. Dec. 239. In this case bills were drawn 62 L. R. A.

in Tennessee upon a firm in Louisiana, and accepted and paid by the latter for the accommodation of the drawer. The action was by the acceptors against the drawer for money paid to the latter's use. It was held that the acceptors were entitled to 5 per cent interest by way of damages allowed by the law of Louisiana, but were not entitled to an additional rate which was allowed in such cases by the custom of business in New Orleans, where the bill was payable.

Bonds.

The principle above stated, that, in case of a conflict between the law of the place where the contract was made and that of the place where it is payable, the latter governs in respect of the right to, and the rate of, interest *ex mora*, has been applied (though with an exception pointed out below) to bonds and coupons. Thus:

Where the principal and interest of railroad bonds issued by an Ohio corporation are payable in New York, in the absence of provision otherwise, they are governed by the statutes of that state relating to interest, and, under such statutes, interest is not recoverable upon coupons which remain in the hands of holders of the bonds from which they have not been detached. *Columbus, S. & H. R. Co.'s Appeal*, 48 C. C. A. 275, 109 Fed. 177.

So, bonds of a railroad company in South Carolina, which purport to have been issued in that state, but are redeemable, and are to be wholly performed in England, bear interest after maturity according to the law of England. *Coghlan v. South Carolina R. Co.* 142 U. S. 101, 35 L. ed. 951, 12 Sup. Ct. Rep. 150. The court seems to regard the intention of the parties as the criterion, and the implication is that the circumstances in a particular case might overcome the presumption or inference that the parties intended to be governed by the law of the place of payment. In this case the bonds were not only redeemable in England, but they were payable in pounds sterling and at the rate of 5 per cent per annum, and these facts were also relied upon as supporting the inference that the parties intended to be governed by the law of England. In this case it was claimed that the bonds should bear interest at 7 per cent, the rate in South Carolina, after maturity; but it was held that the law of England governed.

Coupons cut from bonds bear interest after

erns." 3 Am. & Eng. Enc. Law, p. 547; *McGarry v. Nicklin*, 110 Ala. 559, 17 So. 726. Under the evidence, we are constrained to hold that the note and mortgage were executed in Minnesota, and therefore a Minnesota contract. *McGarry v. Nicklin*, 110 Ala. 559, 17 So. 726, and cases cited therein; *Farmers' Sav. & Bldg. & L. Asso. v. Kent*, 131 Ala. 246, 30 So. 874; *United States Sav. & Loan Co. v. Miller* (Tenn. Ch. App.) 47 S. W. 17.

It was entirely lawful for the complainant to borrow money in the state of Minnesota, and lawful for the respondent to loan him the money there, and to secure its repayment by accepting from him a mortgage on lands in Alabama. And the taking of the mortgage will not change the rule in respect to

the laws of the place which are to govern the transaction as to usury. "The legal fulfillment of a contract of loan on the part of the borrower is repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrows, unless another place of payment be expressly designated by the contract." *De Wolf v. Johnson*, 10 Wheat. 368, 6 L. ed. 343; Tyler, *Usury*, pp. 88, 89; 1 Jones, *Mortg.* 15th ed. §§ 657 *et seq.* Besides, the form of the contract adopted by the respondent in making and securing the loan was the usual and customary one employed by it in doing the same business in twenty-four states, and is substantially the same form employed by it since its organization. *Ben-*

maturity at the rate prevailing at the place where they are payable, rather than that where they were made. *Pana v. Bowler*, 107 U. S. 529, 27 L. ed. 424, 2 Sup. Ct. Rep. 704.

Interest from maturity upon coupons payable in New York may be allowed from their maturity until the date of the entry of judgment, at the rate established by the law of New York. *Hughes County v. Livingston*, 43 C. C. A. 541, 104 Fed. 306, 322.

A bond given in Massachusetts for a debt due in England to a third party draws New England interest. *Jones v. Belcher*, Quincy (Mass.) 9.

Interest payable upon bonds as damages for nonpayment at maturity is to be paid according to the law of the place where the bonds are payable, although secured by a mortgage upon real property in another place. *Kavanaugh v. Day*, 10 R. I. 393, 14 Am. Rep. 691. The bonds in this case were executed in New York between residents of that state, and, no provision being made for their payment elsewhere, it was held that they were presumably payable in New York; and the law of that state was accordingly applied, although the land mortgaged to secure them was situated in Rhode Island.

In *Huey v. Macon County*, 35 Fed. 481, it seems to have been assumed that coupons payable in New York would bear interest from maturity at the New York rate, though, in the absence of proof of that rate, the rate of the forum was applied.

A bond made in England, and sent to the obligee in Ireland, the money to be paid there, should carry Irish interest. *Champant v. Ranelagh*, Prec. in Ch. 128.

But the fact that bonds issued by the state of North Carolina are payable in New York does not subject them to the law of the latter state, according to which the state is liable, like a private person, to pay interest after maturity. *United States v. North Carolina*, 136 U. S. 211, 34 L. ed. 336, 10 Sup. Ct. Rep. 920. The court said that the manifest object of the alternative, allowed by the statute under which the bonds were issued, of making bonds payable either in New York or North Carolina, was to promote the convenience of bondholders, and not to submit the obligation, the construction, or the effect, of the bonds to the operation of different laws according to the place at which they should actually be made payable; and, 62 L. R. A.

therefore, the case fell within the general rule that contracts are to be governed, as to their nature, their validity, or their operation, by the law of the place where they are made, unless the contracting parties appear to have had some other place in view.

In *Gray v. State*, 72 Ind. 567, it was held that interest after maturity upon bonds and coupons issued by the state of Indiana in that state, but payable in New York, was to be determined by reference to the law of New York. It is to be observed in this case that the law of New York was applied only so far as the rate was concerned. The liability of the state to pay interest at all was based upon the terms of the statute under which the bonds were issued. In this case, however, a resolution had been adopted by the state board to the effect that, as the state had announced its readiness to pay the bonds, interest would not be allowed thereon after a specified date, and it was held that whatever the case might be, if the bonds had been made payable at the state treasury, or generally, without naming any place of payment, the bonds being payable in New York, the resolution could have no effect.

Accounts between principal and agent.

Where the agreement between the parties to a contract is silent as to the rate of interest to be paid on any balance that may be due, the rate must be that allowed by the laws of the place where the balance was payable. *Ballister v. Hamilton*, 3 La. Ann. 401. In this case it was held that, where an advance was obtained in Louisiana, from an agent residing in that state, of a foreign principal, on merchandise to be shipped and sold by the latter abroad, the allowance of interest on any balance due to the foreign principal, in consequence of the proceeds of the sale falling short of the advances, must be determined by the law of the domicile of the principal, where the merchandise was sold. The court disapproved of the decision of Judge Story in *Grant v. Healey*, 3 Sumn. 523, Fed. Cas. No. 5,696.

On a consignment of goods by a merchant in New York to a factor in California, for sale, the contract of the factor is to be performed in California by remitting thence the proceeds of the sale in the usual way; and in an action by the principal to recover the proceeds, he is entitled to interest at the rate allowed by the

nett v. Eastern Bldg. & L. Asso. 177 Pa. 233, 34 L. R. A. 595, 35 Atl. 684.

Furthermore, if it be conceded that we are mistaken in our finding of the fact from the evidence that the note and mortgage were delivered in Minnesota, but that they were in fact delivered in Alabama, yet the evidence fails to establish that the stipulations in said note and mortgage, "understood to be made with reference to and under the laws of the state of Minnesota," were a mere device to evade the usury laws of this state.

No such sinister purpose appears in the contract, and the evidence fails to afford any reasonable inference that there existed any such sinister motive in making the note payable in Minnesota. *Hayes v. Southern Home Bldg. & L. Asso.* 124 Ala. 689, 26 So. 527, and *Pioneer Sav. & Loan Co. v. Nonnemacher*, 127 Ala. 545, 30 So. 87.

Reversed and remanded.

Haralson, J., dissents.

laws of California. *Cartwright v. Greene*, 47 Barb. 9.

In *Wittkowski v. Harris*, 64 Fed. 712, it was said that interest on advances made by a factor to his principal in America on goods to be consigned to the factor for sale in Australia was not to be computed according to the rate in Australia, unless the contract of loan expressly stipulated that the advances were to be repaid in Australia at the rate of interest allowable by the laws of that country. The court probably meant, however, that the Australian rate was not to prevail unless the repayment was to be made in Australia, for the subsequent language indicates that the law of the place of performance prevails over the law of the place where the contract is made.

Sales.

See also *Peyton v. Helnekin*, 20 L. ed. 679, *infra*.

In *Fanning v. Consequa*, 17 Johns. 511, 8 Am. Dec. 442, Reversing 3 Johns. Ch. 587, it was held that a New York merchant was liable for the rate of interest prevailing at Canton upon the price of goods purchased there by his agent, but that he was only liable for interest at the New York rate upon goods consigned to him as a commission merchant to be sold in New York, although the goods were delivered to his agent at Canton. The decision is upon the principle stated by Huberus, to the effect that contracts are to be interpreted according to the laws of the country where they are made; but if, by the terms or nature of the contract, it appears that it is to be executed in a foreign country, or that the parties had respect to the laws of another country, then the place of making the contract becomes immaterial; and the obligation must be tested by the laws of the country where the duty was to be performed.

Where a person in New Orleans orders, by letter, goods to be shipped to him from New York, offering to pay for them at a certain period after the shipment shall have been made in New York, the contract will be deemed to have been made in New York where the final assent necessary to its completion was given, and where the order was received and executed. It was accordingly held that the law of New York governed with respect to the right to interest after the expiration of the credit agreed upon. *Shaw v. Oakley*, 3 Rob. (La.) 361. In this case New York was evidently regarded as the place of payment also.

In *Croninger v. Crocker*, 62 N. Y. 151, a purchaser, under a contract of purchase and sale of goods made in Ohio, indorsed, for the accommodation of the seller and to enable him to purchase the goods to fill the contract, a note dated and made payable in New York, and at its 62 L. R. A.

maturity paid and took it up at the request of the seller. In an action to recover the amount advanced because of the failure of the seller to perform the contract, it was held that the note was valid in the hands of the buyer against the seller as a security for the repayment of the amount represented by it; and, as it was a New York note, interest was recoverable thereon at the rate allowed by the law of New York.

In *Arrington v. Gee*, 27 N. C. (5 Ired. L.) 594, a sale of personal property was made in Alabama; one half of the purchase price was paid in cash, and the other secured by a bond dated in Alabama and signed in that state by the purchaser, and delivered to the obligee, who brought it to North Carolina, where it was signed by two other parties as sureties. No place of payment was specified, and the court held that the law of the place where the contract was made governed as to the rate of interest, and in the view of the court the contract was made in Alabama. The court seems to have taken two alternative positions: One, that the contract whose *locus* was material was the original contract of sale, and, that having taken place in Alabama, the fact that the bond given as surety for the purchase price may have been executed in another state was immaterial; and the other ground was that, if the bond constituted the contract, it was still to be regarded as a contract made in Alabama.

Bills and notes.

In applying the principles stated at the beginning of this division to bills and notes, it is to be remembered that, according to the great weight of authority, while the place of payment of the contract of the primary obligor, *i. e.*, the acceptor of a bill or the maker of a note, is the place of payment specified in the bill or note, or, if none is specified, the place where the bill or note was made (*i. e.*, the place where it was delivered so as to become binding upon the acceptor or maker), the place of payment of the contract of the secondary obligor is the place where his contract was made (*i. e.*, the place where the bill or note was delivered so as to become binding upon him), irrespective of the place of payment named in the bill or note. (See *note to Spies v. National City Bank* [N. Y.] 61 L. R. A. 193.) It is therefore established by the great weight of authority, as shown in that note, that the liability of the drawer or indorser for interest as damages for nonpayment of the bill or note (*i. e.*, interest *ex mora*), as distinguished from interest stipulated in the bill or note (interest *ex contractu*), is to be determined by the law of the place where, in a legal sense, the bill was drawn, or the bill or note indorsed.

The liability of the primary obligor (*i. e.*,

the maker or acceptor) for interest *ex mora*, however, is to be determined by the law of the place where the note or bill was first delivered, so as to become binding upon him, if no other place of payment is named. *Dunn v. Clement*, 2 Ala. 392; *Johnson v. Williams*, 1 J. J. Marsh. 490; *Pawling v. Sartain*, 4 J. J. Marsh. 238.

If payable elsewhere, the law of the place of payment governs so far as the primary obligor is concerned. *Cooper v. Waldegrave*, 2 Beav. 282; *Bainbridge v. Wilcocks*, Baldw. 536, Fed. Cas. No. 755; *Boyce v. Edwards*, 4 Pet. 111, 7 L. ed. 709; *Bank of Illinois v. Brady*, 3 McLean, 268, Fed. Cas. No. 888 (*obiter*); *Dickinson v. Branch Bank*, 12 Ala. 54; *Vinson v. Platt*, 21 Ga. 135; *Johnson v. Williams*, 1 J. J. Marsh. 489; *Pawling v. Sartain*, 4 J. J. Marsh. 238; *Lapice v. Smith*, 18 La. 91, 33 Am. Dec. 555; *Bent v. Lauve*, 3 La. Ann. 88; *Healy v. Gorman*, 15 N. J. L. 328; *Freese v. Brownell*, 85 N. J. L. 285, 10 Am. Rep. 239; *Frierson v. Galbraith*, 12 Lea, 129; *Wheeler v. Pope*, 5 Tex. 262.

The case of *Peck v. Mayo*, 14 Vt. 36, 25 Am. Dec. 205, is also authority for this principle, though it was there incorrectly applied so as to hold the indorser of a note liable for interest after maturity according to the rate at the place where the note was payable, though the contract of indorsement was made elsewhere. Such application is accounted for by the fact that Judge Redfield took the position, contrary to the weight of authority, that the contract of the indorser, being merely collateral to that of the maker, is payable at the same place, *viz.*, the place of payment named in the note. Though such application of the principle was contrary to the weight of authority (see note to *Spies v. National City Bank* [N. Y.] 61 L. R. A. 193), the decision would have been clearly correct as applied to the liability of the maker, though the note was made in Canada, indorsed in Vermont, and was payable in New York.

A note made and payable in Missouri is governed by the Missouri statute allowing 4 per cent damages upon protested notes, although secured by mortgage on Illinois lands, notwithstanding *Hurd's Rev. Stat. (Ill.)* p. 835, chap. 74, § 8, providing that when any written contract, wherever payable, shall be made in the state, or shall be secured by mortgage or trust deed on lands in the state, it may bear any rate of interest allowed to be taken in the state. *Guignon v. Union Trust Co.* 156 Ill. 185, 40 N. E. 558, Affirming 53 Ill. App. 581.

A judgment upon a note made and payable in another state is properly rendered for the principal with interest at the rate prevailing in such other state until paid. *Lockwood v. Lindsey*, 6 App. D. C. 396. This case is merely authority for the elimination of the *lex fori*. The other cases of this kind will be found cited in the note to *Gray v. Western U. Teleg. Co. (Tenn.)* 56 L. R. A. 301.

In *Lanusse v. Barker*, 3 Wheat. 101, 4 L. ed. 343, it was said that, where a general authority is given to draw bills from a certain place on account of advances there made, the undertaking is to replace the money at that place; and, accordingly, interest at the Louisiana rate, rather than the New York rate, was allowed under a count declaring upon a refusal to accept a bill drawn upon a party in New York, pursuant to his authority to draw bills from New Orleans on account of advances made there.

In *Shipman v. Miller*, 2 Root, 405, it was held 62 L. R. A.

(that, in assessing damages upon a foreign bill of exchange which is protested, the court will inquire as to the custom of the place where the bill was drawn. In this case the bill was drawn in the West Indies on a merchant in London. It does not appear against whom the action was brought. If against the drawer, the implication that the law of the place where the bill was drawn will prevail over the law of the place upon which it is drawn, is in accord with the weight of authority, as shown in note to *Spies v. National City Bank* (N. Y.) 61 L. R. A. 193; but, if against the acceptor, the implication is contrary to the weight of authority as above shown.

The *lex loci* where a bill of exchange is drawn is the rule, both for interest and damages, on bills. *Winthrop v. Pepon*, 1 Bay, 468. No distinction is made as between the liability of the drawers and that of the acceptors, but in this case they seem to have been the same parties. The decision is based upon a decision of a special jury of merchants finding a verdict for the amount of the bill with interest and 3 per cent damages, agreeably to the custom of merchants in Boston where the bill was drawn. The court said that the verdict may be considered as establishing the law on the point, and making the *lex loci*, or law of the place where the bill is drawn, the rule.

In some states the general principle of international law above stated, to the effect that the liability of the acceptor of a bill of exchange in case of nonpayment is to be determined by the law of the place of payment, has been changed by statute, and, under the influence of such statute, the law of the place where the bill was drawn, rather than that of the place where it was payable, has been applied, even when it was a question of the liability of the acceptor. Since these cases turn upon local statutes, and not upon general principles of international law, no attempt has been made to collect them; but the following may be cited by way of illustration: *State Bank v. Bowers*, 8 Blackf. 72; *Wood v. Farmers' & M. Bank*, 7 T. B. Mon. 281; *Farmers' Bank v. Brainerd*, 8 Ohio, 292; *West v. Valley Bank*, 6 Ohio St. 168; *Bank of New Orleans v. Stagg*, 1 Handy (Ohio) 382.

Miscellaneous.

Interest allowed for the wrongful taking of a ship and cargo in the Indies should be computed at the Indian rate. *Ekins v. East-India Co.* 1 P. Wms. 895.

A trustee of a lunatic appointed in Mississippi, who receives money in a foreign state for his *cestui que trust* residing in Mississippi, and applies the same to his own use, must account for interest at the rate prevailing at the place where it was received. *Neill v. Neill*, 31 Miss. 36. It does not appear in this case where the money was used by the trustee. The point contested in the case was, apparently, not as to the rate of interest, but as to whether or not interest was allowable at all.

The date from which a legacy carries interest is governed by the law of the testator's domicile. *Welch v. Adams*, 152 Mass. 74, 9 L. R. A. 244, 25 N. E. 34.

The amount secured by a settlement and will made in England, where all the parties resided, draws English interest, though charged on an Irish estate. *Phipps v. Anglesea*, 1 P. Wms. 606.

IV. Usury.

a. Effect of penal or remedial character of foreign statute.

It is a well-established principle of private international law, operating by way of exception to the general principles, that the courts of one state or country will not execute the penal laws of another; and this principle applies to usury laws in so far as they merely impose a penalty by way of punishment for the exaction of excessive interest. The usury laws, however, often strike at the very foundation of the contract, and declare it void. In such a case it is universally agreed that the courts of another state will recognize the effect of the statute in that respect, and refuse to enforce the contract. This principle, which is expressly stated in the following cases, is impliedly recognized and acquiesced in by all of the cases cited in the subsequent subdivisions.

A court of one state will not administer the mere penal exactions of foreign law by forfeiture; but when by those laws the contract itself is void there, it is void everywhere, and the court of another state will not enforce it, even though it might have been valid if made under the law of the forum. *McAllister v. Smith*, 17 Ill. 328, 65 Am. Dec. 651.

Usury in a loan effected elsewhere is no offense against the laws of Massachusetts. In a suit upon a contract founded upon such a loan the penalty for usury could not be set up in defense under the statutes formerly in force in this commonwealth. Neither can a penalty as a partial defense authorized by the laws of one state be applied or made effective in the courts of another state. Such penal laws can be administered only in the state where they exist. But when a usurious or other illegal consideration is declared by the laws of any state to be incapable of sustaining any valid contract, and all contracts arising therefrom are declared void, such contracts are not only void in that state, but void in every state and everywhere. They never acquire a legal existence. *Akers v. Demond*, 103 Mass. 318.

In *Houghton v. Page*, 2 N. H. 42, 9 Am. Dec. 30, it was held that a Massachusetts contract, being void by the statute of that state against usury, could not be enforced in New Hampshire. The court said it did not come within the exception to the rule, that the *lex loci* governs, to the effect that the penal statutes of one state cannot be enforced in another. The court further said that, as applied to the validity of the contract itself, the statutes where it was made, whether penal or not, seemed to have equal force; and the rate of interest there prescribed has always been recognized and enforced where the contract is sued. As applied to the remedy on contracts, no foreign statutes, whether penal or otherwise, are enforced, but the extent of the exception is only that, as penal statutes are a part of the criminal jurisprudence of the country, their operation and punishment and breach are all local, and hence, when broken, whether at home or abroad, no prosecution can be instituted abroad for the penalty; but that contracts of the kind in suit are personal, and their breach can be punished abroad as well as at home.

A note which is void for usury at the place, and under the law, where the contract was made, is void in Alabama, and will not be enforced there, although the rate of interest is not usurious in that state. *McGarry v. Nicklin*, 110 Ala. 559, 17 So. 726.

Where the mortgagor and mortgagee reside in Georgia, and all the transactions between them took place in that state, and the mortgage does not designate any particular place of payment, the law of Georgia determines the validity and operation of the contract, and such contract will be enforced so far, and only so far, as it is valid under the laws of that state, unless it offends the positive law, or violates the public policy, of the forum. *Cubbedge v. Napier*, 62 Ala. 518.

An agreement made and to be executed in New York, which is usurious and void by the law of New York, will not be enforced in Louisiana. *Clague v. Their Creditors*, 2 La. 115, 20 Am. Dec. 300.

A contract void for usury by the law of the state where it is made cannot be enforced elsewhere. *Astor v. Price*, 7 Mart. N. S. 409.

When, however, the foreign statute, instead of declaring the contract void for usury, merely provides for the forfeiture or deduction of a certain amount to be measured by the amount of usurious interest exacted,—*e. g.*, twice or three fold such usurious interest,—some courts have refused to give it any effect, even when interposed as a defense to an action upon the contract by which the usurious interest was reserved. It has been so held in *Sherman v. Gassett*, 9 Ill. 521; *Watriss v. Pierce*, 32 N. H. 560; *Wright v. Bartlett*, 43 N. H. 552; *Willis v. Cameron*, 12 Abb. Pr. 245; *Thornton v. Dean*, 19 S. C. 583, 45 Am. Rep. 796. In all these cases the statute involved contemplated that the amount of the forfeiture might be deducted from the amount otherwise recoverable, and that judgment should be rendered for the balance only. The majority opinion in *Sherman v. Gassett*, 9 Ill. 521, intimated that the case came within the rule that the courts of one state will not enforce the penal laws of another, but held that in any event the forfeiture provided by the statute merely affected the remedy, and that the remedy is to be determined by the *lex loci*. So, the decisions in *Watriss v. Pierce*, 32 N. H. 560, and *Wright v. Bartlett*, 43 N. H. 552, are upon the ground that the statute affected the remedy only, and therefore could not be enforced out of the state in which it was enacted. *Willis v. Cameron*, 12 Abb. Pr. 245, and *Thornton v. Dean*, 19 S. C. 583, 45 Am. Rep. 796, seem to be upon the ground that the statute came within the rule as to penal statutes. Three of the judges dissented from the position taken by the majority in *Sherman v. Gassett*. The dissenting opinion says: "To maintain that we are bound to declare a usurious contract wholly void when the laws of the contract make it so, whereby the creditor is deprived of the whole of his claim, but that we are not bound to regard the law when it provides for a forfeiture only, by which the creditor loses but a part of his claims, seems to involve a singular inconsistency. It, in other words, involves the following remarkable syllogism: 'The law everywhere avoids usurious contracts when they are declared wholly void by the law of the place. This contract was void in part, and consequently it is good as to the whole.'"

The Iowa supreme court, in the case of *Arnold v. Potter*, 22 Iowa, 194, disapproved of the position taken by the majority opinion in *Sherman v. Gassett*, 9 Ill. 521, and held that the provision of the Massachusetts statute (the same

that was involved in the other case) to the effect that, if more than the legal rate of interest is reserved, the plaintiff shall forfeit threefold the amount of the whole interest reserved, and shall have judgment for the balance only, was not penal in its nature, and would be enforced by way of defense in an action in Iowa if the contract were otherwise governed by the law of Massachusetts. The court, in this case, approved of the language above quoted from the dissenting opinion in *Sherman v. Gassett*, and regarded the subsequent decision of the Illinois supreme court in *Barnes v. Whitaker*, 22 Ill. 606, as authority for its position. The case referred to, however, may, perhaps, be distinguished from the *Sherman* case in that the Iowa statute (which was applied in the *Barnes* case) merely provided that the plaintiff in an action on a usurious contract should have a judgment for the principal sum only, without either interest or costs. The distinction seems extremely technical, but it might, perhaps, be urged that the Iowa statute renders the contract void so far as interest is concerned, whereas the Massachusetts statute, which was involved in the *Sherman* case, does not render any part of the contract void, but merely provides for a deduction from the amount otherwise recoverable. The court, in the *Barnes* case, neither expressly overrules nor reaffirms the decision in the *Sherman* case, though it refers, with approval, to the general principle stated in that case, that a court of Illinois has no jurisdiction to vindicate the violated majesty of the laws of another state. The statement, however, was alluded to in connection with the decision in the *Barnes* case that the court of Illinois could not enforce so much of the Iowa statute as provided for the forfeiture of 10 per cent per annum for the benefit of the school fund.

In *Crebbin v. Deloney*, 70 Ark. 493, 69 S. W. 312, the statute of Missouri was applied in so far as it imposed a forfeiture of the interest, the recovery being limited to the principal; and in *McFadin v. Burns*, 5 Gray, 599, the statute of another state was enforced so far as it worked a forfeiture of interest in excess of 6 per cent. The distinction suggested in connection with the citation of *Barnes v. Whitaker*, 22 Ill. 606: *supra*, if sound, is equally applicable to these cases.

In *Crebbin v. Deloney*, 70 Ark. 493, 69 S. W. 312, the court held that the contract in question, which was a loan secured by a mortgage upon real property in Arkansas, was a Missouri contract. The contract was usurious under the law of Missouri. By that law, when a contract is usurious judgment may be rendered thereon for the real sum of money lent and interest on the same at the rate of 10 per cent per annum; but the court is required to make an order setting apart the whole interest for the use of the county in which the suit may be brought for the use of the common schools, and the same, when collected, shall be paid over accordingly, and go to, and form a part of, the common-school fund of the county. The court held that this provision of the Missouri statute was penal, and could not be enforced. Since the effect of the Missouri statute, however, was only to impose a forfeiture of the interest, the plaintiff was allowed to recover the principal, notwithstanding that if the contract had been an Arkansas contract it would, if usurious under the law of Arkansas, have been void.

In *McFadin v. Burns*, 5 Gray, 599, suit was brought upon a factor's account rendered in Mis-

souri, where both parties resided, with interest charged at 10 per cent. The statute of Missouri prohibited the taking of interest in excess of 6 per cent, and provided that, in any action on a contract made within that state in which it should be found that more than that rate was agreed for or taken, the court should give judgment for the plaintiff for the principal sum, after deducting the amount of unlawful interest; and also judgment for interest at the rate of 6 per cent upon the balance; and order the whole amount of interest to be set apart for the use of the common schools of the county in which the action was brought, and, when collected, to form a part of the common-school fund of the county; and that the defendant should recover his costs. The Massachusetts court refused to apply the latter provisions, and held that the plaintiff was entitled to a verdict for the amount of the account with interest at the rate of 6 per cent. There is no opinion, but the decision is evidently upon the ground that the provisions for the benefit of the school fund were in the nature of a penalty. See also *Barnes v. Whitaker*, 22 Ill. 606.

In *Gale v. Eastman*, 7 Met. 14, the court refused to apply the provisions of the statute of New Hampshire, where the note was made and payable, with reference to deductions for usury, upon the ground that they related to the remedy; and also refused to apply the law of Massachusetts (*lex fori*) upon the subject because that law applied only to contracts made in violation of the law of Massachusetts.

Lindsay v. Hill, 66 Me. 212, 22 Am. Rep. 564, illustrates another distinction based upon the character of the statute as penal or otherwise. In that case a contract was made and performable in New Brunswick, and it was held that the law of that country governed so far as it went to the substance of the contract. The instruments in question were, upon their face, free from the taint of usury, even by the law of New Brunswick; and the alleged usurious payments were made after the debts were overdue and the contract had been broken. The court laid down the proposition that, in order to render a contract void for usury, it must be tainted with that offense in its inception; that it is the reservation or receipt of usurious interest in pursuance of the terms of the contract itself that renders it void; and that the subsequent payment of such interest upon a contract free from the taint of usury in its origin will not have that effect, though it may subject the party receiving the usurious interest to the penalty or forfeiture for a violation of the law against usury. In accordance with these propositions, the court held that the provision of the New Brunswick statute rendering usurious contracts void would not have applied even if the action had been brought in New Brunswick; that, while another provision of the New Brunswick statute, imposing upon the lender a forfeiture of the principal sum lent and all interest for every offense against the provisions of the statute, would have governed if the action had been brought in New Brunswick, the latter provision related to the remedy, and therefore would not be enforced by a court of Maine, because matters pertaining to the remedy are governed by the law of the forum. It seems to have been assumed in this case that the court would have applied the forfeiture or penalty of the forum if there had been any such; but it was held that no penalty or

forfeiture was imposed by the law of the forum at the time the suit was brought.

Where, by the law of a state where a contract is made payable, usury does not avoid the contract, but only affects the remedy, the court of another state can enforce the contract, but by no other remedies than those furnished by the statute of the forum. The provisions of the statute of the place where the contract was made and payable, which provide for the recovery or appropriation of usury paid upon a contract, form no part of the contract, but relate solely to the remedy which will be afforded by her courts to the party from whom the usury is taken. *Collins Iron Co. v. Burkam*, 10 Mich. 283.

In *Farmers' Bank v. Burchard*, 38 Vt. 346, the court, upon the assumption that notes given to a Vermont corporation were made in Michigan, and were governed by the law of that state, refused to apply what was claimed to be the common-law rule in Michigan, whereby the reservation by a foreign corporation of a rate of interest exceeding that which it is allowed by its charter to take, renders the contract void, though the rate specified be not in excess of the Michigan rate, and notwithstanding that, under the statutes of Michigan, the only effect of the reservation of usury by a natural person is the forfeiture of the excessive interest. The court said that the rule that the *lex loci contractus* governs could not be applied to such an extent.

In *Matthews v. Paine*, 47 Ark. 54, 14 S. W. 463, the court said that, exercising that comity which exists between the courts of different states, it would adjudicate the rights of the parties with reference to a Tennessee transaction precisely as it understood they would be adjudicated if they were in a court of Tennessee. It was accordingly held that, as the statute of Tennessee providing for the recovery by suit of illegal interest which has been paid was exclusive, such illegal interest could not be recovered in an action in Arkansas to recover the principal debt.

b. General principles governing choice of law; intention.

While, as stated in division I., *supra*, the courts generally treat the question what law governs in respect of usury as, in its last analysis, one as to the intention of the parties, subject to the qualification that they must act in good faith and without intention to evade the usury laws of the place to which the contract is really referable, still, the courts have often held that the *lex loci contractus* governed without expressly referring the question to the intention of the parties; but in most of these cases all of the vital elements of the contract and significant circumstances of the transaction had their situs at the place where the contract was made; and it will be observed that most of them qualify the rule by the condition that the contract is not performable elsewhere. Thus, the following cases hold that the *lex loci contractus* governs when the contract is not payable elsewhere: *United States Mortg. Co. v. Sperry*, 138 U. S. 313, 34 L. ed. 969, 11 Sup. Ct. Rep. 321; *Kuhn v. Morrison*, 75 Fed. 81; *Moore v. Davidson*, 18 Ala. 209; *Bigelow v. Burnham*, 83 Iowa, 120, 49 N. W. 104; *Hart v. Willis*, 52 Iowa, 56, 35 Am. Rep. 255, 2 N. W. 619; *Templeton v. Sharp*, 10 Ky. L. Rep. 499, 9 S. W. 507, 696; *New York Security & T. Co. v. Davis*, 96 Md. 81, 53 Atl. 669; *Jones v. Rider*, 62 L. R. A.

60 N. H. 452; *Watson v. Lane*, 52 N. J. L. 550, 10 L. R. A. 784, 20 Atl. 894; *Curtis v. Leavitt*, 15 N. Y. 9; *Grand Rapids School Furniture Co. v. Hammerstein*, 45 N. Y. S. R. 863, 18 N. Y. Supp. 766; *Heldenheimer v. Mayer*, 10 Jones & S. 506, Affirmed in 74 N. Y. 607; *Mills v. Wilson*, 88 Pa. 118; *Clark v. Searight*, 135 Pa. 173, 19 Atl. 941; *Thompson v. Collins*, 2 Head, 443.

In *Nalle v. Ventress*, 19 La. Ann. 373; *Andrews v. Torrey*, 14 N. J. Eq. 355; and *Palmer v. Yarrington*, 1 Ohio St. 253,—which also applied the *lex loci contractus*, the qualification as to the place of payment is not so clearly made as in the previous cases; but even in these cases no other place of payment seems to have been named.

In *Kennedy v. Knight*, 21 Wis. 340, 94 Am. Dec. 543 (suit to foreclose a mortgage), a contract for a loan was made in Wisconsin with a New York bank, the money to be repaid in Wisconsin with interest at 10 per cent, which was authorized by the law of Wisconsin, but usurious by the law of New York. It was held that the law of Wisconsin governed, on the ground that the contract was made and to be performed in that state, there being nothing to show that the bank was restricted to any particular rate of interest, or was governed by any statute of New York other than that applicable to individuals and corporations generally.

In *New York Security & T. Co. v. Davis*, 96 Md. 81, 53 Atl. 669 (action to foreclose a mortgage), it was held that notes and a mortgage executed by a resident of Maryland to a resident of New York, reserving a rate of interest authorized by the law of New York but usurious by the law of Maryland, were governed by the law of Maryland, and that the mortgagor was, therefore, entitled to have the payments in excess of the legal rate credited upon the principal. The decision is upon the ground that the contract was a Maryland contract, it appearing that the mortgaged land was situated in Maryland, that the mortgage was executed in Maryland, and the principal and interest notes dated in Maryland. No place of payment was specified, and the court said that, in the absence of proof to the contrary, the presumption was that the note was payable at the place where it was dated. In this case, therefore, all of the elements entering into the transaction, except the residence of the mortgagee, had their situs in Maryland.

The maker or indorser of a promissory note cannot, as against an indorsee of the same in Massachusetts for value before maturity and without notice, show that the note, although dated at Boston with intent that it should be a Massachusetts contract, was actually made in New York, and, on account of illegal interest, was void under the usury law of that state. *Towne v. Rice*, 122 Mass. 67. This decision was upon the assumption that the note, if usurious, would be void even in the hands of an innocent holder, and was without reference to the question whether, as between the original parties, the law of New York would govern, the intention being, rather, that it would govern as between those parties.

The foregoing cases are not to be understood as laying down a hard and fast rule to the effect that the *lex loci contractus* governs when no other place of payment is mentioned; or as implying that the law of the place of payment necessarily governs, without reference to other circumstances, when different from the *lex loci*

contractus. The rules seem to be merely prima facie, applicable when there are no other circumstances persuasive of a different bona fide intention of the parties. The general principle seems to be as stated in the following case:

The *lex loci contractus* is to govern in respect to usury, unless the parties, by the terms of the contract, have in view a different place. *Brewster v. Lyndes*, 2 Miles (Pa.) 185. It will be observed that the statement of the exception to the rule that the *lex loci contractus* governs is as broad as the bona fide intention of the parties, and is not restricted to the circumstance that the contract is payable elsewhere.

The importance which is attached to the intention of the parties when expressed in the contract, if not evasive, is illustrated by the three cases next cited, which, it will be observed, applied the law designated by the parties, though it was neither *lex loci contractus* nor *lex loci solutionis* (It being remembered that the *locus contractus* is the place where the note or instrument is delivered, not the place where it is signed).

A stipulation in a deed of trust of real property in Arkansas that it shall in all respects be construed according to the laws of the state of Arkansas "where the same is made," is binding on the parties, and subjects the contract to the law of Arkansas in respect of usury, notwithstanding that the note and deed of trust were executed in Tennessee by a resident of Arkansas who was temporarily in the former state, and that the same were made payable in New York. *Lanier v. Union Mortg. Bkg. & T. Co.* 64 Ark. 39, 40 S. W. 466.

An express stipulation that notes are made and executed under, and are to be construed by, the laws of the state of Minnesota, is valid where the makers resided in Minnesota, the notes were secured by a mortgage on land in Minnesota, and the instruments were made in that state, notwithstanding that they were accepted and the money advanced in Connecticut, and the notes were also payable there. *Smith v. Parsons*, 55 Minn. 520, 57 N. W. 311.

A transaction in procuring a loan on land is an Alabama, and not a New York, contract, when the notes and mortgage were executed in Alabama and forwarded to the borrower's agent in New York, who delivered them to the loan company and received the sum borrowed, which he transmitted to the mortgagor, where the mortgage contained a provision waiving exemption under the Constitution and laws of Alabama, and a further provision that the mortgage and notes should be governed and construed by the laws of such state, notwithstanding that the note was payable in New York. *Ashurst v. Ashurst*, 119 Ala. 219, 24 So. 760.

So, in *Glover v. Equitable Mortg. Co.* 31 C. C. A. 105, 59 U. S. App. 151, 87 Fed. 518, the court, evidently guided by the presumed intention of the parties, applied a law that was strictly neither *lex loci contractus* nor *lex loci solutionis*. In that case it was held that a contract for the loan of money was a Mississippi contract, and was governed by the law of Mississippi with reference to usury, it appearing that the lender was located there, that the property was there situated, and that the agreement was there completed. Although the note and mortgage, which were dated there, were executed in Tennessee, which fact was satisfactorily explained. The note in this case was payable in New York, and was usurious both by the 62 L. R. A.

law of Tennessee and by the law of New York, but not by the law of Mississippi. The court seems to have taken the view that the only question was as between the law of Mississippi and that of Tennessee, and no reference is made in the opinion to any contention that the law of New York ought to govern.

When the intention of the parties is not shown by an express stipulation in the contract, it is to be presumed or inferred from all the terms of the contract and the circumstances surrounding the transaction. Since such terms and circumstances vary widely in different cases, and are susceptible of almost countless combinations, it is obviously impossible to formulate rules that will be applicable to all possible combinations of terms and circumstances; and it is further apparent that any rule that may be formulated with reference to the presumption or inference from a given combination of terms and circumstances, always remains subject to displacement when additional facts appear, or when the combination is varied. The general principle that the intention of the parties, to be ascertained (when not expressed in terms in the contract) from all the facts and circumstances of the case, is to be consulted, and the bearing which the subordinate rules have upon the broader question as to the intention of the parties, are well illustrated by the following cases:

In *Brown v. Freeland*, 34 Miss. 181, 60 Am. Dec. 389, a bank in Mississippi, being indebted to a party for an amount payable in London, in consideration of an extension of time, gave its paper payable in New York bearing a rate of interest authorized by the law of Mississippi, but usurious by the law of New York. The court said that the main point to be settled was whether the parties had in view the law of Mississippi, or that of New York, in consummating the contract. Referring to the difference in the decisions, the court says: "One set of decisions is based upon an admitted doctrine,—that the *lex loci contractus* controls the nature, construction, and validity of the contract, and that, if it is valid by that law, it is equally so everywhere. 2 Kent, Com. 454. The other set of decisions rests upon another doctrine, which, with certain qualifications, may also be admitted,—that, when a contract is made in one country, but to be performed in another, it must be presumed that the parties contracted with reference to the laws of the latter country. This, however, being but a presumption, must be controlled by the actual truth of the case when ascertained; or, in other words, by the intention of the parties to be collected from the contract itself and all the surrounding circumstances." The court then proceeded to inquire as to the intention of the parties, and, from the circumstances of the case, inferred that their intention was to contract with reference to the law of Mississippi, rather than that of New York. One of the considerations which impressed the court was the fact that the original obligation, if not otherwise taken care of, would have been enforced in Mississippi, and that the object of the new contract was to relieve the debtor from the consequences which the law of Mississippi attached to the failure to perform the original contract, and that the advantage accruing in Mississippi, it was fair to presume that the bank was willing and intended to pay for such advantage what the law of the state permitted the other parties to exact. Again, the propo-

sition coming, as it did, from the bank, it may be presumed that her officers intended to contract with reference to those laws. But, even apart from these considerations, it would seem that the court would have reached the same conclusion, as it cites and approves of the decision in *Depau v. Humphreys*, 8 Mart. N. S. 1, and says: "Whatever the rule at one time may have been, it is now settled by the modern decisions that, when a contract is made in one country stipulating for a rate of interest sanctioned by the laws of that country, it is valid regardless of the laws of the country where it is payable, unless it shall appear that it was made with reference to the laws of the latter country. The presumption is never to be indulged that parties intended, in making their contract, to violate the law; and, if there be two laws, with reference to either of which they may contract, and the contract accords with one of the laws, it must be presumed that the parties so intended, because they had their election to mould the contract according to either law; and, as the law presumes in favor of a contract, and not against it, the presumption must be that the parties had in view the law which will give full effect to their contract."

In *Jackson v. American Mortg. Co.* 88 Ga. 756, 15 S. E. 812, the court said that, in determining what law as to usury governed, it was necessary to arrive at the intention of the parties as to the real situs of the contract, and as to what state they had reference in fixing the rate of interest. It was regarded as significant, in this connection, that, although the notes were finally delivered in New York, they were dated at Georgia, and left the hands of the maker in that state, and the court said, that granting that all the intermediaries between the maker and the lender were the former's agent, and that there was no complete and final delivery of the notes and deed until they were put in the lender's hands in New York, yet, to effectuate the intention of the parties, and to accomplish the purpose of justice, such manual delivery there ought, on the doctrine of relation, to refer back to the time and place of signing the instruments. The court again says: "There was no intention to make the notes effectual without making the deed effectual also. There was no intention to make a loan without having it secured both by notes and a deed. It was, therefore, impossible to accomplish the object without calling in the law of Georgia as to a part of the transaction. New York had no law which could make any contract conveying land situated in Georgia operative or obligatory. As the law of Georgia would thus be essential with respect to a part of the transaction, that law, if possible, ought to be applied to the whole. There was no intention to make a mere personal contract, but the scheme was to make one partly personal and partly confined by its very nature to a given situs, to wit, the state of Georgia." The opinion proceeds upon the assumption that the borrower was a resident of Georgia.

In *Thompson v. Edwards*, 85 Ind. 414, a resident of Indiana made an application to a New York corporation for a loan to be secured by a mortgage upon real property in Indiana, representing that he wished to obtain such loan to enable him to remove encumbrances from the real property, and to make improvements thereon. The corporation examined the application at its place of business in New York, and informed local attorneys, through whom the ap-

plication was made, of its acceptance of the same. The mortgage, bonds, and coupons were executed and delivered to the attorneys, who forwarded them to the lender in New York. The attorneys, pursuant to the direction of the lender, drew their draft on the latter in New York in favor of the borrower, the draft being discounted in Indiana. Some of the notes were payable in New York, and others specified no place of payment. The rate of interest reserved was authorized by the law of Indiana, but usurious by the law of New York. It was held that the law of Indiana governed. The decision is based on the presumed intention of the parties, inferred from all the circumstances of the case. The court said that, in determining the question, it must look, mainly, to the real intention of the parties, and to their acts expressive of such intention. Again, the court said: "The general rule is that, where interest is to be paid on a contract, either expressly or impliedly, it must be paid according to the law of the place at which the contract is to be performed. But the question of the greatest difficulty often is to ascertain where, under all the circumstances, the contract is to be performed, having reference to the principal object which the parties had in view in entering into it."

In *Mott v. Rowland*, 85 Mich. 561, 48 N. W. 638, a resident of New York, while temporarily in Michigan, discussed the matter of a loan to a resident of the latter state, and upon his return to New York wrote the latter a letter proposing a loan upon certain conditions, suggesting that the latter execute and record a mortgage upon real property in Michigan and send it to him in New York; the borrower accordingly executed the mortgage, and, after it was recorded, took it to New York to the lender, and, upon the latter's objection to receiving the mortgage without a note or bond, executed a note in New York, dating it, however, in Michigan. The money was paid over to him in New York. Both note and mortgage reserved a rate of interest which was authorized by the law of Michigan, but usurious by the law of New York. It was held that, under all the circumstances, the law of Michigan governed. The decision clearly rests upon the ground that the inference from all the circumstances is that the parties intended to be governed by the law of Michigan, and that there was no intention to evade the usury law of New York. The court expressly said that the parties had the undoubted right to adopt the law of either state provided they did so in good faith, and then enumerates, as the circumstances from which the inference that they intended the law of Michigan to govern,—the residence of the mortgagor in Michigan; the use of the funds in that state; the situation of the mortgaged lands there; and the execution and recording of the mortgage in that state; and the fact that the rate of interest reserved was valid in that state but invalid in New York. The fact that the terms of the agreement were originally made in Michigan is also emphasized, the court saying that it has been frequently held that the place where the terms of a contract are agreed upon governs, rather than the place where the evidences of agreement are executed. Apparently, the court would have applied the law of Michigan, even if the agreement had been entirely made in New York, for it says: "In any event the parties having agreed upon a rate of interest which was valid in the state where

the borrower resided, in the absence of anything appearing to the contrary, the parties must be presumed to have contracted with reference to the laws of the state in which the contract was valid." (See discussion of cases in the opinion.)

In *Cothael v. Blydenburgh*, 5 N. J. Eq. 17, affirming 5 N. J. Eq. 631, a resident of New York sold a tract of land in New Jersey to another resident of New York, taking back a bond and a mortgage on the land as security for the purchase price. Papers were signed and acknowledged in New York, but, for convenience, were delivered in New Jersey at the clerk's office of the county in which the land was situated. The bond and mortgage reserved 7 per cent interest, which was authorized by the law of New York, but usurious by the law of New Jersey. It was held that the contract was a New York contract, and was governed by the law of that state. The court said it was not a case of a borrower and lender residing in New Jersey making a contract for the loan of money, and going into New York to exchange the papers, and reserving 7 per cent interest; implying that in such a case the law of New Jersey would govern.

In *Senter v. Bowman*, 5 Helsk. 17, a note dated in Missouri, drawing interest at a rate authorized by the law of Missouri, but usurious by the law of Tennessee, was delivered in Tennessee; it recited that the money was advanced on cotton which the makers were to ship to the payees. The court said that, although the note must be regarded as having been made in Tennessee, where it was delivered, yet it was competent for the parties to contract for the rate of interest allowed by the law of the place where it was to be performed; and it then said that the question was whether the parties made their contract to be performed in Missouri, and that that was a question of intention to be deduced from the language implied in the contract in the light of the situation of the parties, the motives which induced the agreement, and the purposes and objects designed to be affected by it. The trial court charged the jury that the note would not be usurious, although made in Tennessee, if it appeared on its face that it was payable in Missouri. The court held that this charge was misleading, because the jury would naturally understand that it must be expressed upon the face of the note that it was payable in St. Louis to authorize them to find that it was not usurious, whereas they were authorized to find such fact from the circumstances in the case, including the fact that the note was dated in Missouri, and that the payees were commission merchants and cotton factors doing business in Missouri, and that the maker wanted an advance on his shipment of cotton to them, and the payees wanted to secure the handling of the cotton.

In *Brown v. Gardner*, 4 Lea, 145, a resident of Alabama and a resident of Tennessee entered into a written agreement in the former state for the sale by the former to the latter of certain property, including a tract of land in Tennessee. The contract provided that the buyer should give his notes to bear interest at the rate of 8 per cent per annum if not paid at maturity. The deeds of the property were subsequently executed in Tennessee, but, whether the notes were then executed and delivered, or whether they were executed and delivered previously in Alabama, does not appear, but the court says that the fact in that respect was not

very material. The rate of interest stipulated was authorized by the law of Alabama, but not by the law of Tennessee. The court said that the parties to the contract were manifestly contracting with reference to the laws of Alabama. It does not appear exactly upon what facts the court based such inference, but, apparently, it was largely upon the fact that the rate of interest stipulated was legal by the law of Alabama, but illegal by the law of Tennessee.

In *Hubble v. Morristown Land & Improv. Co.* 95 Tenn. 585, 32 S. W. 965, the secretary and treasurer of a Tennessee corporation negotiated a loan for and in behalf of his company from a resident of New Jersey, who was, at the time, temporarily sojourning in Connecticut. The loan was to be secured by a mortgage upon the land of the company in Tennessee, and the money was to be paid upon the arrival of the proper papers at the residence of the lender in New Jersey. The note and mortgage were executed by the officers of the company at their residence in North Carolina, and forwarded to the lender in New Jersey, the note being, by its terms, payable in New Jersey, and drawn with interest at the rate of 7 per cent, which was usurious by the law of Tennessee and that of New Jersey, but lawful by the law of North Carolina and Connecticut. It was held that the law of New Jersey governed. The court said: "As already observed, this note is payable, on its face, in the state of New Jersey, and the court of chancery appeals does not find that, by any understanding between the parties, the execution and performance of the contract were to be governed by any other law than the law of the place of payment as fixed by the note. It follows that the validity of this contract must be determined by the law governing such contracts prevailing in the state of New Jersey." This language seems to indicate that the decision is upon the ground that the law of the place of performance governs; but the court also took the position in this case that the note and mortgage were delivered, and the contract consummated, in New Jersey, quoting with approval, in this connection, the statement of Tiedeman in his work on Commercial Paper, § 506: "It is, however, not the law of the place where the contract was signed or executed, but the law of the place where the contract was consummated by delivery or otherwise, which governs the construction of the contract. . . . If the contract is made in one place, and it is agreed to be performed in another place, the law of the place of performance, instead of the law *loci contractus*, will govern the contract." In this case it was conceded that the contract was usurious by the law of New Jersey, but there was no proof of the law of New Jersey as to the effect of charging usury, and the court could not presume that the statutes of New Jersey respecting penalties and forfeitures were similar to those of Tennessee, and therefore held that the contract was only avoided to the extent of the usury, although, if it were a Tennessee contract, the usury appearing on the face of the note would void the latter contract. The decision does not seem to rest upon the ground that the law of New Jersey governed because that was the situs of the consideration, and the only mention of the situs of the consideration is in the statement that the money was to be paid upon the arrival of the proper papers in New Jersey.

In *Jacks v. Nichols*, 5 N. Y. 178, it was held that the law of New York with respect to usury

governed a note dated in New York given in renewal of a previous note made and payable in New York, although it did not name any place of payment, and was delivered to the payee while temporarily staying in Connecticut, it appearing that the borrowers were residents of New York, and that the note in question was collaterally secured by a note made by third parties payable in New York. The decision is upon the ground that, under all the circumstances, the parties must be regarded as having contracted with reference to the law of New York, their intention in that regard being the criterion.

So, where a contract was intended to be performed, and was performed, partly in the state of Tennessee and partly in the state of Arkansas, it may be treated as a contract of either state, and may, therefore, stipulate for interest at the highest rate allowed by either. *Porter v. Price*, 26 C. C. A. 70, 49 U. S. App. 295, 30 Fed. 655.

The qualification or condition that the parties must have acted in good faith and without any intention to evade the usury laws of the place to which the contract is really referable is expressed or implied in all, or nearly all, the cases that have ascertained the governing law by reference to the intention of the parties; but is especially emphasized in the following cases:

In *American Freehold Land & Mortg. Co. v. Jefferson*, 69 Miss. 770, 12 So. 464, the court said that the presumption of law is always in favor of the legality of purpose and motive of the contracting parties; and where a contract is made in one state to be executed in another, and under the laws of one would be illegal, and under those of the other legal, it is reasonable to presume that the parties intended their contract to be controlled by the laws of the state in which it would be valid; and so the courts will, in furtherance of a presumed lawful intention, assign it to that state by which its validity will be upheld. So, too, there may be cases in which the law of the domicile of the debtor and situs of the security may be applied to a contract made in another state and to be performed in yet a third. It was held, however, that these principles did not apply to the case at bar, since it was one in which the parties, manifestly and purposely providing for usury, have sought to cloak the transaction and evade the laws against usury by which their contract is controlled by stipulating that, if litigation shall arise, the laws of another state may be invoked as a shield to the usurer. The laws of this state, and access to its courts, cannot be thus made the subject of a contract. The court said that it was unnecessary to determine whether the contract was governed by the law of Tennessee or by that of New York, since it was usurious under either.

It seems that a contract made out of New York, by persons residing in the state, for a loan of money at a higher rate of interest than is allowed to be taken here, cannot be enforced in the courts of New York provided it can be shown that the making of a contract for the loan in another state was a mere device to cover a usurious premium for the use of money, and to evade the operation of the laws of New York. *Pratt v. Adams*, 7 Paige, 615.

In *Hewitt v. Bank of Indian Territory* (Neb.) 90 N. W. 250, it was said,—in reply to an assignment of error, that the trial court erred in refusing an instruction that if the note in suit, which was dated at Oklahoma and bore a rate 62 L. R. A.

of interest authorized by the law of that territory, was sent from Nebraska, the laws of the latter state would govern,—that the trial court's instruction that the law which was contemplated by the parties at the time as governing the contract was to control was at least as favorable to the makers of the note as they were entitled to. Reversed on another point in 92 N. W. 741.

In *Cope v. Wheeler*, 41 N. Y. 303 (Affirming *Cope v. Alden*, 53 Barb. 350), where the law of New York was applied to a loan made in New York between citizens of New York, notwithstanding that the loan was secured by a mortgage upon real property in Wisconsin, and that by the law of New York the transaction was usurious, while by the law of Wisconsin it was not, the court said, no doubt it was possible for parties in New York to make a contract or advance with such reference to a foreign law that the latter will govern its construction and legal effect, but that such rule does not purport that parties, by a mere mental operation, can import the law of another state into New York for the purpose of altering the character of a loan to be made and to be returned in New York without any undertaking or duty to use the money anywhere else, or any understanding that in respect to the use or repayment of the money the loan shall differ from any other. In this case it was urged that an additional reason why the law of Wisconsin should govern was that the borrower had money due her there at 12 per cent interest which the borrower there desired to retain, and to which she had consented, and that, as she was to receive 12 per cent for her money lent in Wisconsin, she was willing and agreed to pay 12 per cent for money borrowed in New York to relieve her present wants. The court said, however, that the loan was made in New York, and was to be repaid there, and the use of the money loaned was unrestricted, and the reason why the borrower was willing to pay more than lawful interest was wholly irrelevant and immaterial.

In *Kilcrease v. Johnson*, 85 Ga. 600, 11 S. E. 870, it was held that it was error to strike out a plea of usury in an action upon a promissory note which alleged that the contract sued on was made and executed in Georgia, and was to be performed there, and that the making of the same payable in Massachusetts was a mere device to avoid the laws of Georgia.

In *Agricultural Nat. Bank v. Sheffield*, 4 Hun, 421, a Massachusetts corporation agreed to take notes in payment of a judgment, which was a lien on real estate owned by some of the defendants, under an arrangement which, by the laws of New York, would be usurious, though not so by the laws of Massachusetts. All of the defendants resided in New York, and the transactions took place in that state; but the notes were dated and made payable in Massachusetts with the intention, as claimed by defendant's counsel, to evade the usury laws of New York. It was held that the contract was a Massachusetts contract, and was governed by the law of that state in respect of usury, the evidence not being sufficient to show an intention to evade the usury law of New York.

In *Holmes v. Manning* (Mass.) 19 N. E. 25, it was held that the law of New York with respect to usury governed a note, notwithstanding that it was dated and was made payable at Boston, it appearing that the agent of the borrower in New York applied to the lender for the loan. The court seems to have regarded

the question as to what law governed as one of fact, under the circumstances of the case. By the law of New York the contract was usurious and void.

The importance of this qualification as to good faith is still further illustrated by the cases cited in *infra*, IV. h, where the courts refused to apply the law which the rules, formulated for ascertaining the unexpressed intention of the parties, and, in some instances, the express provisions of the contract, designate as the law with reference to which the parties intended to contract, because they did not act in good faith, but in bad faith, and for the purpose of evading the usury law of the real situs of the contract. The cases there cited will show the circumstances which, in view of the court, were indicative of such bad faith. It may be remarked, in this connection, however, that bad faith can scarcely be predicated of the bare circumstance that the lender desired to get the higher rate of interest, if any of the vital elements of the contract, or significant circumstances of the transaction, had their true (not fictitious) situs at the place allowing the higher rate. This is implied by the cases in *infra*, IV. c, 3, where the intention of the parties, which was given effect, was presumed from the very fact that the contract stipulated for the higher rate of interest; and is expressly held in the following case:

It is not an evasion of the interest laws of a state, in which the contracting parties reside, to have the purchase-money notes for land executed in another state, where the land is situated, in order to gain a higher rate of interest than is allowed by the law of the former state. *Van Vleet v. Sledge*, 45 Fed. 743.

In *Goodrich v. Williams*, 50 Ga. 425, where a note made in South Carolina and payable in that state was held to be a South Carolina contract, governed by the law of that state, the court said, in reply to the contention that the making of the note in South Carolina and the provision for its payment there were a device to escape the effect of the Georgia law against usury, that when the lender, who was a resident of South Carolina, was applied to for a loan by the borrower, a resident of Georgia, he had the right to stipulate that the contract should be made according to the laws of South Carolina, the place of his residence, the place where he was doing business.

The court in *Smith v. Muncie Nat. Bank*, 20 Ind. 158, went even further, saying, in reply to the contention that a bill drawn in Indiana was made payable in Ohio for the purpose of evading the usury laws of Indiana, that it was not denied that the parties intended in good faith that the contract should be executed in Ohio in good faith, and that the laws of a sister state may be taken advantage of by citizens of Indiana when, with whatever motive, they elect to make that state the place of performance of any contract into which they enter. The distinction in the mind of the court was evidently between the designation of another state as the actual and real place of performance, though such designation be made for the purpose of evading the usury law of the state where the parties reside, and a mere nominal designation of such other state as the place of performance, the intention being that the contract should be really performed in the state of the borrower's residence.

62 L. R. A.

c. Rule that law upholding the contract will be applied.

1. In general.

The cases cited in the last subdivision as illustrating the general principle that the intention of the parties is to be consulted, inferred the intention from all the circumstances in the case without referring the decision to any formulated subordinate rule, though in some instances the rules are mentioned and relied upon to some extent.

During the course of judicial inquiry as to the governing law, the courts, guided by the fundamental principle of giving effect to the bona fide intention of the parties, have evolved two subordinate rules of very extensive application, resting, of course, upon the presumed intention of the parties. These rules have been formulated by the United States Supreme Court in *Miller v. Tiffany*, 1 Wall. 298, 17 L. ed. 540, as follows:

1. If the interest allowed by the law of the place of performance of a contract is higher than that permitted at the place of the contract, the parties may lawfully stipulate for the higher interest.

2. If the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that place, also, for the higher rate.

The court said that both rules were subject to the qualification that the parties acted in good faith, and that the form of the transaction was not adopted to disguise its real character.

Some of the other statements of the rules are as follows:

When the rate of interest at the place of contract differs from the rate at the place of payment, the parties may contract for either rate, and the contract will govern. *Cromwell v. Sac County*, 96 U. S. 51, 24 L. ed. 681.

Parties to a contract made in one state payable in another may, if they act in good faith, stipulate for the highest rate of interest allowed by either the law of the place where the contract is made or that where it is payable. *Arnold v. Potter*, 22 Iowa, 194.

In *Smith v. Parsons*, 55 Minn. 520, 57 N. W. 311, the court said that it was in accord with the weight of authority and with principle that, where two parties make a contract of loan in one state to be performed in another, they may, acting in good faith and without intent to evade the law, agree that the law of either state shall control as to the rate of interest.

Parties to a contract made in one state and payable in another may lawfully stipulate for the rate of interest allowed in either, if it is done in good faith, and not as a cover for usury. *Townsend v. Riley*, 46 N. H. 300. It was held in this case that where a promissory note was made payable in one state, and after its maturity the maker in another state, where he had his domicile, agreed to pay the lawful rate of interest of the latter state upon such note,—such agreement was not usurious, although the rate of interest was greater than that in the state where the note was originally payable.

The general rule that interest is to be paid upon contracts according to the law of the place where they are to be paid must be understood as applicable, alone, to contracts in which the parties have failed to make any stipulation as to the rate of interest. In such cases it is presumed that the parties contracted with a view

to the rate of interest allowed by the law of the place of payment. It is upon this presumption the general rule is based; but, where the parties, by the very terms of the contract, stipulate for a higher or lower rate of interest than is allowed by the law of the place where the payment is to be made, the presumption that the contract was made with a view to the law of that place cannot arise, and therefore does not apply. *Bolton v. Street*, 3 Coldw. 31.

In *Cockle v. Flack*, 93 U. S. 344, 23 L. ed. 949, it was held that an agreement for the repayment of advances made by a commission merchant in Baltimore to a pork packer in Illinois was not usurious because it reserved a rate of interest in excess of that allowed by the law of Maryland but not in excess of that allowed by the law of Illinois. It does not appear in this case where the contract was made or payable, it merely appearing that the contract was made by letter. For aught that appears in this case, the contract may have been made and payable in the same place. The court said, however, that the contract was quite as much an Illinois contract as a Maryland contract.

These rules have been stated in slightly different forms, and specifically applied, in many cases, and are established beyond question; but it is doubtful whether the case to which their origin is usually traced is authority for them. That is the case of *Depau v. Humphreys*, 8 Mart. N. S. 1, in which the Louisiana supreme court held that a note made and delivered in New Orleans, payable in New York, bearing a rate of interest authorized by the law of Louisiana, but usurious by the law of New York, was governed by the law of Louisiana, and was not usurious. The purpose of much of the argument in the opinion seems to be to establish the proposition that, while the rate of interest *ex mora* is to be determined by the law of the place of payment, the validity of the stipulation for a certain rate is to be determined by the law of the place where the contract is made, and where the consideration is advanced; though in this case the application of such principle operated to uphold the contract.

The Alabama supreme court, in *Hanrick v. Andrews*, 9 Port. (Aia.) 9, took this view of the decision in the Louisiana case but the question is, perhaps, not very important, except as a matter of judicial history, since the rules themselves are supported by a large number of subsequent decisions.

The two rules formulated in *Miller v. Tiffany*, 1 Wall. 298, 17 L. ed. 540, are but specific applications of the more general principle, that the parties are presumed to have contracted with reference to a law that will uphold, rather than one that would invalidate, their contract. While that principle cannot operate to designate, as the place furnishing the applicatory law, a place that otherwise bears no relation to the parties or to the transaction in question, yet it is not necessarily limited to a choice between the *locus contractus* and *locus solutionis*. Thus, the residence of one or both the parties may, under the operation of this principle, furnish the applicatory law.

The law of the place of payment does not necessarily govern the rate of interest which may be contracted for. Where the law of the place where the parties reside allows a greater rate, they may contract with reference to that law; and, if the contract is valid according to that law, it will not be declared usurious because it 62 L. R. A.

exceeds the rate allowed by the law of the place of payment. *Vliet v. Camp*, 13 Wis. 198, following *Richards v. Globe Bank*, 12 Wis. 692.

In *Scott v. Perlee*, 39 Ohio St. 63, 48 Am. Rep. 421, a resident of Ohio, while temporarily in Illinois, agreed to make a loan to a resident of the latter state, upon his note to be signed as surety by a resident of Ohio; and, without further arrangement, the borrower wrote the note in Illinois, dating it there, and sent it to the surety in Ohio, who signed it and delivered it to the payee in Ohio, receiving the money in that state, and forwarding it to the principal. The parties intended in good faith to contract with reference to the law of Illinois as to the rate of interest to be paid for the use of the money. The court conceded that the contract was not completed until delivery in Ohio. It said that, if the note in question had expressly been made payable in Illinois, the case would have fallen within the general principle stated in *Kilgore v. Dempsey*, 25 Ohio St. 413, 18 Am. Rep. 306, that, where a contract was entered into in one state to be performed in another between citizens of each, and the rate of interest is different in the two, the parties may, in good faith, stipulate for the rate of either, and will be presumed to have contracted with reference to the law where the stipulated rate is lawful until such presumption is overcome. It then expressed the opinion that, for the purposes of such rule, the note might be deemed payable in Illinois, that being the residence of the debtor and the place where it was dated and signed by him; but held that, even if the contract were to be regarded as made and payable in Ohio, yet it could be upheld; saying that there was no reason why a citizen of Illinois or any other state may not come into Ohio and borrow money to be used in the state of his residence, and in good faith contract with reference to the laws of the latter state independently of where his note is executed, or where it is legally presumed to be payable. The court, in referring to *Arnold v. Potter*, 22 Iowa, 195, and *Chapman v. Robertson*, 6 Paige, 627, 31 Am. Dec. 264, said it was true that in those cases security was given by mortgage upon lands in the state of the debtor's residence, and that such fact had significance in determining what the intention of the parties was as to the laws of which state their contract had reference, or by which it was to be construed; but it was a fact of no greater significance than the facts in the case at bar, that the borrower actually negotiated for the loan in the state of his residence, dated his note there, and stipulated for interest allowed by her laws. This decision clearly makes the question turn upon the intention of the parties. The court says, in this connection: "That the parties here entered into this contract in good faith with reference to the laws of Illinois, there can be no doubt. The law of Ohio never entered into the transaction so far as the intention of the parties can be ascertained. There was no intention to make an illegal contract; and to hold it illegal we must be able to say that the mere fact that Scott [the borrower] forwarded this note to his surety for his signature, and that it was signed and delivered by the surety in Ohio, and the money there paid (more than probably as a mere matter of convenience), has the effect of defeating the intention of the parties. It is difficult to perceive upon what principle we should so find. We do not, in thus holding, encourage two citizens of Ohio to attempt to contract here for

money to be used here, and make their notes payable in another state, nor in any way relax the strictness of the rules which prevent any form of evasion of the law against usury; but we hold that it is not repugnant to such law for a person to contract with reference to the law of his domicile for money to be used there, where no such evasion is sought or intended."

So, in *Dugan v. Lewis*, 70 Tex. 246, 12 L. R. A. 93, 14 S. W. 1024, the court said that the rate of interest on a contract between citizens of different states may be fixed according to the law of either state; and upon this principle applied the law of Texas (the borrower's residence), according to which the stipulated rate was valid, rather than the law of New York, according to which it was usurious, notwithstanding that the contract seems to have been made and payable in New York. The loan in this case was secured by a deed of trust upon real property in Texas, which expressly provided that the contract should be construed according to the law of Texas. The court, however, held that that provision did not cover the question as to the validity of the contract, and was important merely as a circumstance to be considered in ascertaining and giving effect to the intention of the parties.

In *Pancoast v. Travelers' Ins. Co.* 79 Ind. 172, the court laid it down as a general principle that, where the parties reside in different states, they may contract for a rate of interest allowed by either state, provided it be done in good faith without an attempt to evade the usury laws. In this case, however, the contract was made in the state whose law was applied, though payable elsewhere; so that it came within the second of the rules stated in *Miller v. Tiffany*, 1 Wall. 298, 17 L. ed. 540.

In *Arnold v. Potter*, 22 Iowa, 194, it was held that if the parties act in good faith and without intent to evade either the law of the place where the contract was finally completed, or where the payment was to be made, it was competent for a lender residing in Massachusetts, and a borrower residing in Iowa who secures the loan by a mortgage on real property in the latter state, to contract for the rate of interest allowed by the law of Iowa, although the notes given by the borrower were payable in New York, and the notes and mortgage, though dated in Iowa, were actually delivered in Massachusetts, the money being received in the latter state. The decision in this case, however, is carefully limited to the facts in the case, and the court expressly said that it did not mean to hold that two citizens of Massachusetts could make a contract in that state payable there or in New York, agree to be governed by the laws of Iowa or California, and thereby avoid the consequences of usury; or that a citizen of one state could make his note in another state to a resident there, payable in a third, with interest as allowed in a fourth. The important facts which were held to justify the parties in contracting with reference to the law of Iowa were the residence of the lender, and the location of the property by which the debt was secured, in that state. Other facts were emphasized, but their significance lies in their bearing upon the good faith of the parties. It will be observed that the decision is upon the assumption that it is found as a fact that the parties, in good faith, agreed that the law of Iowa should govern with respect to interest.

In *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 163, 13 L. R. A. 299, 9 So. 143, 62 L. R. A.

the court queried whether the parties may not legally contract for a rate of interest lawful by the *lex rei sitæ*, though unlawful by the *lex loci contractus* and *lex loci solutionis*. In this case, however, the *lex loci contractus* and the *lex rei sitæ* were coincident.

See also *Mott v. Rowland*, 85 Mich. 561, 48 N. W. 638, and *American Freehold Land & Mortg. Co. v. Jefferson*, 69 Miss. 770, 12 So. 464, *supra*, IV. b.

In *Bullard v. Thompson*, 35 Tex. 313, a resident of Texas, while temporarily in New York, there executed and delivered his promissory notes, but dated them at his residence in Texas, and stipulated therein for a rate of interest authorized by the law of Texas, but usurious by the law of New York. The court held that the fact that the notes were dated at the maker's residence in Texas forcibly implied that they were to be paid in accordance with the laws of Texas, and that such inference was greatly strengthened by the fact that such notes were not repugnant to the law of Texas, whilst they were to the law of New York. No place of payment was specified.

2. When contract usurious by *lex loci contractus*, but valid by *lex loci solutionis*.

The following cases sustain and apply the rule that the law of the place of payment governs in respect to usury if the interest reserved is not usurious by that law, but is by the law of the place where the contract was made and there are no circumstances sufficient to rebut the presumption that the parties intended to contract with reference to the former law (strengthened, as it is, by the presumption that the parties intended to contract with reference to a law that will uphold, rather than one that will invalidate, their contract) or to show that the place of payment was designated as a mere cover for usury. It will be observed that in some of these cases there are other circumstances, beside the mere facts that the contract is payable at a particular place and is valid by the law of that place, to aid the presumption that the parties intended to contract with reference to that law; as, for instance, in *Hamilton v. Fowler*, 40 C. C. A. 47, 99 Fed. 18, *infra*, that the note, although in fact executed in a different state, purported upon its face to have been made in Missouri, where it was payable. The combined effect of these cases, however, is, at least, to establish the rule that, *prima facie* and upon the face of the contract, the law of the place of payment governs when it upholds, and the law of the place where the contract was made would invalidate, the contract. Some of these cases, it will be observed, go beyond this, and negative the effect of certain other circumstances to defeat the rule.

If a bond be not usurious by the law of the place where payable, a plea of usury cannot be sustained in an action thereon, unless it alleges that the place of payment was inserted as a shift or device to evade the law of the place where the bond was made. *Junction R. Co. v. Bank of Ashland*, 12 Wall. 228, 20 L. ed. 385. The court apparently concedes that, if the bond had been usurious by the law of the place of payment, but valid by the law of the place where it was made, the latter law would govern.

Where commission merchants in New York agreed to advance money to defendant to be reimbursed with interest from the proceeds of flour sent to them by him, the advance to be made in New York and to be repaid there, that

state was the place of performance, and it was legitimate to fix the rate of interest there allowed by law. *Peyton v. Heinkekin*, 131 U. S. 41, Appx., and 20 L. ed. 679. In this case the contract seems to have been made in Tennessee.

Contracts made in one place, to be performed in another, are to be governed by the laws of the place of performance; and, if such laws allow a higher rate of interest than those of the place of execution of the contract, the parties may expressly stipulate for such higher rate of interest, and the contract will be valid and obligatory. *Wittkowski v. Harris*, 64 Fed. 712.

The effect of the reservation of an unlawful rate of interest in a note which purports, upon its face, to have been made in Missouri and is payable there is governed by the law of Missouri, although the makers reside in another state, and it is secured by a mortgage on real estate situated in the latter state, and the note and mortgage were in fact executed there. *Hamilton v. Fowler*, 40 C. C. A. 47, 99 Fed. 18.

In *Kroegher v. Callivada Colonization Co.* 119 Fed. 641, it was held that the fact that a contract, by which a Colorado corporation agreed to pay a director 8 per cent interest on money to be advanced by him to discharge liens on the corporation's property in Nevada, was made in Pennsylvania, where such rate was unlawful, did not invalidate it, such rate being permissible in both Colorado and Nevada, and there being nothing to show that it was made with the intention and as a means of evading the Pennsylvania statute.

A note made in Arkansas, but payable in Tennessee, is governed by the laws of Tennessee; and, in the absence of proof of the law of that state, such note, though usurious if governed by the law of Arkansas, will be enforced in her courts. *White v. Friedlander*, 35 Ark. 52.

At common law bonds are governed, in respect of the validity of the rate of interest reserved, by the law of the state where they are payable. *Butler v. Edgerton*, 15 Ind. 15. This was upon the assumption that the bonds were actually made and delivered in another state. The rate of interest reserved was valid by the law of the state where the bonds were payable.

The rule stated in *Miller v. Tiffany*, 1 Wall. 298, 17 L. ed. 540, was applied in *Smith v. Muncie Nat. Bank*, 29 Ind. 158, with the result that a bill of exchange drawn in Indiana upon a party in Ohio and payable in the latter state and accepted there, being valid by the law of Ohio, was held not usurious, although it allowed a greater rate of interest than was allowed by the law of Indiana.

In *Bigelow v. Burnham*, 83 Iowa, 120, 49 N. W. 104, a note bearing 7 per cent interest, without specifying the place of payment, was dated on its face in Iowa. It appeared, however, that the note was signed in New York, and was there delivered to the payee who resided in that state, the maker being a resident of Iowa. It was not shown where the indebtedness was incurred for which the note was given, or where the consideration therefor was delivered to and received by the maker. The rate of interest was usurious by the law of New York, but lawful by the law of Iowa. It was held that the fact that the note was dated in Iowa raised a presumption that Iowa was the place of payment, and that that presumption, under all the circumstances of the case, was not overcome by the fact that it was actually delivered in New York. The court, having thus fixed Iowa as the place of payment, applied the rule stated at 62 L. R. A.

the beginning of this subdivision, with the result that the law of Iowa was applied, and the contract upheld. The court expressly qualifies the rule by the condition that the transaction be a bona fide one, and not a mere device for securing usurious interest.

In *Martin v. Martin*, 1 Smedes & M. 176, it was held that a note made and delivered in Mississippi, but payable in New Orleans, where the payee did business, bearing 10 per cent interest, was governed by the law of Louisiana in respect of usury. The law of Louisiana on the subject, however, not being proved, the court held that it must be presumed the contract was valid.

In *Duncan v. Helm*, 22 La. Ann. 418, a resident of Mississippi applied to another resident of that state for a loan; the latter granted the application in Mississippi, and agreed to give the borrower his bill on New Orleans, and authorized a third person in Louisiana to accept the mortgage. The notes, and a mortgage upon real property in Louisiana, were executed and made payable in the latter state. The court held that the law of Louisiana in respect of usury governed. It said that, even if the agreement entered into in Mississippi could be regarded as the contract whereby the money was loaned to the borrower (a proposition which the court said it could not assent to), still it was to have effect in Louisiana, and came within a provision of the Civil Code declaring that the effect of the acts passed in one country to have effect in another is regulated by the laws of the country where they are to have effect.

The general principle in relation to contracts made in one place to be executed in another, such as promissory notes executed and delivered in one state, but made payable in another, is well settled. They are governed by the laws of the place of performance; and, if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the delivery of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury. *Ames v. Benjamin*, 74 Minn. 335, 77 N. W. 230. In this case a resident of Minnesota executed and delivered in that state a note and chattel mortgage upon property in that state to a resident of North Dakota. The notes were made payable in the latter state and drew a rate of interest allowed by the law of that state, but usurious by the law of Minnesota. The court said that there was nothing in the transaction which indicated any attempt on the part of the payees to evade the usury laws of Minnesota, unless such attempt was to be inferred from the mere facts that the notes were made payable in North Dakota, and drew a rate of interest in excess of that permitted in Minnesota. The court expressly qualified the rule above stated by saying that it must be understood that making the note payable in another state, wherein another rate of interest is permitted than in Minnesota, must not be a device to evade the usury laws of Minnesota, but that such an intent cannot be inferred from the facts stated.

A stipulation for interest, in a note, which is valid according to the law of the place where the interest was, in good faith, agreed to be paid, will be upheld in Missouri, where the note was signed, as the law of that state only purports to affect the right to recover interest in case of usury. *Long v. Long*, 141 Mo. 352, 44 S. W. 341.

A note payable in Kansas is a Kansas con-

tract though executed in Missouri, and is not usurious if it bears a rate of interest allowed by the law of Kansas, though in excess of that allowed by the law of Missouri. *Central Nat. Bank v. Cooper*, 85 Mo. App. 385.

In *Coad v. Home Cattle Co.* 32 Neb. 761, 49 N. W. 757, a Wyoming corporation having most of its property, and transacting the greater part of its business, in Nebraska, dated and signed a note in Wyoming, where, by its terms, it was payable, reserving a rate of interest authorized by the law of Wyoming, but usurious by the law of Nebraska. The note was secured by a mortgage executed in Wyoming on certain real and personal property of the corporation in Nebraska. The payee and mortgagee, who was a resident of Wyoming, refused to pay the money until he had examined the records in Nebraska, and after making such examination, the money was paid over in Nebraska, and the note and mortgages delivered there. The court held that the law of Wyoming governed, there being nothing to indicate an intent to evade the usury law of Nebraska. The decision seems to be upon the assumption that the loan contract, as distinguished from the note and mortgage, was made in Wyoming. The court, however, cites with apparent approval the doctrine laid down in *Miller v. Tiffany*, 1 Wall. 298, 17 L. ed. 540. Upon the assumption, however, that the contract was both made and performable in Wyoming, it is not apparent why it was necessary to invoke such doctrine. Regarding the note and mortgage as the contract, the doctrine of the case referred to would be applicable, since they were made (*i. e.* delivered) in Nebraska, and were payable in Wyoming. The consideration was also paid over in Nebraska at the time the note and mortgage were delivered.

In *Ball v. Consolidated Franklinite Co.* 32 N. J. L. 102, where a note made in New York, but payable in New Jersey, was attacked as usurious, the court held it was governed by the law of New Jersey, saying that, where a note is made and payable at a particular place, it is, in all respects, to be treated as if made there without regard to the place where it is dated or delivered. Tested by the law of New Jersey, the note was not usurious.

In *Berrien v. Wright*, 26 Barb. 208, it was held that a note made and delivered in New York, but payable in Florida, reserving interest at the rate of 8 per cent, was governed by the law of Florida, and was, therefore, not usurious, where it was given as a part consideration for lands in Florida, the negotiation for the sale of which was commenced and completed in Florida, though the contract was reduced to form in New York, and the note signed and delivered there. The court seems to have been of the opinion that the contract must be deemed to have been made in Florida; but it seems that the same decision would have been reached if the court had regarded the contract as made in New York, since it was to be performed in Florida, for the opinion states the broad proposition that when a personal contract, by its terms, is to be performed in another state, and the place of its performance is not chosen with any intention to avoid the laws of New York, but because that place best suits the intention of the parties, the usury laws of New York do not apply to it, although it was made and executed in New York. The court added that, of course, there would be a presumption of an intent to

evade our laws until some explanation should be made.

Where money was loaned to a firm of Iowa bankers by a resident of New York, and a certificate of deposit was issued, dated in Iowa, acknowledging the receipt of the money, and promising to pay the same to the order of the lender at a rate of interest valid by the law of Iowa but usurious by the law of New York, the contract will be regarded as an Iowa contract and governed by its laws with respect to usury, notwithstanding that the money was actually received for the firm by a partner or agent in New York. *Potter v. Tallman*, 35 Barb. 182. There was no place of payment mentioned, but, in legal effect, the certificate was, of course, payable to the bank in Iowa.

In *Hackettstown Bank v. Rea*, 6 Lans. 455, 64 Barb. 175, Affirmed in 53 N. Y. 618, it was held that a note which was payable in New York, where the maker and indorser resided, was not usurious because discounted in New Jersey for more than the legal rate of interest there, the rate not being usurious according to the law of New York.

A note given in North Carolina, payable in New York, as the price of merchandise sold in New York, is not usurious because it bears the rate of interest allowed by the law of New York. *Roberts v. McNeely*, 52 N. C. (7 Jones L.) 506, 78 Am. Dec. 261. The court laid down the principle that where a contract is made in one country, and is to be performed in another, the rate of interest will be according to the law of the latter. It said, however, that if the note had been given for money loaned, or for a debt previously contracted in North Carolina, there would have been ground to support the allegation of usury.

In *Senter v. Bowman*, 5 Helsk. 15, a note not expressly naming any place of payment, dated in Missouri, but signed and delivered in Tennessee, where the maker resided, bearing a rate of interest unauthorized by the law of Tennessee, but authorized by the law of Missouri, where the payees, who were commission merchants, did business, and reciting that the money was advanced on bales of cotton to be shipped by the maker to the payees, was held to be governed by the law of Missouri with respect to usury. It was conceded that the note must be regarded as having been made in Tennessee, notwithstanding that it was dated in Missouri; but the court held that the fact that it was dated in Missouri raised a presumption that it was payable there, and that that presumption was corroborated by the recital in the note with reference to the shipment of cotton.

In *Sharp v. Davis*, 7 Baxt. 608, a resident of Mississippi had money on deposit in Tennessee, which he loaned to a resident of that state upon a note made there, but payable in Mississippi, and reserving a rate of interest lawful by the law of Mississippi, but unlawful by the law of Tennessee. The court said that, the note being payable in Mississippi, it was not usurious on its face, and that the only question was whether the note was made payable in Mississippi in order to evade the usury laws of Tennessee. This question was determined, in view of all the circumstances, against the existence of such purpose.

The contract of a surety, made in Tennessee upon a note payable by its terms in another state, and with reference to the laws of the other state, and bearing interest authorized by the laws of the state where payment is to be

made, but exceeding the lawful rate of Tennessee, is valid and binding upon the surety, and will be enforced by the courts of Tennessee, unless such contract was so made payable in the other state for the purpose of evading the usury laws of Tennessee. *Parham v. Pulliam*, 5 Coldw. 497.

Railroad aid bonds issued by a county under a statute authorizing them to bear interest at the legal rate at the place where they are made payable, are not defeated by the fact that the rate at that place is larger than the legal rate in the state where they are issued. *Nelson v. Haywood County*, 87 Tenn. 781, 4 L. R. A. 648, 11 S. W. 385.

The law of the place where a note is payable, rather than that where it is made, governs in respect of interest, unless the place of payment was designated as a cover for usury. *Andrews v. Hoxie*, 5 Tex. 171. The court said that the latter question was a question of fact for the jury, under the circumstances, but that prima facie the contract was governed by the law of the place of payment named in the note. The note in this case specified a rate of interest which was authorized by the law of the place of payment.

A contract which is payable abroad will not be held usurious merely because it would be so by the law of England. *Thompson v. Powles*, 2 Sim. 211.

In *Well v. Lange*, 6 Daly, 549, it was held that a note, payable by its terms in New Jersey, signed by the maker in the latter state as an accommodation for the payee, and indorsed by the payee and a third party for his accommodation in New York, and there discounted at a usurious rate of interest, was, so far as the liability of the payee and other indorsers was concerned, governed by the law of New York. The decision is upon the ground that, while the maker may be bound only by the law of the place where the note is payable, there being no stipulated place at which the indorser is to pay upon the default of the maker, his contract is governed by the law of the place where it is made, *i. e.*, the place where the note is delivered, and his contract of indorsement first takes effect.

In *Andrews v. Pond*, 13 Pet. 65, 10 L. ed. 61, the court said: "The general principle in relation to contracts made in one place to be executed in another is well settled. They are to be governed by the law of the place of performance; and, if the interest by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury." It was held, however, that this principle did not apply where a bill of exchange drawn in New York upon Mobile included a rate of interest forbidden by the laws of New York, and concealed under the name of exchange in order to evade that law. The court said: "A contract of this kind cannot stand on the same principles with a bona fide agreement made in one place to be executed in another. In the last-mentioned cases the agreements were permitted by the *lex loci contractus*; and will even be enforced there if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there it is void everywhere." 62 L. R. A.

The action on the bill of exchange was brought in a Federal court in Alabama.

Mix v. Madison Ins. Co. 11 Ind. 117, was, upon its facts, substantially like the case of *Andrews v. Pond*, 13 Pet. 73, 10 L. ed. 64, and the court follows the decision in the latter case. In the *Mix* Case a bill was drawn and discounted in Indiana upon parties in New York. The court said that, if the transaction was a loan of money in good faith to be repaid in New York, the lender was entitled to contract for and receive the rate of interest allowed by the law of New York, but that in fact the interest was not calculated at the New York rate, but at the Indiana rate; the evidence indicating that, if it was the intention of the parties to conform to any law relative to the rates of interest, it was the law of Indiana. The usury was sought to be disguised under exchange. The court held that the fate of the bill was to be determined by the law of Indiana, where it was made, rather than by the law of New York, where it was payable.

In *Craven v. Atlantic & N. R. Co.* 77 N. C. 289, the court held that bonds issued by a North Carolina corporation to a resident of that state, and secured by a mortgage upon real property there, were governed by the law of North Carolina, and could legally bear no greater rate of interest than was allowed in that state, notwithstanding that they were payable in New York. It appeared in this case, however, that the bonds expressed a rate of interest which was not legal, even in New York, except by virtue of the rule of pleading established in the latter state, whereby corporations are forbidden to plead usury, and which was held not to apply to a corporation of North Carolina sued in North Carolina.

In *Hanrick v. Andrews*, 9 Port. (Ala.) 9, however, the court expressly took the position that the law of the place where the contract is made, at least if the usury is paid or retained there, governs, rather than the law of the place of payment, notwithstanding that the contract is usurious and void by the former, and would be valid by the latter. The court took the view that the decision in *Depau v. Humphreys*, 8 Mart. N. S. 27, was simply to the effect that the law of Louisiana governed because that was the place where the contract was made, and not because that was the law that would sustain the validity of the contract. This decision (*Hanrick v. Andrews*), however, is contrary to the clear weight of authority as above shown.

It will be observed that some of the foregoing cases refer the decision upholding the contract directly to the principle that the law of the place of payment governs rather than to the first of the rules formulated in the cases cited in the last subdivision, and which rest upon the inference as to intention drawn from the circumstance that the contract is valid by the *lex loci solutionis*, but usurious by the *lex loci contractus*. So far as the actual decision goes, it is, of course, immaterial to which principle it is referred, since both necessarily lead to the same result; but in the one case there is an apparent implication that the law of the place of payment would have still been applied, even if it would have rendered the contract usurious, and though the *lex loci contractus* would have rendered it valid; while the implication in the other case is that, under such circumstances, the *lex loci contractus* would have been applied. The first implication, however, is, in most instances at least, more apparent than real, since

the courts were merely concerned in finding a basis for the decision, and did not stop to choose between the two principles, either of which was sufficient for the purpose in hand.

In *New York Dry Dock Co. v. American Life Ins. & T. Co.* 3 Sandf. 225, Affirmed in 3 N. Y. 344, it was held that bills of credit, or notes, though expressed to be payable in London, were governed by the law of New York in respect of usury, where the contract for the loan was made in New York, and was secured by a deed of trust on real property in that state which is referred to in the bills. The court said that it was in every sense a New York contract, and would be so adjudged in the courts at Westminster Hall. By the law of New York the transaction was usurious.

In *Holmes v. Manning* (Mass.) 19 N. E. 25, it was held that the questions whether a transaction was governed by the law of New York, and whether a note constituting a part of the transaction was tainted with usury, were questions of fact for the jury upon evidence that a resident of Massachusetts, through his agent in New York, applied to a resident of the latter state to borrow money, agreeing to give his note with 25 per cent interest for the first year, and 6 per cent per annum thereafter,—the latter being a legal, and the former an illegal, rate in the state of New York. The note was dated and made payable at Boston.

A contract for the payment of a fixed rate of interest on a deed, if the rate of interest contracted for is authorized by the laws of the place where the contract was made, will be enforced against the payee and against real estate in West Virginia mortgaged to secure the debt and interest, although the rate of interest thus secured is in excess of that allowed by the laws of the latter state. *Shipman v. Bailley*, 20 W. Va. 144.

3. When contract usurious by *lex loci solutionis*, but valid by *lex loci contractus*.

The second of the rules stated in *Miller v. Tiffany*, 1 Wall. 298, 17 L. ed. 540, *supra*, IV. c. 1, *viz.*, that, if the rate of interest be higher at the place of the contract than at the place of performance the parties may lawfully contract for the higher rate, implies that, when they have specified the higher rate prevailing at the place of the contract, they will be presumed to have contracted with reference to the law of the place of contract, rather than the place of performance. It will be observed that in such case the presumption does not coincide with, but is opposed to, the general presumption that the parties contract with reference to the *lex loci solutionis*. It must be borne in mind, however, that this rule, being based upon the presumed intention of the parties, may be defeated by circumstances rebutting the presumption upon which it rests, or showing that the presumed intention, if entertained, was conceived in bad faith and for the purpose of evading the usury laws of the place of payment, or of some other place to which the contract was really referable. Upon the other hand, there are other circumstances which may aid the presumption that the parties intended to contract with reference to the *lex loci contractus*.

In many of the following cases that support the rule the contract was secured by a mortgage upon real property at the place where the contract was made and the borrower resided; but the decisions nevertheless rest mainly upon 62 L. R. A.

the rule above stated, which would undoubtedly have been applied, even if these additional circumstances had not favored the *lex loci contractus*: *Tilden v. Blair*, 21 Wall. 241, 22 L. ed. 632; *Sturdivant v. Memphis Nat. Bank*, 9 C. C. A. 256, 23 U. S. App. 300, 60 Fed. 730; *Glover v. Equitable Mortg. Co.* 31 C. C. A. 105, 59 U. S. App. 151, 87 Fed. 518; *Providence County Sav. Bank v. Frost*, 8 Ben. 293, 13 Nat. Bankr. Reg. 356, Fed. Cas. No. 11,453; *New England Mortg. Security Co. v. Vader*, 28 Fed. 265; *Brown v. American Finance Co.* 31 Fed. 516; *Fitch v. Remer*, 1 Bliss. 337, Fed. Cas. No. 4,836; *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 168, 13 L. R. A. 299, 9 So. 143 (see *infra*, IV. e); *Eccles v. Herrick*, 15 Colo. App. 350, 62 Pac. 1040; *McKay v. Belknap Sav. Bank*, 27 Colo. 50, 59 Pac. 745; *New England Mortg. Security Co. v. McLaughlin*, 87 Ga. 1, 13 S. E. 81; *Raines v. American Freehold Mortg. Co.* 94 Ga. 699, 20 S. E. 10; *Jackson v. American Mortg. Co.* 88 Ga. 756, 15 S. E. 812; *Stansell v. Georgia Loan & T. Co.* 96 Ga. 227, 22 S. E. 898; *Underwood v. American Mortg. Co.* 97 Ga. 238, 24 S. E. 847; *Hill v. American Freehold Co.* 99 Ga. 87, 24 S. E. 848; *Taylor v. American Freehold Land Mortg. Co.* 106 Ga. 238, 32 S. E. 153; *Engler v. Ellis*, 16 Ind. 475 (*obiter*); *Panchoast v. Travelers' Ins. Co.* 79 Ind. 172; *Butters v. Olds*, 11 Iowa, 1; *Chapman v. Robertson*, 6 Paige, 627, 31 Am. Dec. 264 (see discussion of this case in *note to McIlwaine v. Ellington* [C. C. App. 4th C.] 55 L. R. A. 933); *City Sav. Bank v. Bidwell*, 29 Barb. 325; *Balme v. Wombough*, 38 Barb. 352; *Roelofson v. Atwater*, 1 Disney (Ohio) 346, Affirming 2 Handy (Ohio) 19; *Nea Perez Silver Min. Co. v. Windsor*, 1 Ohio L. J. 23; *Wilson v. Rose Clare Lead & Spar Co.* 1 Ohio L. J. 314; *Kilgore v. Dempsey*, 25 Ohio St. 413, 18 Am. Rep. 306; *British American Mortg. Co. v. Bates*, 68 S. C. 551, 36 S. E. 917; *Bolton v. Street*, 3 Coldw. 31; *Richardson v. Brown*, 9 Baxt. 242. See also *Thompson v. Edwards*, 85 Ind. 414; *Mott v. Rowland*, 85 Mich. 561, 48 N. W. 638; *Senter v. Bowman*, 5 Helsk. 17, *supra*, IV. b.

First Nat. Bank v. Mann, 94 Tenn. 17, 27 L. R. A. 565, 27 S. W. 1015, held that a note was governed by the law of North Carolina, where it was delivered, though it was dated and, upon its face was payable, in Tennessee. The fact that the rate of interest reserved was authorized by the law of North Carolina, but usurious by the law of Tennessee, seems to have been regarded as a circumstance pointing to the law of the latter state; but the court also said that the fact that the note was dated and payable in Tennessee arose from an accidental use of a blank note with those words in it, and not from a design to make it a Tennessee contract, or that it should be governed by Tennessee law.

In *Butters v. Olds*, 11 Iowa, 1, *supra*, and *Richards v. Globe Bank*, 12 Wis. 692, *infra*, both borrower and lender were residents of the state where the contract was made.

In *Taylor v. American Freehold Land Mortg. Co.* 106 Ga. 238, 32 S. E. 153, *supra*, the mortgage recited that it was intended to conform to certain statutes of Georgia where the notes and mortgage were made and the land situated.

In *New England Mortg. Security Co. v. McLaughlin*, 87 Ga. 1, 13 S. E. 81, *supra*, the mortgage expressly provided that the contract was to be construed by the laws of Georgia,

where it was made, and where the mortgaged land was situated.

In *Smith v. Parsons*, 55 Minn. 520, 57 N. W. 311, it was held that the parties to a note and a mortgage given to secure a loan by a resident of Minnesota, upon land there situated, made in that state and sent to Connecticut for examination, and there accepted, the notes being payable in Connecticut, may stipulate that the note shall be construed by the laws of Minnesota. The court said it was unnecessary to decide which law would have governed if the parties had not so stipulated. Treating the note and mortgage as the contract, the contract would seem to have been made in Connecticut, so that the *lex loci contractus* and *lex loci solutionis* were the same.

In *Merchants' Bank v. Griswold*, 9 Hun, 561, it was held that the validity of a bill of exchange, so far as usury was concerned, was governed by the law of Canada, it appearing that the bill was drawn there, and was discounted upon the faith of a letter of credit from the drawee, such letter of credit being regarded as equivalent to an actual acceptance in Canada, notwithstanding that the bill was addressed to the drawee at New York. The bill would have been usurious by the law of New York, but was not by the law of Canada; but this was not the ground of the decision.

A bond and mortgage or trust deed upon land in Illinois, made by a citizen of that state to a corporation of another state, are not usurious under state statutes providing that such contracts shall be governed by the laws of that state, because the rate of interest reserved is in excess of that allowed by the law of the state in which the bond is made payable. *Fowler v. Equitable Trust Co.* 141 U. S. 384, 35 L. ed. 786, 12 Sup. Ct. Rep. 1.

Blackwood v. Bowen, 43 Ill. App. 320, is to the same effect.

In *Second Nat. Bank v. Smoot*, 2 MacArth. 371, and *Pratt v. Adams*, 7 Paige, 615, the courts lay some emphasis upon the fact that the money was to be advanced in the state where the contract was made.

In *Richards v. Globe Bank*, 12 Wis. 692, the court alludes to the fact that the proceeds were used in Wisconsin, where the contract was made; and *New England Mortg. Security Co. v. Vader*, 28 Fed. 265, refers with approval to the statement in *Wharton on Conf. of Laws*, § 508, to the effect that the place of performance of an obligation for the payment of money is the place where the money is used.

While in most of the cases above cited the proceeds of the loan were probably used in the state which was held to furnish the applicatory law, yet none of them, except the last two, seem to lay any stress upon the fact, if it was such; and in most of them it does not expressly appear what the fact in that respect was.

A note payable in New York, signed by one of the makers in Washington and forwarded by the payee to the other maker in Kentucky, who there signed it and sent it by mail to the payee in New York, who afterwards assigned it to parties in Ohio for the benefit of the first maker, is a Kentucky contract, and governed by the laws of that state with respect to usury. *Wm. Glenny Glass Co. v. Taylor*, 99 Ky. 24, 34 S. W. 711. It was conceded in this case that the general rule is that, if a contract is executed with a view to, and in reference to, the laws of the place of performance, it is to be governed by the law of that state; but the cir-

cumstances of the case were regarded as negating an intention to be governed by the law of New York. The court seems to have taken the view, in this case, that when the note was signed by the second maker in Kentucky and inclosed to the payee, it was an executed instrument as much so as if the payee had been present and the note delivered to her in Kentucky. This decision apparently overrules the decision of the superior court in *Wm. Glenny Glass Co. v. Taylor*, 18 Ky. L. Rep. 125, holding that the law of New York governs.

The two cases next cited emphasize the fact already pointed out, that the rule stated at the beginning of the subdivision is not an absolute rule of law, but rather a rule of evidence, which may be defeated by circumstances rebutting the presumption upon which it rests.

In *Commercial Bank v. Auzé*, 74 Miss. 609, 21 So. 754, the court said that the rule that when a contract made in one country, to be performed in another, stipulates for the payment of a rate of interest not allowable by the *lex loci solutionis*, it will be governed by the law of the place where it was entered into, was, after all, based upon a presumption, and must yield to the facts showing what the real intent and purpose of the parties were. In the case at bar a note was made in Louisiana and secured by a mortgage upon real property in that state, but was payable in Mississippi; the interest reserved was lawful under the law of Louisiana, but usurious under the law of Mississippi. The evidence of the circumstances attending the loan was conflicting. Some of it tended to show that the loan was effected in Mississippi, the money paid there, and was intended to be paid back by the borrower there, and no thought of the Louisiana law was in the mind of the parties, and no word was spoken about performance under Louisiana laws; and, on the other hand, there was evidence tending to show that the contract was made with direct and express reference to the laws of Louisiana. The jury were told that, if the evidence showed that the contract of loan evidenced by the notes was made in Louisiana, it was not usurious. The appellate court held that the instruction was sufficiently favorable to the lender, and intimated that it went too far in making the legal presumption arising from the execution of the contract in Louisiana conclusive as to the intention of the parties to contract with reference to the law of that state, where the contract was legal, ignoring the question whether the contract was in good faith, and with no purpose to evade the Mississippi usury law, so made in Louisiana.

See also *Brown v. Freeland*, 34 Wis. 181, 69 Am. Dec. 389, *supra*, IV. b.

In *Underwood v. American Mortg. Co.* 97 Ga. 238, 24 S. E. 847, *supra*, it was held that the jury were warranted in inferring that the parties to a note contracted in view of the law of Georgia, and not the law of New York, in fixing the rate of interest, where it appeared that the payee was a New York corporation; that the maker was presumably a resident of Georgia; that the note was executed in the latter state, being given for the purchase of land therein, and containing a waiver of the benefit of homestead and exemptions provided for by the Constitution and laws of Georgia, and bore a rate of interest which was authorized by the law of Georgia, but which was usurious by the law of New York, and which would render the note void; there being no evidence tending to

show any device or contrivance to evade the usury law of New York, notwithstanding that the note was payable in the latter state. The court said that it was not ruled in *Odom v. New England Mortg. Secur. Co.* 91 Ga. 505, 18 S. E. 131, that the note there sued upon was usurious, but simply that it was open to attack for usury, and that the court erred in rejecting certain competent evidence offered by the defendant for that purpose, and moreover, that it did not appear in that case that the note itself was executed in Georgia.

It is to be remembered that the rule discussed in this subdivision is subject to the qualification that the parties must have acted in good faith. Some of the cases expressly state the qualification, and it is undoubtedly implied by the others. The following, from *McAllister v. Smith*, 17 Ill. 328, 65 Am. Dec. 631, summarizes the position of the courts upon this point: "Any rate per cent sanctioned by the laws of the place where the contract is made, or by the substituted laws of the place where it is to be performed or paid, will be recognized and enforced in the courts of other governments whose laws would make such rate usurious. But there is a jealous vigilance . . . to detect evasions of the usury laws, and, when discovered, courts will withhold any aid to those who make foreign contracts a pretense for exacting usury at home." In this case it was held that, assuming the truth of the averment that the parties had reference to the laws of New York and intended to evade the laws of that state, a bill of exchange drawn upon and accepted by a party in Illinois, but payable in New York, and reserving a rate of interest usurious according to the law of that state, would not sustain an action in Illinois.

The cases of *Jewell v. Wright*, 30 N. Y. 259, 86 Am. Dec. 372, and *Dickinson v. Edwards*, 77 N. Y. 573, 33 Am. Rep. 671, have sometimes been regarded as opposed to the second rule stated in *Miller v. Tiffany*, 1 Wall. 208, 17 L. ed. 540. These cases did deny the application of that rule to the particular state of facts involved, but, while they cannot be said affirmatively to support the rule, they cannot properly be regarded as opposed to it. In *Jewell v. Wright*, 30 N. Y. 259, 86 Am. Dec. 372, a note, dated and payable in New York, was signed there by the maker and payee, and was there delivered to a third person for the latter's accommodation, who discounted it in Connecticut at a rate of interest usurious both by the law of Connecticut and of New York. It was held that the law of New York governed as to the consequences of the usurious discount upon the ground that the latter state was the place of payment. In *Dickinson v. Edwards*, 77 N. Y. 573, 33 Am. Rep. 671, a note payable in New York was dated and signed in that state, and there delivered by the maker to the payee for the latter's accommodation, and was first negotiated by the latter in Massachusetts at a rate of interest lawful there but usurious by the law of New York. It was held in this case, also, that the usury law of New York governed, and the note was therefore invalid in the absence of any evidence to show that the maker knew, intended, or contemplated that the note was to be taken out of the state for its first use. The decision proceeds upon the assumption that the note must be regarded as made in Massachusetts (where it was first delivered so as to become binding upon the maker), and rests upon 62 L. R. A.

the general principle that the law of the place of performance governs in respect to the validity of a contract, in the absence of evidence or circumstances to show a contrary intention. The court referred to the cases holding that, when the contract stipulates for a rate of interest lawful where it is made, though greater than that where it is to be performed, the *lex loci contractus* will govern; and neither assented to, nor dissented from, that proposition, but distinguished the case at bar upon the ground that there was no stipulation by the maker with respect to the rate of interest, and that the only indication which the note gave of the mind of the maker on that point was the phrase which specified the place of payment, and the indication from that was of a rate of interest lawful at that place. The case of *Tilden v. Blair*, 21 Wall. 241, 22 L. ed. 632, was specifically distinguished upon the ground that there were circumstances in that case indicating that the accommodation bill should be negotiated in a state other than that in which it was payable. *Clayes v. Hooker*, 4 Hun, 231 applied the doctrine of the *Dickinson* Case to the liability of one who indorsed a note in New York for the accommodation of the makers, the note being also payable in New York; and held that, it having been negotiated by the maker in Canada at a rate of interest usurious by the law of New York, the indorser was not liable.

The general term of the Buffalo superior court, in *Bowen v. Bradley*, 9 Abb. Pr. N. S. 395, refused to follow the decision in *Jewell v. Wright*, 30 N. Y. 259, 86 Am. Dec. 372, *supra*, and held that a note dated and payable in New York, and there indorsed for the accommodation of the maker, and negotiated by him in another state, was not usurious as against the indorser, unless so by the law of the latter state. The decision in this case was disapproved, and the doctrine of *Jewell v. Wright*, approved as applied to such a state of facts in *Dickinson v. Edwards*, 77 N. Y. 573, 33 Am. Rep. 671.

In *First Nat. Bank v. Morris*, 1 Hun, 680, the court strongly intimated its opinion, in spite of a contrary decision in *Jewell v. Wright*, 30 N. Y. 259, 86 Am. Dec. 372, that a bill of exchange drawn in Massachusetts upon a firm doing business in New York, accepted by the latter for the accommodation of the drawer, and discounted for the latter's benefit in Massachusetts, at a rate of discount valid by the law of that state, but usurious by the law of New York, was governed by the law of Massachusetts with respect to usury, notwithstanding that the draft, being accepted in New York, was also payable there. The question, however, was not decided, the case being disposed of on another point. It would seem that the law of Massachusetts might have been applied in this case without conflicting with the decision in *Jewell v. Wright*, since here it was apparently contemplated that the bill would be discounted in Massachusetts.

In *Hildreth v. Shepard*, 65 Barb. 263, the court said that the true rule to be drawn from the cases seemed to be that, where a note is dated and made payable in one state, and taken out of that state into another for negotiation or sale, it is still to be considered as a contract made and subject to the laws of the state where dated and made payable; but that, where the note is made in one state, ne-

gotiated and sold in that state at a rate of interest allowed by its laws, then the same is to be governed by the laws of that state, and not of the state where it is payable.

In *Wayne County Sav. Bank v. Low*, 81 N. Y. 566, 37 Am. Rep. 533, the rule in *Tilden v. Blair* was approved and applied to a note, dated and payable in New York, but made for the express purpose of being used in renewal of a note for the same amount held by a bank in Pennsylvania. The note in suit was actually written in Pennsylvania in the form in use in that state, by the cashier of a bank, and forwarded to the maker in New York for his signature. The note was signed by the maker in New York, and then mailed by him to the bank in Pennsylvania, together with a check for the discount at the rate of 8 per cent, which was lawful in Pennsylvania, but usurious in New York. It was held that the law of Pennsylvania governed, the case being distinguished from *Jewell v. Wright and Dickinson v. Edwards*, upon the ground that the note was executed to be used in Pennsylvania. So, in *Sheldon v. Haxtun*, 91 N. Y. 124, where, pursuant to an arrangement between a resident of New York and a resident of Illinois, the latter collected, for the former, notes due from parties in Illinois, bearing interest at 10 per cent, and sent his own notes for the amount thereof, with interest at 10 per cent, through the mail to the former in New York, such notes being valid by the law of Illinois, were held valid in New York, although they would have been usurious if governed by the law of that state; and the court expressly held that the fact that one of the notes was made payable in New York did not distinguish it on the point of usury from the others; citing *Tilden v. Blair*, 21 Wall. 241, 22 L. ed. 632. The decision is upon the assumption that the transaction was complete when the notes were deposited in the mails in Illinois.

The rule in *Tilden v. Blair* was also applied in *Whitehead v. Heldenheimer*, 57 App. Div. 590, 68 N. Y. Supp. 704, by holding that the law of Germany in respect of usury, rather than that of New York, governed drafts drawn in Germany, payable to a resident of that country and discounted by him at a rate of interest usurious by the law of New York, though not necessarily so by the law of Germany, notwithstanding that they were drawn upon parties in New York, who accepted them there for the accommodation of the drawer and returned them to the holder in Germany, the action being against the accommodation acceptors, and the drafts being payable in New York.

See also *Staples v. Nott*, 128 N. Y. 403, 28 N. E. 515, *infra*, IV. 1.

The New York cases above cited, when read together, show that the courts of that state admit the soundness of the general principle that a contract valid by the *lex loci contractus*, but usurious by the *lex loci solutionis*, is governed by the former because the parties will be presumed to have contracted with reference to a law that will uphold, rather than one that will invalidate, their contract; but make an exception, so far as the liability of the accommodation party is concerned, in case of a bill or note payable by its terms in one state, and there signed or indorsed by one party for the accommodation of another, who negotiates it in another state at a rate of interest authorized by the law of that state, but usurious by the law of the former state, if the accommodation party did not au-

thorize its use outside of the state where it was payable, or know that such use was intended. The exception seems perfectly consistent with the reasoning upon which the general principle rests, unless the intention of the accommodated party is to be attributed to the accommodation party. The general principle would apply with full force as between the accommodated party and a subsequent holder, since it is a fair inference, so far as he is concerned, that he intended to contract with reference to the law of the place where the bill or note was delivered (*lex loci contractus*), he having sold the note there at a rate of discount allowed by such law but usurious by the law of the place of payment. But the case is different with the accommodation party, so far as the inference as to his intention, drawn from his own acts or conduct is concerned. So far as his personal intention goes, there is no basis for an inference that he intended to contract with reference to the law of the place where the bill or note was negotiated. On the contrary, the clear inference, as pointed out in *Dickinson v. Edwards*, upon the state of facts assumed, is that he intended to contract with reference to the law of the place of payment. The correctness of this conclusion is more apparent when the accommodation party is, upon the face of the bill or note, the primary obligor (i. e., the maker or acceptor), than when he is merely the secondary obligor (i. e., drawer or indorser); for, in the latter case, it would seem that it might be plausibly argued that, since he is a mere surety for the primary obligor, his liability, so far as it is affected by any act affecting the inception of the contract, must be determined by the same law that applies to the liability of the primary obligor. In the other case (i. e., when the accommodation party is, upon the face of the instrument, the primary obligor), his liability, while dependent upon the act of the accommodation party, is not dependent upon, or subsidiary to, the latter's liability, and therefore, while the latter may bind himself as secondary obligor by the negotiation, it does not necessarily follow that the primary obligor is bound. It might, perhaps, be urged in either case that, if the accommodated party has sufficient ostensible authority to bind the accommodation party by the negotiation of the instrument out of the state where it is payable, contrary to the latter's instruction, if the negotiation is otherwise valid, he has sufficient ostensible authority to bind him as to the rate of discount, and, therefore, the intention of the accommodated party with reference to the governing law should be attributed to the accommodation party, and the case be thus brought within the general principle. However this may be, it is clear that the New York cases do not deny the general soundness of the rule stated at the beginning of the subdivision though they do deny its application to cases in which the circumstances are regarded as overrunning the presumption upon which the rule rests, viz., that the parties intended to contract with reference to the *lex loci contractus*, when that law will uphold, and the *lex loci solutionis* would invalidate, their contract.

In *McGarry v. Nicklin*, 110 Ala. 550, 17 So. 726, a resident of Tennessee sent a renewal note, payable in that state, to parties in Alabama. The latter, after striking out certain provisions, and changing the date from Tennessee to Alabama, and inserting a rate of interest

allowed by the law of Alabama, but usurious by the law of Tennessee, returned it through the mail to the payee in Tennessee, who accepted the same. It was held that it was governed by the law of Tennessee, and was, therefore, usurious, since it was, in a legal sense, both made and payable in Tennessee. The court conceded that, if the note had been signed and returned without alteration, it would have been regarded as made in Alabama; and, apparently, the court would have applied the principle that the parties may stipulate for the greatest rate of interest allowed either by the law of the state where the contract is made, or where it is payable.

Brower v. Life Ins. Co. 86 Fed. 748, held that a loan by a Virginia corporation to a resident of North Carolina, secured by a mortgage upon real property in the latter state, payable in Virginia, was governed by the law of Virginia, notwithstanding that by the law of that state the contract was usurious. While it does not expressly appear that the contract was made in North Carolina, or that it would be valid by the law of that state, the decision is upon the ground that Virginia is the place of payment; and the court attempts to refer it to the first of the principles stated in *Miller v. Tiffany*, 1 Wall. 310, 17 L. ed. 543, apparently overlooking the fact that that principle rests upon the assumption that the contract is valid by the law of the place of performance. Upon the assumption that the contract was made in North Carolina, and was valid by that law, the case would fall within the second, rather than the first, of the principles stated in *Miller v. Tiffany*.

See also *Brown v. Nevitt*, 27 Miss. 801, *infra*, IV. g.

4. When claim of usury based on transaction with drawer or indorser.

In applying the rules stated in the last two subdivisions to the liability of the drawer of a bill or the indorser of a bill or note, it must be borne in mind that his contract is performable, not at the place where the bill is payable by the acceptor, or the note by the maker, but at the place where the bill is, in a legal sense, drawn, or the note indorsed (i. e., where it is delivered so as to become binding upon the drawer or indorser as the case may be). Therefore, so far as the claim of usury is based upon a transaction between the drawer or indorser and a subsequent party, the law of the place where the bill was drawn (i. e., delivered so as to bind the drawer), or the bill or note indorsed (i. e., delivered so as to bind the indorser), necessarily governs, since it is both *lex loci contractus* and *lex loci solutionis*.

Thus, the usury laws of the state in which the indorsement and sale of a negotiable promissory note are made, rather than those of the state in which the note was made and is payable, govern as between the holder and the indorser. *Glidden v. Chamberlin*, 167 Mass. 486, 48 N. E. 103. So, the law of the place where a bill is negotiated by the drawer governs, even as affecting the liability of the acceptor, when the claim of usury is based on the transaction in which the bill was discounted. Thus:

The acceptor of a bill of exchange payable in New York cannot avoid liability upon the ground that the bill was discounted by the drawer at a rate of interest usurious by the law of New York, where the bill was drawn, and discounted in Georgia, by the law of which the discount 62 L. R. A.

was not usurious. *Bank of the State v. Lewin*, 45 Barb. 340.

But it has been held in *Freese v. Brownell*, 35 N. J. L. 285, 10 Am. Rep. 239, that, where the drawer is an accommodation party, and the claim of usury as affecting his liability is based upon the transaction between the acceptor and the holder, the question of usury, as affecting the drawer's liability, is to be determined by the same law that would govern if the liability of the acceptor only were involved. In other words, the inquiry is as to the law governing the acceptor's contract, and not as to the law governing the drawer's contract generally. In that case the bill was drawn upon a bank in Illinois for the accommodation of the bank, immediately accepted by it, and forwarded to the payee in New York, to take up an outstanding obligation of the bank held by the payee. The court said that, in legal effect, the bill, both as to drawer and acceptor, was made in New York (where it was delivered so as to become binding upon them) and expressly recognized the rule that as to the drawer, the place of payment is the place where the bill is, in a legal sense, drawn (i. e., delivered so as to become binding upon him), which in this case was New York; but held that, as there was no usurious agreement made with the drawer, and that, as he stood only for the default of the acceptor,—he could not escape his obligation unless the transaction was usurious as between the payee and acceptor. Having thus taken the position that the question as to usury, even as affecting the accommodation drawer, was to be determined by the law governing the acceptor's contract, the court held that such contract was governed by the law of Illinois, upon the ground that that was the place of payment as to the acceptor, and that by the law of that state the transaction was not usurious. The same view was taken in *Davis v. Clemson*, 6 McLean, 622, Fed. Cas. No. 8,680. In the latter case a citizen of Ohio drew a bill in that state upon parties in New York for the latter's accommodation, and forwarded it to them; they accepted it and negotiated it with the plaintiff, a citizen of New York, for a consideration which was usurious by the law of New York; the action was against the drawer. It was held that the usury law of New York governed, and that the drawer was, therefore, not liable. The opinion concedes that, if the bill had not been for the accommodation of the acceptors, and had been negotiated in Ohio, its validity, so far as the drawer was concerned, would have been determined by the law of Ohio, and would not have been affected by the subsequent usurious transaction with reference thereto; but it was held that, as the drawer's liability was only conditioned upon the nonperformance of the acceptor's contract, and as there was no binding contract upon the acceptor, since the law of New York clearly governed as to him, there could be no liability upon the part of the drawer. It is apparent that the court, as in the preceding case, took the view that the question of usury as affecting the indorser is to be determined by the law governing the contract of the acceptor; but it will be observed that in this case, unlike the preceding case, the same result would have been reached if regard had been had, alone, to the contract of the drawer, for in this case the *locus solutionis*, as well as the *locus contractus*, of the drawer's contract coincided with that of the acceptor's contract, whereas in the other case, while the *locus contractus* of the two con-

tracts were the same, the *loci solutionis* were different.

In *Weil v. Lange*, 6 Daly, 549, it was held that the question of usury, as against one who indorsed a note in New York for the accommodation of the payee, was to be determined by the law of New York, the note having been discounted by the payee in that state, notwithstanding that it was payable in New Jersey. The decision is upon the ground that, though the maker may be bound only by the law of the place where the note is payable, there being no stipulated place at which the indorser is to pay upon default of the maker,—his contract is governed by the law of the place where it is made; that is, the place at which the note is delivered and his contract of indorsement first takes effect.

If the note in this case had been indorsed for the accommodation of the maker, it would seem, upon the principle stated in *Freese v. Brownell*, 85 N. J. L. 285, 10 Am. Rep. 239, that the question of usury, as affecting the accommodation indorser's liability, should have been determined by the law of New Jersey, as the place of payment of the maker's contract; but the note was made for the accommodation of the payee, and the *loci contractus* and *loci solutionis* of both contracts of indorsement were the same (i. e., New York), and, therefore, it was immaterial whether the law governing the payee's contract of indorsement, or that governing the accommodation party's contract of indorsement, was applied, though, as a matter of fact, the court seems to have applied the latter.

Accommodation notes drawn, dated, signed, and indorsed in Pennsylvania, where the makers and indorser resided, but discounted by the party accommodated in New York, are governed by the law of New York, rather than by the law of Pennsylvania, with respect to the effect of discounting of the same at a usurious rate of interest. *Re Conrad*, 8 Phila. 147, Fed. Cas. No. 3,126. The notes do not appear to have specified any place of payment, so that New York was not only the *locus contractus*, but the *locus solutionis*, of the contracts of all the parties; and it was immaterial whose contract was regarded as furnishing the applicatory law.

In *Overton v. Bolton*, 9 Helsk. 762, 24 Am. Rep. 307, a note, payable in Tennessee, for the purchase price of cotton sold by a resident of Mississippi to dealers in Tennessee, was dated in Mississippi, and was there signed by the maker and some of the indorsers. It was a condition of the sale, however, that the note should be indorsed by a resident of Tennessee, and the note was accordingly indorsed by such person in the latter state with full knowledge of the facts, upon its presentation to him by an agent of the seller of the cotton. The note was subsequently sold to a bona fide holder. In an action by the latter against the Tennessee indorser, the court held that the latter was precluded from claiming that the contract as to him was made in Tennessee. The decision is upon the ground that the indorser warrants that the note is what it purports to be, and that in this case, since the note was dated in Mississippi and bore a rate of interest allowed by the laws of that state, it purported on its face to be a Mississippi contract, notwithstanding that it was, by its terms, payable in Tennessee.

d. *When usurious by both *lex loci contractus* and *lex loci solutionis*.*

The rules heretofore stated are based upon 62 J. R. A.

the presumed intention of the parties. Even the rule stated in subdivisions II. and III., *supra*, to the effect that, when the rate of interest is not stipulated, the law of the place of performance governs, is based upon the presumed intention of the parties to be governed by that law, and is a specific application of the exception to the general principle, that the validity of a contract is governed by the law of the place where it is made, that obtains when the contract is made in one place with the intention that it shall be governed by the laws of another place where it is to be performed. When the circumstances negative an intention to contract with reference to the law of the place of performance, the presumption upon which the exception rests falls, and therefore the general principle that the *lex loci contractus* governs is left operative. This latter principle, it will be observed, is not necessarily dependent upon any presumed intention, and may, therefore, operate, although the contract was made in violation both of the *lex loci contractus* and the *lex loci solutionis*. This is the condition which exists when a contract is usurious both by the *lex loci contractus* and the *lex loci solutionis*; and it is accordingly held by the weight of authority in such case that the consequences of the usury are to be determined by the *lex loci contractus*, rather than the *lex loci solutionis*. *Andrews v. Pond*, 13 Pet. 65, 10 L. ed. 61; *Heath v. Griawold*, 18 Blatchf. 555, 5 Fed. 373; *Adams v. Robertson*, 37 Ill. 45; *Mix v. Madison Ins. Co.* 11 Ind. 117; *Butler v. Myer*, 17 Ind. 77; *Arnold v. Potter*, 22 Iowa, 194; *Olmsted v. New England Mortg. Secur. Co.* 11 Neb. 487, 9 N. W. 650; *Joslin v. Miller*, 14 Neb. 91, 15 N. W. 214; *Bascom v. Zediker*, 48 Neb. 380, 67 N. W. 148; *Craven v. Atlantic & N. C. R. Co.* 77 N. C. 289; *Kelsey v. Skidmore*, 2 Ohio C. C. 219.

In *Pine v. Smith*, 11 Gray, 38, it was held that the effect of reserving usury in a note was to be determined by the law of Massachusetts, where, pursuant to an arrangement made in New York, the note, at the direction of the payee, was sent through the mail to him at New York. The decision is upon the ground that the contract must be regarded as having been made in Massachusetts. But in this case it does not appear where the note was made payable, so the *locus contractus* and the *locus solutionis* may, in fact, have been the same.

In *Gallaudet v. Sykes*, 1 MacArth. 489, it was held that a bill of exchange drawn in New York upon a party who is designated therein as of Washington, who, for the accommodation of the drawer, wrote his acceptance thereon in Washington and returned the note to the drawer in New York, where it was discounted at a rate of interest usurious by the law of both places, was governed by the law of New York as to the consequences of usury. The court took the position that the acceptance, being solely for the accommodation of the drawer, was consummated in New York, and says: "The bill, therefore, had its origin in New York; it was consummated there; the money was loaned and the security delivered in that place; it is dated there, and no other place of performance is designated in the contract." It would seem, however, that the bill on its face, having designated the acceptors as of Washington, was payable there, and, if so, there would be a conflict between the law of the place where the contract was made and the place where it was to be performed, which would seem to call for the applica-

tion of the law of New York, not as the *lex loci solutionis*, and *lex loci contractus*, but as the *lex loci contractus* only, upon the principle above stated.

In a number of the foregoing cases, especially *Andrews v. Pond*, 13 Pet. 65, 10 L. ed. 61, and *Arnold v. Potter*, 22 Iowa, 194, the courts expressly recognized the general principle that, if the interest allowed by the laws of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury, and distinguished the case where the contract is usurious by the law of both places upon reasoning substantially like that suggested at the beginning of this subdivision. It is true that in a number of the foregoing cases (e. g. *Arnold v. Potter*, 22 Iowa, 194, and *Rascomb v. Zediker*, 48 Neb. 380, 67 N. W. 148) the *lex loci contractus*, which was applied, permitted a recovery of the principal notwithstanding the usury, whereas the *lex loci solutionis* would have rendered the contract void; but the decision is not based on that fact, and in *Andrews v. Pond*, 13 Pet. 65, 10 L. ed. 61, the fact in that respect was reversed, since, by the *lex loci contractus*, which was applied, the contract was wholly void for usury, whereas, the *lex loci solutionis* would have permitted a recovery of the principal.

In *Opdyke v. Merwin*, 13 Hun, 401, however, while the *lex loci contractus* was applied, the decision seems to be upon the ground that the *lex loci contractus* only worked a forfeiture of the interest, while the *lex loci solutionis* would render the contract void *in toto*; and the implication seems to be that, if the facts in that respect had been reversed, the *lex loci solutionis* would have been applied. So, in *Hull v. Wheeler*, 7 Abb. Pr. 411, where it was held that the consequences of reserving usury in a note which was usurious by both the law of Connecticut and of New York were to be determined by the law of Connecticut, the court, while taking the position that Connecticut was both *locus contractus* and *locus solutionis*, intimated that, even if the note had been made in New York, it would still be governed by the law of Connecticut as the *lex loci solutionis*.

And in *Campbell v. Nichols*, 83 N. J. L. 81, the court applied the law of New Jersey to a note made in New York and payable in New Jersey, notwithstanding that it was usurious by the law of the latter state, which, however, merely operated to forfeit the interest, and permitted the recovery of the principal. While it is not so stated, the note in this case was undoubtedly usurious by the law of New York, and, if tested by that law, would have been void *in toto*. The decision in this case is upon the general principle that a contract is governed by the law of the place in which the parties, in good faith, intend it shall be performed. The decision in the last case, if upon the assumption that the contract was usurious by the law of New York, is contrary to the weight of authority as shown by the cases previously cited in this subdivision; and, if upon the assumption that the contract was not usurious by that law, is against the weight of authority as shown by the cases cited in *supra*, IV. c. 3. Upon either assumption the court, in applying the general principle that the law of the place of performance governs, seems to have overlooked the fact that that principle is merely *prima facie*, and is based on the presumed intention of the parties to contract with

reference to that law, which presumption, in the case at bar, is, upon either assumption, opposed by the fact that the contract was made in violation of the law of New Jersey. Upon the first assumption, then, there is no basis for any presumption, since the contract is in violation of both the *lex loci contractus* and the *lex loci solutionis*; and the general principle, which does not rest upon presumed intention, that the *lex loci contractus* governs, therefore applies. Upon the second assumption, the presumption would be that the parties intended to contract with reference to the *lex loci contractus*. Upon either assumption, therefore, it would seem that the *lex loci contractus* should have been applied.

e. Effect of mortgage security.

The cases in which the location of the property mortgaged to secure the loan within the state where the contract was made has been allowed greater or less effect as a circumstance aiding the presumption that the parties intended to contract with reference to the *lex loci contractus*, which was based chiefly upon the circumstance that the contract was valid by the *lex loci contractus*, but invalid by the *lex loci solutionis*, have been referred to in *supra*, IV. c. 3.

In *Jackson v. American Mortg. Co.* 88 Ga. 758, 15 S. E. 812, *supra*, IV. b, it will be observed that the court attached much importance to the location of the mortgaged property.

In *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 163, 13 L. R. A. 299, 9 So. 143, *supra*, IV. c. 3, the court laid considerable stress upon the fact that the loan was secured by a mortgage upon real property, and, while it would not express any opinion upon the question whether the parties may legally contract for a rate of interest which is lawful by the law of the state where the property is situated if the *locus contractus* and *locus solutionis* are in another state where such rate is unlawful, it held that at least the principle is applicable when the *lex loci contractus* and *lex rei sitæ* are coincident. It will be observed, however, that even the rule here intimated only takes account of the location of the land as a circumstance aiding the presumption or inference that the parties intended to contract with reference to a law that would uphold, rather than one that would invalidate, their contract, and as tending to show that such intention was bona fide, and not for the purpose of evading the usury law of the place to which the contract was referable; and this case, therefore, as well as the other cases cited in *supra*, IV. c. 2, in which the location of the premises may have been regarded as an additional circumstance strengthening the presumption of an intention to contract with reference to the *lex loci contractus*, implies, what is shown by the note in *McIlwaine v. Ellington* (C. C. App. 4th C.) 55 L. R. A. 933, to be established by the overwhelming weight of authority, that the location of the land is, at most, but a circumstance bearing upon the question as to what law governs in respect of usury, and does not, of itself and independently of other circumstances, determine that question, as it does in respect of matters pertaining to the form of the mortgage, the sufficiency of the acknowledgment, etc. This is also made clear by the cases cited in *infra*, IV. h, which have held that loans by building and loan associations were governed by the law of the state

where the association was domiciled, although the land mortgaged to secure the loans was situated elsewhere; and the cases cited in *supra*, IV. c. 3, which apply the law of the state where the mortgaged land was situated, do not rest wholly or mainly upon the location of the land there, but upon all of the circumstances of the case, the location of the land being merely regarded as one of the circumstances bearing upon the intent and the bona fides of the parties.

In *Interstate Sav. & L. Asso. v. Badgley*, 115 Fed. 300, the court refused to entertain an action to foreclose a mortgage upon real property in Oregon to secure a loan made by a Minnesota building and loan association, upon the ground that the complaint was without equity, it appearing that the mortgagor had paid an amount that equaled the face of the loan and 12 per cent interest. The court said that the question whether the complaint was without equity was not determinable by the laws of the state where the association was organized, but by the law of the forum.

If the court meant to hold that a complaint in an action to foreclose a mortgage on real property is without equity, when it appears that the contract would be usurious tested by the law of the forum, the principle would have the same effect in practical operation, so far as the mortgage security is concerned, as a rule subjecting the validity of the mortgage with respect to usury to the *lex rei sitæ*, since the forum of an action to enforce the mortgage is necessarily the state or country where the property is situated. This position, however, would be opposed to the great weight of authority, as is apparent from the cases cited in subdivision IV. h, *infra*. Probably the court merely meant to declare the right of the court of the forum to withhold its aid when the contract is excessively usurious, or there are other circumstances, in addition to the mere fact that the contract would be usurious tested by the *lex fori*, that reveal a want of equity.

A contract valid by the law of the state where it was made and to be performed cannot, when sought to be enforced in another state, be held to be invalid as contravening the usury law of that state, notwithstanding it is secured by a chattel mortgage upon property in the latter state executed in the former state. *Whitman v. Conner*, 8 Jones & S. 339.

1. Place where money is to be used.

Wharton, in his *Conflict of Laws*, 2d ed. §§ 504-510, formally adopts the law of the place of performance as the governing law; but, after doing so, he is practically no nearer the solution of the question, what law governs, than he was before, for he proceeds to locate the place of performance by reference to the presumed intention of the parties as to what law should govern. Practically, therefore, he assents to the principle exemplified in the cases heretofore cited, that the question as to what law governs in respect of interest and usury depends upon the presumed intention of the parties; but he differs from most of them in regarding the place where the money is to be used as the circumstance from which the intention of the parties is to be inferred, and therefore adopts the view that the place where the money was intended to be used by the borrower furnishes the applicatory law, though, as already suggested, instead of going to that conclusion directly, he reaches it indirectly by holding that

the place where the money is used is the place of performance which furnishes the applicatory law. He applies this view specifically to loans secured by mortgages upon real property, and says: "The true test is, Was the mortgage merely a collateral security, the money being lent primarily on the debtor's personal credit, or was the money employed on the land for which the mortgage was given? If the former be the case, then the law of the place where the money is due, and not that of the mortgage, applies. If the latter, then the law of the place where the mortgage [mortgaged land] is situate must prevail." The doctrine here advocated, being based upon the presumed intention of the parties, was probably regarded, even by Dr. Wharton, as furnishing merely a prima facie rule applicable when the other circumstances do not overcome the presumption upon which it rests, though it is clear that he did not regard the circumstance that the contract was made and payable in another state as sufficient to overcome that presumption. Dr. Wharton's views, especially as applied to loans secured by mortgage, have been expressly referred to and approved in *New England Mortg. Security Co. v. Vader*, 28 Fed. 265; *Thompson v. Edwards*, 85 Ind. 414; *Meroney v. Atlanta Bldg. & L. Asso.* 116 N. C. 882, 21 S. E. 924; and *National Mut. Bldg. & L. Asso. v. Burch*, 124 Mich. 57, 82 N. W. 837; and there are other cases which mention the fact that the money was used in a certain state as a circumstance favoring the laws of that state as the applicatory law; e. g., *Kellogg v. Miller*, 2 McCrary, 395, 13 Fed. 198; *Fitch v. Remer*, 1 Biss. 337, Fed. Cas. No. 4,836; *Richards v. Globe Bank*, 12 Wis. 692. But these cases merely regarded it as one of many circumstances, and not of itself as a controlling circumstance.

In *Thompson v. Edwards*, 85 Ind. 414, the decision, applying the law of Indiana to the question of usury, rather than the law of New York where some of the notes were payable, was expressly based on the presumed intention of the parties inferred from all the circumstances of the cases, including the facts that the notes and mortgage were executed in Indiana and delivered there to local attorneys of the lender; that the interest reserved was authorized by the law of Indiana, but usurious by the law of New York; and that the local attorneys drew their draft upon the lender in favor of the borrower who discounted the same in Indiana; as well as the circumstance that the proceeds were to be used in paying off encumbrances upon the mortgaged property, and in improving the same.

In *Meroney v. Atlanta Bldg. & L. Asso.* 116 N. C. 882, 21 S. E. 924, and *National Mut. Bldg. & L. Asso. v. Burch*, 124 Mich. 57, 82 N. W. 837, the principal ground of decision, as pointed out in *infra*, IV. h, 2, was that the association had localized its business in the state where the mortgaged land was situated, and that the attempt to give the contract the character of a contract of the state where the association was domiciled was a mere attempt to evade the usury laws of the former state. In most of the cases, however, the place where the money is to be used is not even mentioned as a circumstance bearing upon the question; and few of them show, except by inference, where the money was used. These facts suggest a practical difficulty inherent in this doctrine, viz., that it rests upon a presumption based upon a circumstance (i. e., the place where the money is to be used), which is not ordinarily disclosed by the contract

itself, or by the other circumstances attending a transaction between the lender and borrower; for, ordinarily the particular use to which the borrower intends to devote the proceeds of the loan is no part of the contract, and generally no concern of the lender. In any event, therefore, the doctrine necessarily has a restricted operation, because of the absence of the circumstance calling into life the presumption upon which it rests.

In *Central Trust Co. v. Burton*, 74 Wis. 329, 43 N. W. 141, the court expressly held that the validity of notes was governed by the law of the place where they were made and payable, notwithstanding that the borrowers resided, and intended to use the money, in another state, where land mortgaged to secure the notes was located.

See also *Cope v. Wheeler*, 41 N. Y. 303, *supra*, IV. b.

g. Les loci considerations

The doctrine that the law of the place where the consideration is received governs in respect of usury has been incidentally alluded to in subdivision I.; and it is there stated that the decisions in the great majority of the cases rest upon other grounds, though some of them apply the same law that would have been applied if this doctrine had been adopted. There are a few cases, however, that lend some direct support to the doctrine.

Thus, in *Akers v. Demond*, 103 Mass. 318, it was held that the law of New York with reference to usury governed a bill of exchange drawn in that state payable in Massachusetts upon a resident of the latter state, and accepted by him for the accommodation of the drawer, and returned to the latter, by whom it was first negotiated in New York, the usurious consideration being there received. The court said: "The general principle is that the law of the place of performance is the law of the contract. This rule applies to the operation and effect of the contract, and to the rights and obligations of the parties under it. But the question of its validity, as affected by the legality of the consideration, or of the transaction upon which it is founded, and in which it took its inception as a contract, must be determined by the law of the state where that transaction was had." This language would indicate that the law of the place where the consideration is advanced and received would determine the question of usury, but the following language from a later part of the opinion, taken by itself, would indicate that the ground of the decision is that the contract had its inception in New York: "The only consideration ever paid was the usurious loan made by these plaintiffs in New York. That was the legal inception of the alleged contracts."

By the statutes of New York that transaction was incapable of furnishing a legal consideration, and, so far as the bills depend upon that, they are absolutely void. The original validity of such a contract must be determined by the law of the state in which it is first negotiated or delivered as a contract."

In *Brown v. Nevitt*, 27 Miss. 801, notes secured by a mortgage upon real property in Mississippi were executed in that state, but payable in Louisiana. Upon the assumption that the parties entered into a usurious agreement under cover of an arrangement by which bank credits were advanced as at par, when they were at a depreciation of from 20 per cent to 30 per cent, 62 L. R. A.

Interest being reserved upon the nominal amount of the notes at the legal rate, the court held the contract was governed by the law of Mississippi. The court said, in reply to the argument that, as the notes were made payable in Louisiana, they were governed by the law of that state, that the argument would have much force if the objection to the transaction were merely that a rate of interest, not permitted by the laws of Mississippi, but allowable by the laws of Louisiana, was claimed or charged bona fide, and not with a view of evading the laws of Mississippi upon the subject; for in such a case the law of the place of performance would govern. It held, however, that the objection in the case at bar was that the consideration of the contract was illegal because the payee reserved, as a component part of the principal sum intended to be secured, a usurious rate of interest upon the sum advanced, this being inherent in the transaction, and necessarily governed by the laws of Mississippi, where it was actually done. The court says: "Such a transaction is held to be prohibited by our laws; . . . and it cannot stand on the same principles with a bona fide agreement made in one place to be executed in another. We cannot recognize the laws of Louisiana as rendering valid a contract made here and sought to be enforced here, which is prohibited by our laws. The rule in such case is that the agreement must stand or fall by the laws of the place where it is made."

In *Martin v. Johnson*, 84 Ga. 481, 8 L. R. A. 170, 10 S. E. 1002, (an action upon a note and for a special lien on land in Georgia deeded as security for the payment of the note), it was held that the law of Georgia in respect of usury governed, though the note was payable in Massachusetts. It appeared in this case that the note was executed in Georgia by a resident of that state, and was delivered to an agent of the lender there, who reserved, from the amount for which the note was made, a sum exceeding the interest allowed by the law of Georgia. The court said that it was undoubtedly true, as a general rule, that the interest which a contract should bear is to be governed by the law of the place where the same is to be performed; that that rule applied to all legal contracts, legal where the same are executed and made; but where, according to the law of the place at which the contract is made, it is unlawful to take or exact usury, or more than a certain per cent of interest provided by law as the legal rate, such contract will, in some instances, be construed according to the law of that place. The reasoning by which the court supports its decision is that, while the note was payable in Massachusetts, the contract, so far as the usurious interest was concerned, was performed in Georgia when the amount representing usurious interest was withheld from the borrower. This, however, is not the sole ground of the decision, since the court emphasizes the fact that the note was secured by a mortgage upon real property in Georgia.

The effect generally accorded to the place where the consideration is advanced as a factor in determining the governing law, when mentioned at all, is well illustrated by the following case:

The interest laws of the state in which the bonds were dated and delivered, and the money paid and the land securing them situated, control, rather than those of the state in which the bonds are payable, where the rate of interest reserved is permitted by the laws of the former

state, but prohibited by those of the latter, and the entire transaction shows that the parties were contracting with reference to the interest laws of the former state. *Gault v. Equitable Trust Co.* 100 Ky. 578, 38 S. W. 1065. This case, it will be observed, makes the intention of the parties the criterion, and merely regards the place where the consideration was advanced as one of several circumstances bearing upon the point, whereas, according to Professor Minor's theory, it would, in and of itself, be conclusive, irrespective of the other circumstances.

In *Murphy v. State*, 3 Head, 250, it was held that the law of Tennessee making it an offense to take usury could not be evaded by parties going into another state for the purpose of reducing the contract to writing and paying over the money to the borrower, where the usury was paid to the lender in Tennessee. The court said, however, that, if a bona fide contract for the payment of money at some place in another state had been entered into, the rate of interest would have been governed by the law of that state; and in such case the reception of the money in Tennessee,—though the rate of interest may have exceeded that prescribed by the law of Tennessee,—would not have been usury.

See also *Second Nat. Bank v. Smoot*, 2 MacArth. 371, and *Pratt v. Adams*, 7 Paige, 615,—*supra*, IV. c. 3.

As suggested in division I., *supra*, when the consideration for the new contract consists of a former contract, it is difficult to resist the conclusion that the question of usury, even as affecting the new contract, must be determined by the law governing the original contract. But in *Sheldon v. Haxton*, 91 N. Y. 124, where the holder of a note, made in, and governed by the law of, New York and usurious by that law, upon receiving a partial payment of the principal, sent the note to the maker in Illinois and requested a new note for the balance, giving as a reason that there was no room to make indorsements of payments on the old note, and the maker, pursuant to such request, executed a new note in Illinois, expressing no place of payment, and forwarded it through the mail to the payee in New York,—the court held that the new note was governed by the law of Illinois in respect of usury. The decision is upon the ground that the new note became complete when it was deposited in the mail in Illinois; and while the court admitted that, if the new note had been given in New York, even with a lawful rate of interest in renewal of, or in substitution for, the prior usurious note, it would have been tainted with usury, it said that the original note was not, in Illinois, illegal or tainted with usury, because the laws of New York were not operative there, but was simply subject to the defense, on the part of the maker, of being unlawful because made in violation of the laws of New York where it was executed; and the court reaches the conclusion that the contract was purged of usury. The decision, therefore, rests upon the assumption that the original note was valid in Illinois for all purposes save that of maintaining an action there.

In *Rhawn v. Grant*, 1 MacArth. 31, it was held that a note made and payable in the District of Columbia, and not stipulating for a usurious rate of interest, would not be deemed usurious, although it was given for a part of the principal of a note which was made and payable in Pennsylvania, and which was usurious by the law of that state, it appearing that, under the law of Pennsylvania, the reservation

of usury did not invalidate the note. Here the transaction seems to have been purged of usury, even regarding it as governed by the law of Pennsylvania; and this distinguishes it from the preceding case. The implication seems to be that, if the original note had been void for usury in Pennsylvania, it would not have supported the new note.

h. Contracts of foreign building and loan associations.

The contracts of this class are, of course, subject to the same general principles as other classes of contracts; but they possess certain features peculiar to them as a class, that affect the application of these principles, and for that reason are considered separately.

It has been shown in division I. that, save in the case where the contract is usurious by both the *lex loci contractus* and the *lex loci solutionis*, the question as to what law governs in respect of interest and usury is, in its last analysis, one as to the intention of the parties, subject to the qualification that the parties must have acted in good faith and without any intention of evading the usury laws of the place to which the contract is really referable. The apparent conflict among the cases dealing with this class of contracts seems to be due, not to any difference of opinion as to the soundness of this general principle, nor even as to the soundness of the subordinate rules that have been formulated for ascertaining the unexpressed intention of the parties, but to a difference of opinion respecting the application of the same, arising in part from the different emphasis laid by different courts upon certain circumstances as affecting the intention of the parties or their good faith, and in part from the difference in the circumstances themselves. Eliminating, for the moment, the question as to the good faith of the parties and the circumstances especially bearing upon that point, these cases have usually presented a state of facts which, in its main features, is substantially as follows: A note or bond, payable at the home of the association, made by a resident of another state, secured by a mortgage upon real property in the latter state; a contract valid if governed by the law of the former state, but usurious if governed by the law of the latter; in some of the cases the contract has been regarded as having been made (*i. e.*, consummated) in the state of the borrower's residence; and in others as having been made in the state of the association's domicile; in some of the cases the contract expressly stipulated that it should be governed by the law of the state where the association was domiciled. Other circumstances are occasionally mentioned, but the foregoing are those upon which the decisions have usually turned.

Disregarding for the present the question as to good faith, it will be observed that the foregoing facts, even after eliminating the express stipulation as to the governing law, and assuming that the contract was made in the state of the borrower's residence, present a case falling within the principle stated and applied in subdivision IV. c. 2, *supra*, and therefore governed by the law of the place of payment, which, in these cases, is the law of the place of the association's domicile.

Cases applying law of domicile of association.

In the cases next cited, which involved substantially such a state of facts (eliminating the express stipulation), the law of the domicile of

the association was applied, and the contract upheld, upon the ground that that was the place of payment. Some of these cases do not expressly hold that the contract must be regarded as made in the other state; but the decisions clearly rest, either upon the principle that the parties are presumed to have contracted with reference to the law of the place of payment, or the other principle, which in this instance is coincident with the first, that they are presumed to have contracted with reference to a law that will uphold, rather than one that would invalidate, their contract, so that the place where the contract was made was immaterial except as it may have borne on the question of good faith. *Redford v. Eastern Bldg. & L. Asso.* 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597; *Building & L. Asso. v. Logan*, 14 C. C. A. 133, 30 U. S. App. 163, 66 Fed. 827; *Dygart v. Vermont Loan & T. Co.* 37 C. C. A. 389, 94 Fed. 913, Affirming 89 Fed. 123; *Hieronimus v. New York Nat. Bldg. & L. Asso.* 101 Fed. 12; *ManSHIP v. New South Bldg. & L. Asso.* 110 Fed. 845; *McIlwaine v. Ellington*, 55 L. R. A. 933, 49 C. C. A. 446, 111 Fed. 578; *Miles v. New South Bldg. & L. Asso.* 111 Fed. 946; *Gale v. Southern Bldg. & L. Asso.* 117 Fed. 732; *Alexander v. Southern Home Bldg. & L. Asso.* 120 Fed. 963; *Pacific States Sav. Loan & Bldg. Co. v. Green*, 123 Fed. 43; *Pioneer Sav. & Loan Co. v. Nonnemacher*, 127 Ala. 521, 30 So. 79; *Hayes v. Southern Home Bldg. & L. Asso.* 124 Ala. 603, 26 So. 527; *Barrett v. Central Bldg. & L. Asso.* 130 Ala. 294, 30 So. 347; *Farmers' Sav. & Bldg. & L. Asso. v. Kent*, 131 Ala. 240, 30 So. 874; *Home Sav. & L. Asso. v. Mason*, 127 Mich. 676, 87 N. W. 74; *Bennett v. Eastern Bldg. & L. Asso.* 177 Pa. 233, 34 L. R. A. 595, 35 Atl. 684; *People's Bldg. Loan & Sav. Asso. v. Berlin*, 201 Pa. 1, 50 Atl. 308; *Equitable Bldg. & L. Asso. v. Vance*, 49 S. C. 402, 27 S. E. 274, 388, 29 S. E. 204; *Tobin v. McNab*, 53 S. C. 73, 30 S. E. 827; *Turner v. Interstate Bldg. & L. Asso.* 51 S. C. 33, 27 S. E. 947; *Pollock v. Carolina Interstate Bldg. & L. Asso.* 51 S. C. 420, 29 S. E. 77; *Interstate Bldg. & L. Asso. v. Powell*, 55 S. C. 316, 33 S. E. 355; *National Mut. Bldg. & L. Asso. v. Ashworth*, 91 Va. 706, 22 S. E. 521; *Nickels v. People's Bldg. Loan & Sav. Asso.* 93 Va. 380, 25 S. E. 8; *Ware v. Bankers' Loan & Invest. Co.* 95 Va. 680, 29 S. E. 744; *People's Bldg. Loan & Sav. Asso. v. Tinsley*, 96 Va. 322, 31 S. E. 508.

Upon the same principle, it was held in *Interstate Bldg. & L. Asso. v. Edgefield Hotel Co.* 120 Fed. 422, upon a similar state of facts, that the manner of determining the amount due was governed by the law of the state where the association was domiciled.

It may be observed, with reference to the South Carolina cases above cited, that the contracts involved were made before the passage of the South Carolina statute to the effect that all contracts secured by mortgage on real estate situated in the state shall be subject to, and construed by, the law of the state regulating the rate of interest allowed, without regard to the place named for performance.

In the three cases next cited in which the law of the domicile of the association was applied, and the contract accordingly upheld, the court seems to have regarded the contract as made (i. e., consummated) in the state where the association was domiciled, it being also payable there, so that the *lex loci contractus* and *lex loci solutionis* were the same; and, while it is not probable that the decision would have been 62 L. R. A.

different if it had been found that the contract was made in the state of the borrower's residence, it is not so clear as in the cases above cited that the decision is upon the ground that the *lex loci solutionis* governs: *Farmers' Sav. & Bldg. & L. Asso. v. Kent*, 131 Ala. 246, 30 So. 874; *Pioneer Sav. & Loan Co. v. Cannon*, 96 Tenn. 599, 33 L. R. A. 112, 36 S. W. 386; *United States Sav. & Loan Co. v. Miller* (Tenn. Ch. App.) 47 S. W. 17 (Affirmed by Supreme Court).

In *Farmers' & M. Sav. Co. v. Bazole*, 67 Ark. 252, 54 S. W. 339, the decision applying the law of the domicile of the association is formally put upon the ground that the contract was made there; but in this case no place of payment was expressly designated.

In *American Bldg. Loan & Tontine Asso. v. McClellan* (Ark.) 70 S. W. 463, the decision is upon the ground that the contract was both made and payable at the home office of the association.

In *National Bldg. & L. Asso. v. Riley*, 4 Pa. Dist. R. 663, also, the decision is put upon the ground that the contract was made and payable at the home office; but in *Bennett v. Eastern Bldg. & L. Asso.* 177 Pa. 233, 34 L. R. A. 595, 35 Atl. 684, *supra*, the decision was expressly put upon the ground that the law of the place of payment governs, irrespective of the place where the contract was made.

In the cases thus far cited, the conclusion that the law of the domicile of the association should govern was reached without the aid of an express stipulation to that effect in the contract, or, at least, if there was such stipulation no particular importance was attached to it. In other words, the intent that such law should govern was inferred from the circumstances of the case, especially the circumstance that the contract was payable at the domicile of the association. In the following cases, however, in which the law of the domicile of the association was applied there was an express stipulation in the contract to the effect that that law should govern: *Andruss v. People's Bldg. Loan & Sav. Asso.* 36 C. C. A. 336, 94 Fed. 575; *United States Sav. & Loan Co. v. Harris*, 113 Fed. 27; *United States Sav. & Loan Co. v. Shain*, 8 N. D. 136, 77 N. W. 1006; *Russell v. Pierce*, 121 Mich. 208, 80 N. W. 118; *Phelps v. American Sav. & L. Asso.* 121 Mich. 343, 80 N. W. 120; *Equitable Bldg. & L. Asso. v. Hoffman*, 50 S. C. 303, 27 S. E. 602. In these cases, however, the contracts were payable at the domicile of the association; and in the second case the court expressly left out of consideration the stipulation in question; in the third case the court practically said the decision would have been the same even without the stipulation; and the last case was decided on authority of *Equitable Bldg. & L. Asso. v. Vance*, 49 S. C. 402, 27 S. E. 274, 388, 29 S. E. 204, in which there was no such stipulation.

In *Carpenter v. Lewis*, 60 S. C. 23, 38 S. E. 244, however, the decision expressly turns upon the stipulation. Pope, J., who wrote the opinion, said that, in reaching the conclusion that the law of Tennessee, the domicile of the association, governed, he was not governed by the fact that the obligation or note of the borrower was made payable at the home office, nor by the stipulation that, in receiving payments of debt, interest, or dues, the local treasurer of the association in South Carolina should be deemed the agent of the members, and not of the association; but that it was within the power of the

parties to make the contract a Tennessee contract by express stipulation to that effect.

In *Equitable Bldg. & L. Asso. v. Vance*, 49 S. C. 402, 27 S. E. 274, 388, 29 S. E. 204, *supra*, the court held that the question whether a contract of loan by a building and loan association of Georgia to a resident of South Carolina, secured by a mortgage upon land in the latter state, was to be performed in Georgia or South Carolina, was a mixed question of law and fact. The circuit judge said that, in view of all the terms of the contract and the surrounding circumstances, he was forced to the conclusion that the parties to the contract intended it should be paid in Georgia, and it was, therefore, governed by the law of Georgia, and his decision on these points was approved by the supreme court. In *Pollock v. Carolina Interstate Bldg. & L. Asso.* 51 S. C. 420, 29 S. E. 77, it is stated that the decision in the *Vance* Case was merely that a contract for payment in another state is to be enforced according to the law of the state where it is to be performed.

In *Hollis v. Covenant Bldg. & L. Asso.* 104 Ga. 318, 31 S. E. 215, it was held that a loan made by a building and loan association of Tennessee to a resident of Georgia, secured by deed of land in the latter state, was governed by the law of Georgia in respect of usury, upon the assumption that the loan was, in fact, made, and was to be repaid, in Georgia; but upon the assumption that it was in fact made, and was to be repaid, in Tennessee, the court said that the legal rate of interest allowed by the laws of that state must be looked to, to determine whether or not the contract was usurious.

In *Guarantee Sav. Loan & Invest. Co. v. Alexander*, 96 Fed. 870, a resident of South Carolina made an application for a loan to a building and loan company incorporated in West Virginia but having its principal office in the District of Columbia, through a local agent of the association in South Carolina; the application was forwarded to the principal office and there passed upon; the notes given for the loan were payable at the principal office, and the checks for the proceeds were drawn in, and sent from, Washington, and were payable in New York. The payments by the borrower on the loan were made to the local agent. It was held that the contract must be regarded as having been made in the District of Columbia, and as governed by the law of the district under which the contract was valid, although such a contract would be usurious if governed by the law of South Carolina. The court cites and relies upon *Equitable Bldg. & L. Asso. v. Vance*, 49 S. C. 402, 27 S. E. 274, 388, 29 S. E. 204, and *Tobin v. McNab*, 53 S. C. 73, 30 S. E. 827.

The following, though not expressly involving the question of usury, apply the same principle as the foregoing cases.

In *Barry v. Snowden*, 106 Fed. 571, it was held that the validity of a stipulation for attorney's fee in case of foreclosure in a mortgage upon land given to a building and loan association of Illinois, whose by-laws provide that all contracts made by or with it shall be deemed to have been made at its home office in Illinois, was to be governed by the law of Illinois. The court said that, of course, so far as the mere forms to be observed in the execution of a mortgage are concerned, they must conform to the law of the state where the real estate is situated; but, as to the obligations to be secured by the mortgage, they are independent of the statutory forms for its execution, and are to be governed by the general principles of the law of contracts.

So, contracts between a building and loan association, incorporated and doing business under the laws of one state, and its borrowing stockholders must be considered as having been made with reference to such laws, and as being governed thereby, notwithstanding that the loans are secured by mortgages executed in another state on land there situated. *MacMurray v. Gosney*, 106 Fed. 11. The question in this case was whether the rule in Pennsylvania, by which a borrowing stockholder, in settling with an insolvent building and loan association, is to be charged only with what he actually received and interest, or the law of Illinois, by which he is chargeable, in addition, with the part of the premium he contracted to pay,— was to govern.

In *Neal v. New Orleans Loan, Bldg. & Sav. Asso.* 100 Tenn. 607, 46 S. W. 755, it was held that a contract for the loan of money, by a building and loan association having no local board or agency in the state, made direct from its own office in Louisiana, secured by a mortgage on land in Tennessee, the loan and each instalment note thereon being payable in Louisiana, was a Louisiana contract; and the Tennessee statute requiring foreign corporations to register their charters as a condition of doing business or holding property in the state did not apply. There was no question of usury involved in this case, but the principle laid down seems applicable, and the court relies on the decisions in several cases involving usury.

Thus far the cases cited in this subdivision have been set forth only sufficiently to show that they reached the conclusion that the law of the domicile of the association should govern by applying the general principle, explained in division I., that the intention of the parties shall prevail; in most cases ascertaining that intention by the application of the subordinate principles that, in the absence of rebutting circumstances, the parties are presumed to have contracted with reference to the law of the place of payment, or that they are presumed to have contracted with reference to a law that will uphold, rather than one that will invalidate, their contract. It must be remembered, however, that both the general and the subordinate principles are subject to the qualification that the intention, expressed or presumed as the case may be, must have been entertained in good faith, and not for the purpose of evading the usury law of the place to which the contract was really referable. Most, if not all, of the foregoing cases conceded or assumed the existence of this qualification; and since, in spite of it, they applied the general principles, they must be regarded as having negatived its application to the particular circumstances involved. Those in which the question as to the applicability of this qualification is discussed and expressly denied will be hereafter referred to in comparison with the cases next cited in which the qualification has been applied.

Cases applying local law.

The following cases have applied the local law in respect of usury to loans by foreign building and loan associations to residents of the state secured by mortgages upon real property within the state, notwithstanding that the contract was, by its terms, payable in the state where the association was domiciled, and in some instances expressly stipulated that it was

made with reference to the law of that state, and notwithstanding that by the local law the contract was usurious, whereas by the law of the domicile it was perfectly valid. *Falls v. United States Sav. Loan & Bldg. Co.* 97 Ala. 417, 24 L. R. A. 174, 13 So. 25; *Skinner v. Southern Home Bldg. & L. Assn.* (Fla.) 35 So. 67; *Vermont Loan & T. Co. v. Hoffman* (Idaho) 37 L. R. A. 509, 49 Pac. 314; *Pryse v. People's Bldg. Loan & Sav. Assn.* 19 Ky. L. Rep. 752, 41 S. W. 574; *Lockman v. United States Sav. & Loan Co.* 103 Ky. 285, 44 S. W. 977; *United States Sav. & L. Assn. v. Colson*, 21 Ky. L. Rep. 12, 50 S. W. 988; *United States Sav. & Loan Co. v. Scott*, 98 Ky. 695, 34 S. W. 235; *National Mut. Bldg. & L. Assn. v. Burch*, 124 Mich. 57, 82 N. W. 837; *Hoskins v. Rochester Sav. & L. Assn.* (Mich.) 95 N. W. 566; *Shannon v. Georgia State Bldg. & L. Assn.* 78 Miss. 955, 57 L. R. A. 800, 30 So. 51; *National Mut. Bldg. & L. Assn. v. Brahan*, 80 Miss. 407, 57 L. R. A. 793, 31 So. 840; *National Bldg. & L. Assn. v. Wilson*, 78 Miss. 993, 30 So. 56; *National Mut. Bldg. & L. Assn. v. Pinkston* (Miss.) 31 So. 834; *National Mut. Bldg. & L. Assn. v. Farnham* (Miss.) 33 So. 2; *National Mut. Bldg. & L. Assn. v. Hulet* (Miss.) 33 So. 3; *Building & L. Assn. v. Bilan*, 59 Neb. 458, 81 N. W. 308; *People's Bldg. Loan & Sav. Assn. v. Shaffer*, 63 Neb. 573, 88 N. W. 669; *National Mut. Bldg. & L. Assn. v. Retzman* (Neb.) 96 N. W. 204; *People's Bldg. Loan & Sav. Assn. v. Parish* (Neb.) 96 N. W. 243; *Meroney v. Atlanta Bldg. & L. Assn.* 116 N. C. 882, 21 S. E. 924; *Rowland v. Old Dominion Bldg. & L. Assn.* 115 N. C. 825, 18 S. E. 965; *Washington Nat. Bldg. Loan & Invest. Assn. v. Stanley*, 38 Or. 340, 58 L. R. A. 816, 63 Pac. 459; *Pacific Bldg. Co. v. Hill*, 40 Or. 280, 56 L. R. A. 163, 67 Pac. 103; *Hicinbotham v. Interstate Loan Assn.* 40 Or. 511, 69 Pac. 1018; *Southern Bldg. & L. Assn. v. Riggle*, 4 Pa. Dist. R. 617; *Building & L. Assn. v. Griffin*, 90 Tex. 480, 39 S. W. 656; *Crenshaw v. Hedrick*, 19 Tex. Civ. App. 52, 47 S. W. 71; *Southern Bldg. & L. Assn. v. Atkinson*, 20 Tex. Civ. App. 516, 50 S. W. 170; *People's Bldg. Loan & Sav. Assn. v. Bessonette* (Tex. Civ. App.) 48 S. W. 52; *National Loan & Invest Co. v. Stone* (Tex. Civ. App.) 46 S. W. 67.

In *Meares v. Finlayson*, 55 S. C. 105, 32 S. E. 986, it was immaterial, in view of the position the court took, whether the contract was a South Carolina, or a North Carolina, contract; but Chief Justice McIver intimated that in his opinion the contract was to be regarded as a South Carolina contract, and commented favorably upon the views expressed in *Rowland v. Old Dominion Bldg. & L. Assn.* 115 N. C. 825, 18 S. E. 965. He said, with reference to *Pollock v. Carolina Interstate Bldg. & L. Assn.* 51 S. C. 420, 29 S. E. 77, that the majority of the court concurred only in the result, and that there were other grounds upon which such a concurrence might have rested than the conclusion of the writer that the contract there in question, similar to the contract involved in the case at bar, was a North Carolina contract. He stated, further, he did not know that it had been authoritatively decided that the contract in question was a North Carolina contract.

Spinney v. Chapman (Iowa) 95 N. W. 230, said that, while it may be true that the involved character of building and loan contracts, and the general interests of the contracting associations, require that such contracts shall be referable to the law of the domicile of the associations, to the end that certainty and uniformity

may result, such doctrine ceases to apply when the association is no longer a going concern, and all its interests in the contract have been transferred without recourse to a stranger. It was accordingly held that the computation of the amount due (no question of usury being involved) between such stranger and a resident of Iowa should be according to the law of Iowa, the association having had a local treasurer in that state to whom payments might be made, and no place of payment having been specified in the bond, although the by-laws of the association provided that all payments should be made, and contracts performed, at the home office of the association in Illinois.

In *National Mut. Bldg. & L. Assn. v. Culbertson*, 126 Ala. 682, 25 So. 173, and *Southern Bldg. & L. Assn. v. Harris*, 98 Ky. 41, 32 S. W. 261, which also apply the local law, it does not appear where the contract was, by its terms, payable; and in the latter case the question as to what law governs is treated as though it turned upon the question where the contract was made.

In *Harmon v. Hart* (Tenn. Ch. App.) 53 S. W. 310, which also applied the local law, the note, which was executed in Tennessee, was silent as to the place of payment, and the deed of trust, which was also executed there, was conditioned in terms for payment at the local office of the association in Tennessee, but expressly made the by-laws of the association a part of the contract, and one of those by-laws provided that all moneys due from members should be payable at the home office (in Georgia); and another provided that, if the members desired, they might make monthly payments to the local treasurer, but that the latter should be deemed the agent of the members, and not of the association.

In *People's Bldg. Loan & Sav. Assn. v. Fowble*, 17 Utah, 122, 53 Pac. 990, and *Snyder v. Fidelity Sav. Assn.* 23 Utah, 291, 64 Pac. 870, where the local law was also applied, the terms of the contract in respect of the place of payment do not appear, but the payments were in fact made in Utah, and not at the home office of the association.

In *Falls v. United States Sav. Loan & Bldg. Co.* 97 Ala. 417, 24 L. R. A. 174, 13 So. 25, *supra*, the decision seems to be upon the ground that the contract, though payable by its terms at the domicile of the association and expressly stipulating that it was made with reference to and under the laws of such domicile, was nevertheless made in Alabama. *Stone, Ch. J.*, dissented upon this point, and took the position, upon a rehearing, that the contract must be regarded as having been completed in Minnesota, the domicile of the association, and therefore held that the contract was governed by the law of Minnesota. Upon the original hearing, he seems to have agreed with the majority that the contract must be regarded as having been made in Alabama, and he was then of the opinion that it was governed by the law of that state.

In his opinion on the rehearing he cites the authorities supporting the principle that, if a contract is made under one government, and to be performed under another, its validity is governed by the law of the place of performance. It is not apparent why the application of this principle would not subject the contract to the law of Minnesota, even upon the assumption that the contract was made in Alabama, since in any case it was expressly payable in Minnesota.

Speaking broadly, however, most of the foregoing decisions rest upon the ground that the parties did not act in good faith in stipulating that the contract was made with reference to the law of the domicile of the association, or in making the contract payable at such domicile; but that their purpose was to evade the usury law of the state of the borrower's residence, and that their real intention was that the contract should be performed in the latter state. This general ground is clearly shown in *Building & L. Asso. v. Griffin*, 90 Tex. 480, 39 S. W. 656. The court in that case said that the question to be determined was whether or not the contract, under the evidence and surrounding circumstances, was really intended to be performed in the territory of Dakota (the domicile of the association), or in the state of Texas; that the general rule of law contended for by the association, that a contract which is to be performed in a state other than that in which it was made may reserve interest according to the laws of either state, is too well settled to require either discussion or citation of authorities, but that the law looks to the substance of the contract, and will not tolerate any contrivance in which it is intended to evade the laws of the state in which the contract is made or sought to be enforced; the fact that the contract expresses that the money borrowed is to be paid in the territory of Dakota is met by the real substantial provisions for its enforcement and the circumstances under which it was transacted, with such overwhelming force that the conclusion is necessary that the contract, in so far as it provides by its terms for the payment of money in Dakota, was simply a device to evade the laws of Texas; and such facts are so manifest from the face of the papers themselves that it was not a question of fact, but was a matter of law. The fact that the association in this case had procured a permit to do business in the state is emphasized. The report does not set out the exact course of the procedure in granting the loan and executing the papers, and it does not expressly appear where the papers were delivered, or where the money was advanced, though presumably both of these things took place in Texas.

Effect given by cases applying local law to localization of business.

When the cases are examined with reference to the particular circumstances upon which the courts have based their decisions that the state of the borrower's residence was the real situs of the contract, and that the designation of the domicile of the association as the place of payment, or the express stipulation that its law should be the governing law, was merely for the purpose of evading the usury law of the former state, it will be found that while each case depends, to a certain extent, upon its own circumstances, and that the location of the premises, the place where the proceeds of the loan were received and were to be used, and other circumstances are sometimes mentioned,—yet the main and distinguishing circumstance is the localization of the business of the association within the state. Thus, in *Shannon v. Georgia State Bldg. & L. Asso.* 78 Miss. 955, 57 L. R. A. 800, 30 So. 51, the court said that the decision rested upon two grounds: "First, that, where a foreign money-lending corporation has localized its business within this state through local boards doing here regularly and continuously for years the business of the corporation, it has thus voluntarily domesticated itself with-

in this state, and subjected its business and contracts to the operation of our laws; and, second, that where, in such case, all the facts, fairly weighed, show that the only purpose of a mere stipulation in the notes or mortgages for payment in a foreign state must have been to evade our laws on the subject of usury, no device, or disguise, or contrivance will prevent the court from stripping off the mask and pronouncing the judgment of the law on the real case made by the actual facts." The court distinguished the case at bar from one where a non-resident money lender, or a foreign corporation in a few isolated cases, deals with the citizens of Mississippi, and takes notes payable in the state of the domicile of such person or corporation. In both these cases the effect of the application of the law of Mississippi was to hold the contract usurious. Both were actions to recover the usurious interest.

In *National Mut. Bldg. & L. Asso. v. Braham*, 80 Miss. 407, 57 L. R. A. 793, 31 So. 840, the business of the association had been localized in the state through local boards; and payments were made to the secretary and treasurer of the local boards; but in *National Bldg. & L. Asso. v. Wilson*, 78 Miss. 993, 30 So. 56, the court said that no distinction could be based on the fact that the business had been localized through agents instead of boards, and the payments made to agents.

So, in *United States Sav. & Loan Co. v. Scott*, 98 Ky. 695, 34 S. W. 235, the court said, in effect, that, when a foreign building and loan association employs the usual agencies to solicit and transact business in the state, and contracts for the payment of premiums and interest in excess of the rate authorized in the state, the transaction will be denounced as an attempt at evasion of the laws of Kentucky, whatever may be the nominal rate specified, or artifice adopted.

In *Building & Loan Asso. v. Bilan*, 59 Neb. 458, 81 N. W. 308, *supra*, the trial court found that the contract in question was made in, and governed by, the laws of Nebraska, notwithstanding a stipulation in the note that it was understood to be made with reference to and under the laws of the territory of Dakota, and that all sums were payable at the office of the association in Dakota; and the supreme court said that the finding had ample evidence in the record to sustain it, pointing out that the real estate encumbered by the mortgage was located in Nebraska; the loan was negotiated there through the lender's agent; the mortgages were executed and delivered and the money paid in Nebraska. The court further says that it is plain that the clause referred to was inserted in the notes as a mere shift or device to escape the penalties of the Nebraska usury laws, and that such clause, in view of the other facts proved, did not have the effect to make the statutes of Dakota govern in the construction and validity of the contracts.

In *Pacific Bldg. Co. v. Hill*, 40 Or. 280, 56 L. R. A. 163, 67 Pac. 103, *supra*, the court said that it was a sound doctrine that a contract for the payment of money, entered into bona fide in one place, and made payable in another, is to be construed, governed, and enforced according to the laws of the state or country where payable; but that that principle did not apply where there was a manifest purpose to avoid the laws of usury. In this case the foreign association was transacting business in Oregon, and had an agent and local board whose function it was to promote the membership of the associ-

ation and approve its loans. The court said that, notwithstanding the express stipulation that the bond was payable in San Francisco, the contract was solvable by the laws of Oregon. The opinion, as a whole, seems to rest upon the idea that the designation of California as the place of performance was merely for the purpose of evading the law of Oregon, but some parts of it seem to indicate that the court regarded the contract as coming within the principle that a court of one state is not bound to enforce or hold valid a contract which is injurious to its public rights, offends its morals, contravenes its policy, or violates a public law, notwithstanding that it was made, and, by its terms, was performable, in another state. In this connection, the court says that the association, although pretending to operate as a building and loan association, had adopted a plan or scheme not in accordance with the true principles and purposes of such association, with the manifest design of collecting interest by another name, and by deception to induce the payment of an unusual and unlawful rate. The court does not clearly distinguish between these two grounds; but it would seem that the latter ground is somewhat broader than the former, since the principle upon which it rests is applicable, even assuming that the contract was in good faith made and to be performed in another state.

In *Hieinbothem v. Interstate Loan Asso.* 40 Or. 511, 69 Pac. 1018, *supra*, the court said the facts that the plaintiff in the Hill Case had made loans to other citizens of Oregon, and had a local advisory board composed of citizens of Oregon, did not differentiate it from the present case, as such circumstances only went to show, and were alluded to by the court as evidence, that the company was doing business in Oregon, and that the agreement between it and the borrower was not an isolated instance of a nonresident making a contract with a citizen of Oregon to be performed elsewhere; that, while the association in the case at bar did not have a local advisory board, and it does not appear that it had in fact made loans to other persons, it had a resident agent in the state with authority to take applications for loans and forward them to the home office, and, although it was stipulated that all payments on stock, premiums, and interest were due and payable at the home office, it did, "for the convenience" of its members, send "for collection to the local bank or treasurer the monthly instalment receipts."

In *National Loan & Invest. Co. v. Stone* (Tex. Civ. App.) 46 S. W. 67, *supra*, the court said it could not distinguish the case in principle from *Building & L. Asso. v. Griffin*, 90 Tex. 480, 39 S. W. 658, though in the latter case a good deal of stress was laid on the fact that the foreign company had obtained a permit to do business in Texas, while in the case at bar no such fact appears in the record. The court said it did appear that the association had a local agent, and that the transaction in question was done through him, and that, being in fact engaged in business in Texas, the association could not avoid the construction given in the *Griffin* Case by avoiding a compliance with the laws affecting foreign corporations.

The fact that payments were actually made by the borrower to local boards or agents of the association has been regarded as significant in this connection, though, according to the strict terms of the contract, it was payable at the 62 L. R. A.

domicil of the association, and the local boards or agent were, *pro hac vice*, the agents of the borrower. Thus:

In *National Mut. Bldg. & L. Asso. v. Farnham* (Miss.) 33 So. 2, the court adhered to its decision in the *Braham* Case, and pointed out an additional ground upon which both cases could rest. This new ground was based upon a provision in the certificate of stock, that "all payments due by reason of this contract must be paid at the principal office, unless the stockholder received official notice in writing from the association designating a depository or collection agent to whom to make payment." The court pointed out that the stock certificate was the basis of the contract, and, together with the bond or note and the mortgage, constituted the contract; that the association did fix a new place of payment,—in Mississippi,—and established there its local board with full corps of officers, constituting one of these officers,—the secretary and treasurer of the local board,—its agent to receive payments at Meridian; and that all the payments were actually made there to the local agent of the association.

In *National Mut. Bldg. & L. Asso. v. Burch*, 124 Mich. 67, 82 N. W. 837, it was held that a loan by a building and loan association of New York to a resident of Michigan, secured by a mortgage upon real property in the latter state, was governed by the law of Michigan, and was usurious. In this case the association had a local agent in Michigan authorized to solicit and receive applications for shares, and to collect and receipt for entrance fees on all shares, but with no authority to collect any other moneys of the association. The land was appraised by members of the local board, and the loan approved by the officers in New York; the loan, according to the terms of the mortgage and bond, was payable at the office of the company in New York; the checks for the loan were sent to the local attorney of the company in Michigan; he examined the title to the lands and turned over the checks to the borrower; the mortgage was delivered to the local attorney; put upon record, and sent to the association; nearly all the payments on the stock and loan were made to the treasurer of the local board. It also appeared that the loan was made to enable the borrower to pay off an existing mortgage and build a house upon the mortgaged property. The court said that while, by the terms of the mortgage, the loan was to be paid in New York, it was expected the money would be paid to the treasurer of the local branch, and most of it was so paid. The court quotes at length from the decision in *Meroney v. Atlanta Bldg. & L. Asso.* 116 N. C. 882, 21 S. E. 924, including the part of that opinion emphasizing the fact that the proceeds of the loan were to be used on the land. The court, referring to the decisions that hold that a foreign corporation is subject to the same restrictions as a domestic association, said there was nothing in *Russell v. Pierce*, 121 Mich. 208, 80 N. W. 118, or *Phelps v. American Sav. & L. Asso.* 121 Mich. 343, 80 N. W. 120, to conflict with such cases, as it did not appear in those cases that what was done would be in violation of the law of Michigan if done by a Michigan building and loan association. The position taken in the *Burch* Case is reaffirmed in *Hoskins v. Rochester Sav. & L. Asso.* (Mich.) 95 N. W. 566.

In *Home Sav. & L. Asso. v. Mason*, 127 Mich. 676, 87 N. W. 74, the same court held that a loan by a building and loan association of Minn-

Speaking broadly, however, most of the foregoing decisions rest upon the ground that the parties did not act in good faith in stipulating that the contract was made with reference to the law of the domicile of the association, or in making the contract payable at such domicile; but that their purpose was to evade the usury law of the state of the borrower's residence, and that their real intention was that the contract should be performed in the latter state. This general ground is clearly shown in *Building & L. Asso. v. Griffin*, 90 Tex. 480, 39 S. W. 656. The court in that case said that the question to be determined was whether or not the contract, under the evidence and surrounding circumstances, was really intended to be performed in the territory of Dakota (the domicile of the association), or in the state of Texas; that the general rule of law contended for by the association, that a contract which is to be performed in a state other than that in which it was made may reserve interest according to the laws of either state, is too well settled to require either discussion or citation of authorities, but that the law looks to the substance of the contract, and will not tolerate any contrivance in which it is intended to evade the laws of the state in which the contract is made or sought to be enforced; the fact that the contract expresses that the money borrowed is to be paid in the territory of Dakota is met by the real substantial provisions for its enforcement and the circumstances under which it was transacted, with such overwhelming force that the conclusion is necessary that the contract, in so far as it provides by its terms for the payment of money in Dakota, was simply a device to evade the laws of Texas; and such facts are so manifest from the face of the papers themselves that it was not a question of fact, but was a matter of law. The fact that the association in this case had procured a permit to do business in the state is emphasized. The report does not set out the exact course of the procedure in granting the loan and executing the papers, and it does not expressly appear where the papers were delivered, or where the money was advanced, though presumably both of these things took place in Texas.

Effect given by cases applying local law to localization of business.

When the cases are examined with reference to the particular circumstances upon which the courts have based their decisions that the state of the borrower's residence was the real situs of the contract, and that the designation of the domicile of the association as the place of payment, or the express stipulation that its law should be the governing law, was merely for the purpose of evading the usury law of the former state, it will be found that while each case depends, to a certain extent, upon its own circumstances, and that the location of the premises, the place where the proceeds of the loan were received and were to be used, and other circumstances are sometimes mentioned,—yet the main and distinguishing circumstance is the localization of the business of the association within the state. Thus, in *Shannon v. Georgia State Bldg. & L. Asso.* 78 Miss. 955, 57 L. R. A. 800, 30 So. 51, the court said that the decision rested upon two grounds: "First, that, where a foreign money-lending corporation has localized its business within this state through local boards doing here regularly and continuously for years the business of the corporation, it has thus voluntarily domesticated itself with-

in this state, and subjected its business and contracts to the operation of our laws; and, second, that where, in such case, all the facts, fairly weighed, show that the only purpose of a mere stipulation in the notes or mortgages for payment in a foreign state must have been to evade our laws on the subject of usury, no device, or disguise, or contrivance will prevent the court from stripping off the mask and pronouncing the judgment of the law on the real case made by the actual facts." The court distinguished the case at bar from one where a non-resident money lender, or a foreign corporation in a few isolated cases, deals with the citizens of Mississippi, and takes notes payable in the state of the domicile of such person or corporation. In both these cases the effect of the application of the law of Mississippi was to hold the contract usurious. Both were actions to recover the usurious interest.

In *National Mut. Bldg. & L. Asso. v. Brahan*, 80 Miss. 407, 57 L. R. A. 793, 31 So. 840, the business of the association had been localized in the state through local boards; and payments were made to the secretary and treasurer of the local boards; but in *National Bldg. & L. Asso. v. Wilson*, 78 Miss. 993, 30 So. 56, the court said that no distinction could be based on the fact that the business had been localized through agents instead of boards, and the payments made to agents.

So, in *United States Sav. & Loan Co. v. Scott*, 98 Ky. 605, 34 S. W. 235, the court said, in effect, that, when a foreign building and loan association employs the usual agencies to solicit and transact business in the state, and contracts for the payment of premiums and interest in excess of the rate authorized in the state, the transaction will be denounced as an attempt at evasion of the laws of Kentucky, whatever may be the nominal rate specified, or artifice adopted.

In *Building & Loan Asso. v. Bilan*, 59 Neb. 458, 81 N. W. 308, *supra*, the trial court found that the contract in question was made in, and governed by, the laws of Nebraska, notwithstanding a stipulation in the note that it was understood to be made with reference to and under the laws of the territory of Dakota, and that all sums were payable at the office of the association in Dakota; and the supreme court said that the finding had ample evidence in the record to sustain it, pointing out that the real estate encumbered by the mortgage was located in Nebraska; the loan was negotiated there through the lender's agent; the mortgages were executed and delivered and the money paid in Nebraska. The court further says that it is plain that the clause referred to was inserted in the notes as a mere shift or device to escape the penalties of the Nebraska usury laws, and that such clause, in view of the other facts proved, did not have the effect to make the statutes of Dakota govern in the construction and validity of the contracts.

In *Pacific Bldg. Co. v. Hill*, 40 Or. 280, 56 L. R. A. 163, 67 Pac. 103, *supra*, the court said that it was a sound doctrine that a contract for the payment of money, entered into bona fide in one place, and made payable in another, is to be construed, governed, and enforced according to the laws of the state or country where payable; but that that principle did not apply where there was a manifest purpose to avoid the laws of usury. In this case the foreign association was transacting business in Oregon, and had an agent and local board whose function it was to promote the membership of the associ-

ation and approve its loans. The court said that, notwithstanding the express stipulation that the bond was payable in San Francisco, the contract was solvable by the laws of Oregon. The opinion, as a whole, seems to rest upon the idea that the designation of California as the place of performance was merely for the purpose of evading the law of Oregon, but some parts of it seem to indicate that the court regarded the contract as coming within the principle that a court of one state is not bound to enforce or hold valid a contract which is injurious to its public rights, offends its morals, contravenes its policy, or violates a public law, notwithstanding that it was made, and, by its terms, was performable, in another state. In this connection, the court says that the association, although pretending to operate as a building and loan association, had adopted a plan or scheme not in accordance with the true principles and purposes of such association, with the manifest design of collecting interest by another name, and by deception to induce the payment of an unusual and unlawful rate. The court does not clearly distinguish between these two grounds; but it would seem that the latter ground is somewhat broader than the former, since the principle upon which it rests is applicable, even assuming that the contract was in good faith made and to be performed in another state.

In *Hicinbotham v. Interstate Loan Asso.* 40 Or. 511, 69 Pac. 1018, *supra*, the court said the facts that the plaintiff in the Hill Case had made loans to other citizens of Oregon, and had a local advisory board composed of citizens of Oregon, did not differentiate it from the present case, as such circumstances only went to show, and were alluded to by the court as evidence, that the company was doing business in Oregon, and that the agreement between it and the borrower was not an isolated instance of a nonresident making a contract with a citizen of Oregon to be performed elsewhere; that, while the association in the case at bar did not have a local advisory board, and it does not appear that it had in fact made loans to other persons, it had a resident agent in the state with authority to take applications for loans and forward them to the home office, and, although it was stipulated that all payments on stock, premiums, and interest were due and payable at the home office, it did, "for the convenience" of its members, send "for collection to the local bank or treasurer the monthly instalment receipts."

In *National Loan & Invest. Co. v. Stone* (Tex. Civ. App.) 46 S. W. 67, *supra*, the court said it could not distinguish the case in principle from *Building & L. Asso. v. Griffin*, 90 Tex. 480, 39 S. W. 650, though in the latter case a good deal of stress was laid on the fact that the foreign company had obtained a permit to do business in Texas, while in the case at bar no such fact appears in the record. The court said it did appear that the association had a local agent, and that the transaction in question was done through him, and that, being in fact engaged in business in Texas, the association could not avoid the construction given in the *Griffin* Case by avoiding a compliance with the laws affecting foreign corporations.

The fact that payments were actually made by the borrower to local boards or agents of the association has been regarded as significant in this connection, though, according to the strict terms of the contract, it was payable at the 62 L. R. A.

domicil of the association, and the local boards or agent were, *pro hac vice*, the agents of the borrower. Thus:

In *National Mut. Bldg. & L. Asso. v. Farnham* (Miss.) 33 So. 2, the court adhered to its decision in the *Brahan* Case, and pointed out an additional ground upon which both cases could rest. This new ground was based upon a provision in the certificate of stock, that "all payments due by reason of this contract must be paid at the principal office, unless the stockholder received official notice in writing from the association designating a depository or collection agent to whom to make payment." The court pointed out that the stock certificate was the basis of the contract, and, together with the bond or note and the mortgage, constituted the contract; that the association did fix a new place of payment,—in Mississippi,—and established there its local board with full corps of officers, constituting one of these officers,—the secretary and treasurer of the local board,—its agent to receive payments at Meridian; and that all the payments were actually made there to the local agent of the association.

In *National Mut. Bldg. & L. Asso. v. Burch*, 124 Mich. 57, 82 N. W. 837, it was held that a loan by a building and loan association of New York to a resident of Michigan, secured by a mortgage upon real property in the latter state, was governed by the law of Michigan, and was usurious. In this case the association had a local agent in Michigan authorized to solicit and receive applications for shares, and to collect and receipt for entrance fees on all shares, but with no authority to collect any other moneys of the association. The land was appraised by members of the local board, and the loan approved by the officers in New York; the loan, according to the terms of the mortgage and bond, was payable at the office of the company in New York; the checks for the loan were sent to the local attorney of the company in Michigan; he examined the title to the lands and turned over the checks to the borrower; the mortgage was delivered to the local attorney; put upon record, and sent to the association; nearly all the payments on the stock and loan were made to the treasurer of the local board. It also appeared that the loan was made to enable the borrower to pay off an existing mortgage and build a house upon the mortgaged property. The court said that while, by the terms of the mortgage, the loan was to be paid in New York, it was expected the money would be paid to the treasurer of the local branch, and most of it was so paid. The court quotes at length from the decision in *Meroney v. Atlanta Bldg. & L. Asso.* 116 N. C. 882, 21 S. E. 924, including the part of that opinion emphasizing the fact that the proceeds of the loan were to be used on the land. The court, referring to the decisions that hold that a foreign corporation is subject to the same restrictions as a domestic association, said there was nothing in *Russell v. Pierce*, 121 Mich. 208, 80 N. W. 118, or *Phelps v. American Sav. & L. Asso.* 121 Mich. 343, 80 N. W. 120, to conflict with such cases, as it did not appear in those cases that what was done would be in violation of the law of Michigan if done by a Michigan building and loan association. The position taken in the *Burch* Case is reaffirmed in *Hoskins v. Rochester Sav. & L. Asso.* (Mich.) 95 N. W. 566.

In *Home Sav. & L. Asso. v. Mason*, 127 Mich. 676, 87 N. W. 74, the same court held that a loan by a building and loan association of Min-

nesota was a Minnesota contract, and was governed by the law of Minnesota in respect of usury. It was contended in this case that the contract was not a Minnesota contract, and that the case was ruled by *National Mut. Bldg. & L. Asso. v. Burch*, 124 Mich. 57, 82 N. W. 837. The court said, however, that it did not agree with such contention, as the contract was, by its terms, to be performed in Minnesota, and there was no intention that any part of it should be performed in Michigan, and that the case, therefore, fell within *Russell v. Pierce*, 121 Mich. 208, 80 N. W. 118. The facts in respect of the localization of the business of the association do not appear.

In *Rowland v. Old Dominion Bldg. & L. Asso.* 115 N. C. 825, 18 S. E. 965, a loan by a building and loan association of Virginia to a resident of North Carolina, the same being secured by a mortgage upon real property in the latter state, was held to be a North Carolina contract, and governed by the law of that state in respect of usury, notwithstanding the attempt of the parties to give the contract the character of a Virginia contract. In this case the borrower applied to the local board of the association in North Carolina, and the money was paid to him in that state. He secured its repayment by a mortgage on land situated in North Carolina, and the mortgage was executed in that state. The court said that calling the transaction a Virginia contract did not make it one, and that sending the application to the "home office," remitting the money from the home office, calling the local board and its treasurer the agent, not of the corporation, but of the members living in that locality, providing in the bond that it should be paid in Virginia,—did not enable a foreign corporation to evade the usury laws of North Carolina. The fact that payments were made in North Carolina was also emphasized in *Meroney v. Atlanta Bldg. & L. Asso.* 116 N. C. 882, 21 S. E. 924.

See also, as to the effect of payments in the state, *Harmon v. Hart* (Tenn. Ch. App.) 53 S. W. 310; *People's Bldg. Loan & Sav. Asso. v. Fowble*, 17 Utah, 122, 53 Pac. 999; and *Snyder v. Fidelity Sav. Asso.* 23 Utah, 291, 64 Pac. 870,—*supra*.

Effect of localization of business considered by cases applying law of association's domicile.

In some of the cases cited at the beginning of this subdivision in which the law of the domicile of the association was applied, the exact extent to which the business of the association had been localized in the state of the borrower's residence does not appear; but it is clear that many of those decisions were rendered in spite of some localization of the business. Thus, in *Bedford v. Eastern Bldg. & L. Asso.* 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597, *supra*, the association, which was a New York corporation, had a local board in Tennessee, but the application for the loan was passed upon and approved at the home office in New York; the local board had officers, one of whom was a treasurer, through whom the members might, if they desired, forward payments due to the association at the home office; but the by-laws stated that in so doing the local treasurer was acting as agent for the stockholders, and not for the association; the bond and mortgage in this case were made payable in New York; the association had not complied with the requirements of the Tennessee statute with reference to foreign building and loan associations doing 62 L. R. A.

business in that state, but the effect of the statute was obviated by holding that the issuance of the stock and the application for the loan made before the passage of the statute created a vested right which could not be impaired by the statute. The case is discussed and distinguished in *Shannon v. Georgia State Bldg. & L. Asso.* 78 Miss. 955, 57 L. R. A. 800, 30 So. 51.

In *Hieronimus v. New York Nat. Bldg. & L. Asso.* 101 Fed. 12, Affirmed in 46 C. C. A. 684, 107 Fed. 1005, *supra*, the contract expressly provided that the payment of the principal should be made at the home office of the association in New York; no express provision was made as to the place of the payment of interest, and it was agreed that certain payments of premiums dues, etc., might be made to the local collector in Alabama. The court said, however, that such agreement was for convenience only, and did not make the contract an Alabama contract. The court further said that the facts alleged in the bill did not show, or tend to show, that the place fixed for the payment of the debt was for the purpose of avoiding the penalty of a usurious contract in Alabama.

In *Manship v. New South Bldg. & L. Asso.* 110 Fed. 845, *supra*, it appeared that the by-laws of the association provided that members might, if they so desired, make payments on the stock to the local treasurer, but that such treasurer should be deemed to be the agent of the members, and not of the association; and it appeared in this case that all payments made on the debt were made in Mississippi to parties selected by the association to collect and remit the same. It further appeared in this case that the association had a local board in Mississippi, and that the application was made to such board and forwarded to the home office, where it was approved; that after approval the note and deed of trust were prepared by the general attorney of the association at New Orleans, and a check drawn by the president and treasurer of the association in favor of the borrower on a bank in New Orleans; that the papers were then forwarded to an attorney at law in Mississippi, who was designated by the association to prepare the abstract of title, and the check was turned over by the latter to the borrower upon the execution by the latter of the note and deed of trust. The court, referring to the allegation in the bill that the contract was made payable in Louisiana for the fraudulent purpose of evading the usury laws of Mississippi, said that the allegation was specifically denied, and that, not only did the proof fail to sustain it, but that all the circumstances surrounding the transaction seemed to reach the opposite conclusion. The court recognized that the decision was contrary to the decision of the Mississippi supreme court in *Shannon v. Georgia State Bldg. & L. Asso.* 78 Miss. 955, 57 L. R. A. 800, 30 So. 51, but held that the question was one for the independent judgment of the Federal court. Among other cases relied upon, are *Bedford v. Eastern Bldg. & L. Asso.* 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597, and *Hieronimus v. New York Nat. Bldg. & L. Asso.* 101 Fed. 12.

In *United States Sav. & Loan Co. v. Harris*, 113 Fed. 27, the court said that, "in order for the fixing of the place of performance in another jurisdiction than where the contract is made to be such a device, it is essential that the fixing of that place be a pretence, and not bona fide;" and quoted with approval, the statement in *VanVleet v. Sledge*, 45 Fed. 743, that the

fact that the intention was to obtain the Arkansas, rather than the Tennessee, rate of interest did not constitute a violation or evasion of the law of Tennessee.

In *Gale v. Southern Bldg. & L. Asso.* 117 Fed. 732, *supra*, it was held that a contract of loan by an Alabama building and loan association to a resident of Virginia was made with reference to the law of Alabama in respect of usury, where it was provided that remittances should be sent to the association at its home office in Alabama, although monthly payments were allowed to be made to local treasurers, the association, however, not being liable for such payments until the money had been received at the home office. In reply to the contention that the provisions in the contract, intended to make it one solvable under the laws of Alabama, were inserted for the purpose of evading the usury laws of Virginia, the court said that both parties supposed, at the time the contract was made, the stock would mature in about six years, and that the loan would thereby be paid, and, if that supposition had been well founded, the borrower would have paid less than 6 per cent per annum for the use of the money; and therefore an intent to evade the usury laws of Virginia was not predicable of the transaction.

In *Hayes v. Southern Home Bldg. & L. Asso.* 124 Ala. 663, 26 So. 527, *supra*, the court said that the principle that a note or bond made payable at a particular place, or which is expressly made with reference to the laws of a particular state, is governed, in respect of its obligation as to interest, by the law of the place stipulated as the place of performance, was subject to an exception to the rule where the stipulation is found to be a mere device to evade the usury laws, in which case it will be held void as against public policy; but that no such sinister purpose appeared in the contract in question. In this case the association had a local board of directors in Alabama. The application for the loan was made to the president of that board, but was, apparently, granted by the association. The payment of the amount loaned was made in the draft of the association on its treasurer in Georgia, such draft being sent from Georgia to the local attorney to be delivered to the borrower in Alabama on the execution by him of the mortgage. It does not appear where payments on the stock and mortgage were made, but probably they were made in Alabama.

In *Pioneer Sav. & Loan Co. v. Nonnemacher*, 127 Ala. 521, 30 So. 79, *supra*, where the association had local agents, the decision was put upon the principle that, where a contract is made in one state to be performed in another, the parties may contract for the payment of the highest legal rate of interest allowed by either state without offending against the usury laws of the other. The court admitted that there was an exception to the rule when the place of payment is designated as a subterfuge and device, the purpose and intention of the parties being simply to evade the usury laws of the place where the contract was made. It said, however, there was nothing in the evidence from which it could be reasonably inferred that there existed any sinister motive in making the note given for the loan payable in Minnesota. That being the place of the home office from which the loan was negotiated and from which the money was sent, it was not unreasonable to stipulate for the performance of the contract, as to the payments, at the home of the lender. It does not expressly appear in this case where

the note and mortgage were delivered, or in what state the contract was regarded as having been made, but the decision, as already stated, is upon the ground that Minnesota was the place of performance. It appears that the advance payments on the stock at least were made to the agents in Alabama.

In *Bennett v. Eastern Bldg. & L. Asso.* 177 Pa. 233, 34 L. R. A. 595, 35 Atl. 684, *supra*, the court seems to have proceeded upon the assumption that the contract was to be regarded as made in Pennsylvania, for, alluding to the circumstance that the business was transacted through the local agent in Pennsylvania, it said that circumstance was of no account if the contract was to be performed in the state of New York. It then said that there was no possibility of successfully disputing the proposition that the contract was to be performed in New York, since it was provided in all the notes and other securities that they should be paid there; and further, that was not the slightest ground for an allegation that the contract was made for the purpose of evading the usury law of Pennsylvania. The court said, in this connection: "The defendant [the association] had a lawful right to loan money wherever it pleased, and it would be most absurd to say that, because it lent money to a Pennsylvanian, it therefore intended to evade the laws of Pennsylvania. The Pennsylvanian had a right to borrow money in the state of New York if he chose to do so, and, if he contracted to pay it in the state of New York, he must be conclusively presumed to know that his contract would be governed by the law of that state. In all this there is not a shadow of an unlawful intent to evade the law of Pennsylvania. There was, therefore, nothing to submit to the jury on that question."

In *Interstate Bldg. & L. Asso. v. Powell*, 55 S. C. 316, 33 S. E. 355, *supra*, it was expressly found that the association had paid a license to the state of South Carolina to do business in that state, and that it had a local board or branch in South Carolina; that the application for the loan was made to that branch and the money paid over to the borrower by the local secretary, and that, by the terms of the bond and mortgage, the certificate of stock, and the constitution and by-laws of the association, the contract was to be performed in the state of Georgia. The South Carolina statute, to the effect that all contracts secured by mortgage on real estate situated in the state shall be subject to, and construed by, the laws of the state regulating the rate of interest allowed, and in all other respects without regard to the place named for the performance of the same, was held not to apply because the contract was made before its passage.

People's Bldg. Loan & Sav. Asso. v. Tinsley, 96 Va. 322, 31 S. E. 508, *supra*, applied the law of the domicile, although neither the bond nor deed of trust expressly provided that the payments should be made there, and some of them were, for the convenience of the parties, made to an agent of the association in Virginia, it being provided by a by-law of the association that all payments should be made at the home office.

In *United States Sav. & Loan Co. v. Miller* (Tenn. Ch. App.) 47 S. W. 17 (affirmed by supreme court), a bill to foreclose a mortgage, a loan by a Minnesota building and loan association to a resident of Tennessee, secured by a mortgage upon land in the latter state, was held to be a Minnesota contract, and governed by the

law of Minnesota in respect of usury, under the circumstances of the case, which are carefully set out in the opinion, and are, substantially, as follows: The association appointed agents in various states with power to take applications for loans and forward the same to the home office; whenever it could do so it likewise had a local board, whose authority, however, was merely advisory; the association had no local board in the county where the borrower resided, and the application was made to its local agent and attorney there, and the application, addressed to the association at Minnesota, was presented to the local agent and attorney, who forwarded it to the home office, where it was approved. The abstract of title was then submitted to the general attorney of the home office, and approved by him; the papers were then prepared by him at the home office, and sent to the local agent for execution, with explicit instructions to turn the same over after execution to a bank which acted as local treasurer of the association, the latter being directed, upon the receipt of the papers, to turn over a draft on the paying officer of the association which had been previously forwarded to it; before the draft was to be paid, however, the papers were to be forwarded to the home office, and there examined and approved. In regular course the draft would be forwarded by the borrower himself, or some one for him, and the papers forwarded by the bank. In the case at bar, however, the draft was cashed for the borrower by the bank, acting, however, in its own behalf, and not as an agent of the association. The bond and mortgage expressly provided that it was agreed and understood that the contract was accepted and delivered in the state of Minnesota, and was made with reference to, and under, the laws of that state, and should be construed agreeably thereto. The court took the view that the loan was not consummated, even when the papers were turned over to the bank and the draft turned over to the borrower, but that there was no delivery with the intent upon both sides that the papers should become operative until they reached the company at the home office, and were approved there. The court says: "We find, then, that the obligation was delivered in Minnesota, and was, on its face, payable there, and was intended by the parties to be a Minnesota contract, and was in law a Minnesota contract."

In *United States Sav. & Loan Co. v. Harris*, 113 Fed. 27, the court, speaking as to the question of good faith, said that not only was the fixing of the place of performance at the office of the association in accordance with the real intention of the parties, but it was reasonable that the place should be so fixed, since thereby uniformity and equality among the borrowing members scattered through many states was secured. *Hayes v. Southern Home Bldg. & L. Assn.* 124 Ala. 603, 26 So. 527, uses similar language.

Comity with respect to foreign exemptions from usury laws.

Assuming that the contract itself has its situs in, and is governed by the laws of, the state of the borrower's residence, it is obvious that the association cannot avail itself of the exemption from the ordinary usury laws extended to it by the statutes of its domicile. So much is, of course, implied in the foregoing cases, which have applied the law of the borrower's residence,

and have held the contract usurious, though, if governed by the law of the domicile of the association, it would not have been usurious. Upon the other hand, it is assumed in most of those cases that, if the contract had had its true situs at the domicile of the association, it would have been upheld, notwithstanding that its validity there was by virtue of a statute exempting the association from the general usury statutes; and it will be observed that in the cases cited at the beginning of the courts, having held that the contracts were governed by the law of the domicile of the association, upheld the same, notwithstanding that their validity depended upon statutes exempting associations from the general usury statutes.

And in *Phelps v. American Sav. & L. Assn.* 121 Mich. 343, 80 N. W. 120, the court, referring to a loan by a Minnesota building and loan association, expressly held that, if the contract in question was a Minnesota contract, it was governed by the statute of that state providing that any premium for loans made by a building and loan association should not be considered or treated as interest, nor render such association amenable to the laws relative to usury.

In *Floyd v. National Loan & Invest. Co.* 49 W. Va. 327, 54 L. R. A. 536, 38 S. E. 653, however, the court, in reply to the contention that, the contract having been made and being performable in Michigan, it was governed by the laws of that state, said that the position would be unassailable if the association were a natural person insisting upon his right to enforce a contract solvable in Michigan and carrying the legal rate of interest in that state; but that in fact it was a corporation clothed with special privileges, among which was an exemption from the usury laws of its own state; and there was no rule of comity which required the courts of another state to recognize or enforce that special privilege. This language, taken by itself, would seem to imply that such special exemption would not be recognized, even assuming that the true situs of the contract were at the domicile of the association so that the law of the domicile would govern in other respects; but, when the opinion is read as a whole, the decision seems to rest upon the ground that the contract pertained to the business of the association in West Virginia, and therefore came within the operation of the statute of the latter state that a foreign corporation doing business within the state shall be subject to the same regulations, restrictions, and liabilities that are imposed on domestic corporations, the court saying that under the law of West Virginia a domestic corporation was not authorized to make a contract like that involved in the suit.

In *Building & L. Assn. v. Billan*, 59 Neb. 458, 81 N. W. 308, the court held that a foreign building and loan association which had not complied with the laws of Nebraska relative to building and loan associations was subject to the penalties of the Nebraska statute against usury; but this seems to be upon the hypothesis that the contract was a Nebraska contract, for the court expressly finds that the contract in question was a Nebraska contract, and not a Dakota contract, the association being incorporated in Dakota, and having its home office there.

In the original opinion in *Anselme v. American Sav. & L. Assn.* 63 Neb. 525, 88 N. W. 665 (a petition to cancel a mortgage to a building and loan association of Minnesota and a cross-petition for the foreclosure of the mortgage),

the court said that the bond, mortgage, application for the loan, and the evidence showing the methods of doing business, show that the contract was a Minnesota contract, and was not usurious tested by that law. It was, therefore, held that the account between the parties should be stated in the manner contemplated by the contract. Upon a subsequent hearing (92 N. W. 745), the judgment on the original hearing was vacated, the court then holding that a foreign building and loan association is subject to the penalties of the statute against usury. This statement seems to be upon the assumption that the contract was a Minnesota contract. At least, there is nothing in the opinion retracting the statement in the original opinion that the contract in question was a Minnesota contract.

Local exemption from usury laws.

Assuming that the contract of a foreign association has its true situs in the state of the borrower's residence so as to be governed by its law, it may be held usurious, notwithstanding that a similar contract by a domestic association would come within the exemption from the general usury statute extended to domestic associations, and would therefore not be usurious, because such exemption does not, of itself, extend to foreign associations.

Thus, in *National Mut. Bldg. & L. Asso. v. Keener*, 57 Neb. 94, 77 N. W. 442, it was held that a foreign building and loan association could not avail itself of the exemption from the general usury statute extended to domestic associations, and that foreign associations were governed by the general statute which in effect limits the rate of interest to 10 per cent per annum; and it was accordingly held that the contract in question was usurious. There is no discussion of the question where the contract was deemed to be made or be payable, or as to the intent of the parties as to what law should govern, and the facts bearing upon such questions are not stated. *Interstate Sav. & L. Asso. v. Strine*, 58 Neb. 133, 78 N. W. 377, Affirmed on Rehearing in 59 Neb. 27, 80 N. W. 45, is to the same effect.

So, in *Sokoloski v. New South Bldg. & L. Asso.* 77 Miss. 164, 26 So. 361, the court held that a foreign building and loan association was not entitled to an exemption from usury laws given to domestic associations by the Mississippi statute; and, 10 per cent per annum being the maximum rate of interest, the contract of a foreign building and loan association stipulating for 6 per cent per annum and 6 per cent per month to be paid upon a loan, was usurious. There is no discussion in this case as to where the contract was made or was performable, and the facts bearing upon those questions are not stated. The decision of the court, however, that the contract was usurious, was presumably upon the assumption that the contract was in reality a Mississippi contract.

National Mut. Bldg. & L. Asso. v. Pinkston (Miss.) 31 So. 824, is to the same effect. In this case it was expressly held, upon the authority of the *Shannon Case*, 78 Miss. 955, 57 L. E. A. 800, 30 So. 51, that the contract was a Mississippi contract.

In *Frele v. No. 4 Fidelity Bldg. & Sav. Union*, 166 Ill. 128, 46 N. E. 784, Affirming 66 Ill. App. 152, however, it was held that a building and loan association of Indiana, being authorized, under the statutes of that state, to contract for premiums and fines in addition to legal interest, could do so in Illinois without vio-

lating the usury statutes of the latter state. This decision, however, seems to be upon the assumption that the contract in question is governed by the laws of Illinois, and it appeared that such a contract by an Illinois corporation would be valid. The court said: "The complainant, as a foreign corporation doing business here, is subjected by our statutes to the same penalties and restrictions as domestic corporations of like character. But there is no restriction imposed upon domestic corporations of the same character as complainant which would render this contract usurious."

L. Which contract to be regarded; contract of principal and surety.

The statement in *Millard v. Truax*, 73 Mich. 381, 41 N. W. 328, to the effect that, where the giving of notes and a mortgage on lands in one state is in fact a transaction in that state, the mere dating of the notes in another state is of no importance,—is undoubtedly true. In those cases, however, in which a preliminary agreement, or arrangement for a loan, was made in one state, and the contract consummated by the delivery of the papers in another, it is often difficult to determine the exact principle upon which the decision rests, owing to the uncertainty whether the court regarded the preliminary or the consummated agreement as the contract for the purposes of the question, what law governs, and the consequent uncertainty as to which state was regarded as the *locus contractus*. To illustrate: The preliminary agreement covering all the conditions of the loan may have been made in New York; and the note and mortgage payable in New York, but delivered in Nebraska, where the borrower resided. Assuming that the preliminary agreement is the contract for the purposes of the question, what law governs: the *locus contractus* and *locus solutionis* are the same (New York), and there is no chance to apply either of the rules stated in *Miller v. Tiffany*, 1 Wall. 298, 17 L. ed. 540, *supra*, IV. c. 1, even assuming that the contract is usurious by the law of New York, but valid by the law of Nebraska. Assuming, however, that the note and mortgage are regarded as the contract, Nebraska is the *locus contractus*, and New York the *locus solutionis*, and the second rule laid down in the above case applies. Strictly speaking, of course, the note and mortgage are the contract, or, at least, the contract is not made until they are delivered; but it may be plausibly urged that the original transaction, by which the loan and the conditions and terms thereof were definitely agreed upon, is a better index to the intention of the parties in respect of the governing law than the formal contract consummated by the delivery of the papers. Few of the cases cited in IV. c. 3, which apply the *lex loci contractus* because it upholds the contract, expressly distinguish between the preliminary agreement and the final contract; or state the facts with sufficient fullness to render it certain that a definite agreement for the loan covering all the terms and conditions was made in a state other than that in which the contract was consummated by the delivery of the papers. In the absence of an obvious attempt to evade the usury laws of a particular state, there seems to be a tendency upon the part of the courts to uphold the contract if possible; and, in furtherance of that end, they may, without expressly discriminating the one from the other, be inclined to regard the prelim-

inary or the consummated agreement as the contract, accordingly as one or the other will serve to bring the case within the principles which will uphold the contract. In the case above supposed, for instance, the court might be more inclined to regard the note and mortgage as the contract because the *locus contractus* would be thus located in a state where the stipulated rate of interest was valid, thus bringing the case within the second rule stated in *Miller v. Tiffany*, and applied in IV. c. 8, than it would if the facts had been reversed and the preliminary arrangement made in Nebraska and the note and mortgage delivered in New York. Substantially such a case, however, was presented in *Sands v. Smith*, 1 Neb. 108, 93 Am. Dec. 331; and the court there held that the preliminary agreement was to be regarded as the contract. In that case an agreement for a loan was made in New York, and the money advanced there; the note, which was payable in New York, was dated and made in Nebraska. It was held that the law of New York governed, notwithstanding that it rendered the note usurious, whereas by the law of Nebraska it would have been valid. The note was secured by a mortgage upon real property in Nebraska (though action appears to have been on the note alone), and both note and mortgage seem to have been delivered in Nebraska. The court said that the original agreement in respect of the loan was to be considered, and that the note was but a mere incident; and then distinguished the case from cases of the kind cited in *supra*, IV. c. 8, upon the ground that the contract was both made and to be performed in New York.

In *Hosford v. Nichols*, 1 Paige, 220, where a contract for the sale of land in New York was made between two of its citizens, one of whom subsequently removed to Pennsylvania, where the contract was afterwards executed by giving a deed and taking a mortgage on the premises to secure the payment of the purchase money, in which mortgage the New York rate of interest was reserved, which was greater than that of Pennsylvania, it was held that the giving the deed and taking the mortgage were only a consummation of the original contract made in New York, and that the mortgage was not void for usury.

In *Bank of Harrison v. Gibson*, 60 Ark. 269, 30 S. W. 39, it was held, in an action to have a mortgage on land in Arkansas declared invalid on the ground that it was usurious, that it was governed by the law of Indiana. The decision is upon the ground that the contract was an Indiana contract, the proposition to borrow the money having been accepted in that state, and the contract there consummated by that act, and, being also payable there, it did not belong to that class of contracts made in one state to be performed in another. In this case the money seems to have been received, and the paper actually delivered, in Arkansas. The court seems to regard the contract to make the loan, rather than the note and mortgage executed in pursuance thereof, as the contract whose situs is important.

In *Varick v. Crane*, 4 N. J. Eq. 128, the court proceeded upon the assumption that the law of the place where the note was made determined the rate of interest upon a bond which did not specify the rate; but the contract contemplated by the court was evidently not the bond itself, but the executory contract for the loan, since it expressly appeared in this case that the bond was delivered and the money advanced in New 62 L. R. A.

York, and these facts are regarded by the court merely as evidence of the place where the contract was made, whereas, if the bond itself was the contract, these facts would be conclusive as to the place where it was made. It does not appear in this case where the bond was payable.

In *Western Transp. & Coal Co. v. Kilderhouse*, 87 N. Y. 430, it was held that the law of Michigan in respect of usury governed notes dated, signed, indorsed, and payable in New York, and there handed to an agent of a Michigan bank, pursuant to an agreement previously made in Michigan by which the bank agreed to extend the time of payment upon a past-due note of the maker of the notes in question upon the condition that certain new notes should be given as collateral security, it being found as a fact that the agent delivered the notes to the bank in Michigan, and that "they accepted the same and extended the time of payment of amount secured by the said past-due note according to the times the said new notes were made payable." The notes were valid by the law of Michigan, but would have been usurious by the law of New York. The court seems to have regarded Michigan as the *locus contractus* of the notes; but it is doubtful whether the decision would not have been the same even if the exact terms and indorsers of the collateral notes had been definitely fixed by the Michigan agreement, and the delivery of the notes had been complete when they were handed to the agent in New York; for most of the argument proceeds upon the theory that the contract whose law determined the question of usury was the Michigan contract, and that the delivery of the notes was merely in performance of that contract.

See also *Mott v. Rowland*, 85 Mich. 561, 48 N. W. 638, *supra*, IV. b.

In *Staples v. Nott*, 128 N. Y. 403, 28 N. E. 515, a note bearing date at Washington, payable in a bank in New York, carrying interest at a rate lawful by the District of Columbia, but unlawful by the law of New York, was held to be governed by the law of the District, both as against the maker and indorser, it appearing that the note was given in renewal of a previous note of the same parties, which bore date and was payable at Washington, in pursuance of an arrangement which was made in Washington, with the payee, who was resident there, the latter having himself drawn the renewal note and handed it to the maker, who took it to his home in New York, where it was signed by him and the indorser and deposited in the mail directed to the payee in Washington. The argument, as a whole, seems to be based on the fact that the agreement for renewal was made in the District of Columbia.

Where a citizen of Georgia, being in North Carolina, offered to lend a resident of the latter state \$6,000, but on his return to Georgia wrote that he could lend only \$3,000, whereupon the borrower went to Georgia and there received the money and executed his note for that amount,—it was a Georgia contract, and governed by the law of that state in respect of usury. *Davis v. Coleman*, 33 N. C. (11 Ired. L.) 303. The court said the talk about the loan which took place in North Carolina, did not amount to a contract; that, if the plaintiff had refused to lend the money, the defendant would have had no cause of action against him; nor would the plaintiff have had a cause of action against the defendants for failing to apply for the money.

It will be observed that in the two New York

cases above cited the ambiguity respecting the contract to be considered was between the agreement for renewal and the renewal notes; and it is clear that the original note was not regarded as the contract to be consulted. In the next case, however, it will be observed that the court goes back to the original contract.

A note given in Connecticut, for a debt contracted in New York, including interest upon the debt at 7 per cent for the time already passed and for the time the note has to run, is not usurious, 7 per cent being allowed by the law of New York. *Phelps v. Kent*, 4 Day, 96. The decision is upon the ground that the note taken in Connecticut was, in substance, a security for the debt according to the terms of the original contract. The court said the mode in which the note was taken and the time given for payment do not change the nature of the security for the same debt, and for the same interest to which the creditor was entitled by the contract.

So, in *Broughton v. Bradley*, 36 Ala. 691, it was held that a bond was governed by the law of South Carolina, and was usurious because it stipulated for a rate of interest in excess of that allowed by the law of such state, notwithstanding that it was executed in Alabama and did not specify any place of payment. The decision is upon the ground that the bond was a substitute for another bond containing similar terms, but executed in South Carolina, and given for the purchase money of property there bought by the obligor from the obligee. The court said that the substituted bond was not the execution or making of a contract but was only evidence of the contract and that, under the circumstances, the law drew the presumption that the contract was to be performed at the place where it was entered into, that is South Carolina.

And in *M'Queen v. Burns*, 8 N. C. (1 Hawks) 476, a resident of North Carolina, who was indebted to a resident of New York, paid a part of the debt in North Carolina to an agent of the creditor, and gave a bond for the balance, including interest thereon until the maturity of the bond at the New York rate. It was held that the contract was governed by the law of New York, and was, therefore, not contrary to the usury law of North Carolina. The decision is upon the ground that the bond was merely a security for the payment of a debt which was contracted, and which was payable in New York.

In *Wallis v. Lehman*, 36 Ark. 569, however, it was held that notes made in Arkansas specifying no place of payment, given in settlement of an account made in Louisiana, were to be governed by the law of Arkansas in respect of usury, and, tested by such law, were not usurious. The decision is upon the ground that the notes were new contracts.

An agreement made in New Jersey to extend the time of payment of a note made and payable in Pennsylvania is to be governed by the law of New Jersey in respect of usury. *Nightingale v. Meginnis*, 34 N. J. L. 461. The agreement was usurious by the law of New Jersey.

In *Troy Carriage Co. v. SImson*, 15 Misc. 424, 37 N. Y. Supp. 1023, Affirmed in 12 App. Div. 626, 43 N. Y. Supp. 1166, a note, bond, and mortgage were executed in New York and sent to a foreign corporation transacting business in Ohio in payment of goods purchased from the latter. The interest reserved was usurious by the law of New York, but lawful by the law of Ohio. 62 L. R. A.

It was held that the law of New York governed upon the ground that the papers were all executed, payable, and to be performed, in the state of New York. In reply to the argument that, inasmuch as the goods were ordered and delivered in Ohio, and the contract was in reality made in that state, it was to be governed by the laws of that state, the courts said that, however that might be, as to the original indebtedness, it would not aid the plaintiff as to the securities taken in New York to secure the indebtedness. The action was to foreclose the mortgage and for a judgment of deficiency upon the bond and note.

In *Merchants' Nat. Bank v. Southwick*, 87 How. Pr. 324, it was held that a note drawn, dated, signed, delivered, made payable, and first used in New York, but given for a precedent debt arising in and owing to a resident of another state, was to be governed by the usury law of New York, although such law rendered the note usurious.

In *Dewar v. Span*, 8 T. R. 425, it was held that a bond given in England, which reserved interest in excess of the English rate, was usurious, notwithstanding that it was given as a substitute for a previous bond bearing the same rate of interest, which was executed in the West Indies.

In *Findlay v. Hall*, 12 Ohio St. 610, two of the three comakers of a note made in New Mexico and bearing 10 per cent, after a partial payment thereon, assumed, in the absence of the third maker, to renew the same for the balance still due, and accordingly subscribed a new note dated in New Mexico and stipulating for 10 per cent. The note was then handed to the payee, and was afterwards, with a full knowledge of the circumstances, signed by the third maker in the state of Missouri. The question was whether the plaintiff was entitled to recover 10 per cent interest, or 6 per cent, the rate in Missouri. The court said it was clear that the law of the place of the contract governed, but that the difficulty was to determine whether New Mexico or Missouri was the place of the contract. It held, however, in view of all the circumstances, that it was a New Mexico contract.

In *Pugh v. Cameron*, 11 W. Va. 523, a resident of Ohio executed and delivered his signed bill in that state, payable to a resident of Virginia, pursuant to a previous arrangement with the latter, also made in Ohio, whereby the former and his brother, who was a resident of Virginia, were to give their joint obligation, the latter as surety; after the bill was signed in Ohio by the principal debtor, it was delivered to the obligee, who took it to Virginia and there obtained the signature of the brother, who had previously promised to sign the same; the bill bore a rate of interest which was authorized by the law of Ohio, but usurious by the law of Virginia. It was held that the surety could not, avoid the contract upon the ground that it was usurious. The decision seems to rest upon two distinct grounds: one, that a surety could not, in any event, avail himself of a plea of usury unless the principal obligor could, and as the principal obligor's contract was clearly made in Ohio, the contract was not usurious as to him; the other ground was that when the surety signed the bill in Virginia, he ratified the contract as an Ohio contract. The court in this case recognized that the law of the place of payment ordinarily controls in respect to interest, but held that no place of payment being

specified in the bill, it was, for the purposes of such principle payable in Ohio where it was made.

A bond dated in Texas, and there executed by the principal obligor, a resident of Texas, payable to a resident of Virginia, no place of payment being mentioned, the drafts constituting the consideration being sent to and received in Texas, and the money borrowed used in Texas by the principal obligor,—is a Texas contract, and is not affected by the usury law of Virginia, so far as either the liability of the principal or sureties is concerned, although the sureties signed the bond in Virginia. *Backhouse v. Selden*, 29 Gratt. 581.

In *Houston v. Potts*, 64 N. C. 33, a resident of North Carolina holding a note against a resident of South Carolina, went to the latter's house to collect the money, but, while there, was induced by the debtor to take a new note upon which he promised that his brother, a resident of North Carolina, would become surety; and it was also agreed that South Carolina interest should be paid; subsequently, in pursuance of this agreement, the debtor executed a note in the ordinary form without express stipulation for interest, and his brother also executed it as surety in North Carolina; the note purported to be dated in South Carolina. It was held that the contract was made in South Carolina, and the stipulation for 7 per cent interest was therefore lawful.

j. Effect of restriction as to rate of interest in charter of corporation.

Sometimes the charter of a corporation limits the rate of interest which it may charge; and, if the terms of this restriction are broad enough, it will undoubtedly govern wherever the contract may have its situs, and by whatever law it may be governed in other respects; but the weight of authority inclines to the view that a restriction in general terms only applies to contracts having their situs within the state.

Thus, in *Bard v. Poole*, 12 N. Y. 495, the court stated that it was a well-settled principle that the validity of a contract in respect of usury depended upon the laws of the country where it was made,—especially if it was to be performed within the same jurisdiction; but admitted that a loan made by a foreign corporation, though reserving a rate of interest lawful by the law of the state where it was made and payable, would, nevertheless, be void if the act of incorporation prohibited the corporation from charging such a rate of interest. In this case, however, it was held that a provision of the charter of a corporation empowering it "to make all kinds of contracts in which the interest of money is concerned, provided that nothing therein contained shall be construed to authorize it to make any contract which, by the existing laws, amounts to usury," did not confine such corporation to the rate of interest allowed by the laws of Maryland in case of a loan made and to be repaid in New York. The court said that the proviso in the charter merely obliged the company, like citizens of Maryland, to observe its laws in regard to interest and contracts governed by such laws; and that the company was not obliged to comply with the laws of Maryland on the subject of the rate of interest in making contracts in other states, and which are there to be performed; as to such contracts the *lex loci contractus* as to interest governs. 62 L. R. A.

In *Hackettstown Bank v. Rea*, 6 Lans. 455, 64 Barb. 175, Affirmed in 53 N. Y. 618, it was held that the clause in the charter of a New York corporation that it should not take "more than the legal rate of interest for the time being" did not operate to render usurious a note payable in New York but discounted by the bank in New Jersey at a rate of interest exceeding the legal rate in New Jersey, but not the legal rate in New York. The decision is upon the ground that the situs of the contract was in New York.

So, a corporation of New York authorized by its charter to lend money on bond and mortgage on real estate within the United States is not restricted to the rate of interest permitted by the laws of New York, but may contract for such rate of interest as is lawful in the state where the loan is made and where the property mortgaged is situated, although such rate is greater than is allowed in New York, and although its charter provides that it shall not loan at a rate of interest exceeding the legal rate. *United States Mortg. Co. v. Sperry*, 138 U. S. 313, 34 L. ed. 969, 11 Sup. Ct. Rep. 321.

The prohibition in the charter of the bank of the United States against interest exceeding 6 per cent was confined to the state of Pennsylvania, and the bank, having general power to make loans, can make any contracts in other states not forbidden by the law thereof. *Hitchcock v. United States Bank*, 7 Ala. 386; *Knox v. Bank of United States*, 26 Miss. 656, 27 Miss. 65.

A provision in a charter of a bank that "the rate of discount at which loans may be made by said bank within this commonwealth shall not exceed $\frac{1}{4}$ of 1 per cent for thirty days" does not restrict the bank to such rate of interest in respect of loans made and payable in other states; but the validity of the interest contracted for is to be determined by the law of the latter state. *Frazier v. Wilcox*, 4 Rob. (La.) 517.

In *Ewing v. Toledo Sav. Bank*, 43 Ohio St. 31, 1 N. E. 138, however, it was held that a savings and loan association of Ohio, which by a statute of that state is permitted to charge interest "at the rate allowed, or that may be allowed, by the laws of Ohio," could not enforce in Ohio a contract made and payable in another state reserving a rate of interest in excess of that allowed by the law of Ohio, although allowed by the law of the state where the contract was made and payable. The court admitted that, if the contracting parties had been natural persons, the law of the place where the contract was made and was payable would have governed. The court cites and relies upon the statement in *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274, that a corporation can make no contract nor do any act, either within or without the state which creates it, except such as are authorized by its charter.

So, a bank incorporated in Vermont cannot recover more than 6 per cent interest for its loans or upon securities taken therefor, though the loans may be made, and the securities executed, in a state where a higher rate of interest is allowed by law. *Farmers' Bank v. Burchard*, 33 Vt. 346.

k. Applicability of law fork.

While, as shown in *supra*, IV. a, the courts sometimes refuse to apply the usury statute of another state or country upon the ground that

it is penal or remedial, they, with very rare exceptions, agree that, if the contract is free from usury, tested by the law governing the substantive contract (which is to be determined by the application of the principles and rules explained in the previous subdivisions), they will be enforced according to its tenor, notwithstanding that they would be usurious by the law of the forum. This principle is assumed by nearly all the cases on the subject, but is brought out more prominently in the following, owing to the fact that the only possible conflict was between the law of the place which was clearly the situs of the contract and the law of the forum as such: *Phinney v. Baldwin*, 16 Ill. 108, 61 Am. Dec. 62; *Mandel v. Swan Land & Cattle Co.* 51 Ill. App. 204; *Robinson v. Holmes*, 75 Ill. App. 203; *Lines v. Mack*, 19 Ind. 223; *Buckinghouse v. Gregg*, 19 Ind. 401; *Uhler v. Semple*, 20 N. J. Eq. 288; *Davis v. Garr*, 6 N. Y. 124, 55 Am. Dec. 387; *Thompson v. Ward*, 33 Misc. 426, 67 N. Y. Supp. 687; *Allen-West Commission Co. v. Carroll*, 104 Tenn. 489, 58 S. W. 314.

Phinney v. Baldwin, 16 Ill. 108, 61 Am. Dec. 62, *supra*, however, seems to imply that the rate of interest or discount might be so excessive, or exacted under such circumstances, as to render the enforcement of the contract contrary to the public policy of the forum, notwithstanding that it was free from usury, tested by the law that would ordinarily govern.

And in *Sime v. Norris*, 8 Phila. 84, a court of Pennsylvania refused to enforce a provision in a note made and payable in San Francisco stipulating for the payment of interest at 2½ per cent per month, payable in advance, and to be compounded if not paid when due, notwithstanding that by the law of California parties may agree to any rate of interest, and that it shall be compounded from time to time, and added to and become a part of the principal. The court impliedly conceded that, under ordinary circumstances, the law of California would govern, but refused to enforce the stipulation for interest in this case upon the ground that it was unconscionable and deceptive; and rendered judgment for the amount of the principal and simple interest according to the nonconventional rate of 10 per cent per annum prevailing in California. The case cites, in support of its position, the case of *James v. Morgan*, 1 Lev. 111 (the barley corn case).

In *Matthews v. Warner*, 6 Fed. 461, it was held that a statute of New York which authorizes the borrower to obtain a surrender of usurious securities in equity without payment of the money actually lent did not bind a court of equity out of the state. This decision seems to be upon the assumption that the contract in question was made and to be performed in New York, and was governed by its laws in respect to usury so far as they went to the substantive rights of the parties as distinguished from their remedial rights. The judgment in this case was affirmed in 145 U. S. 475, 36 L. ed. 782, 12 Sup. Ct. Rep. 945, but the affirmation was upon the ground of an estoppel to deny the invalidity of the securities, and there is no reference in the opinion of the supreme court to the point in question.

In *Meares v. Finlayson*, 55 S. C. 105, 32 S. E. 986, where the contract involved was a loan by a building and loan association of North Carolina to a resident of South Carolina, secured by a mortgage upon real property in the latter state, the court took the view that the 62 L. R. A.

contract was usurious by the law of either state; but, even upon the assumption that it was to be regarded as a North Carolina contract, it held that the action being brought in South Carolina, the parties were bound by the remedy afforded by South Carolina, by which the usury had the effect of preventing a recovery of any interest, while, under the law of North Carolina, only the usurious interest would be forfeited. The decision is upon the ground that the remedy is governed by the *lex fori*. The court distinguishes *Equitable Bldg. & L. Asso. v. Vance*, 49 S. C. 402, 27 S. E. 274, 388, 29 S. E. 204, and *Equitable Bldg. & L. Asso. v. Hoffman*, 50 S. C. 303, 27 S. E. 692, upon the ground that, after it was determined that the contracts in those cases were Georgia contracts, it followed, necessarily, that they were to be construed under the Georgia law, by which there was no usury in those contracts, while the contract under consideration was usurious whether construed under the laws of North or South Carolina.

The decision in *Meares v. Finlayson*, to the effect that, when a contract of another state is usurious by the law of that state, the remedy to be applied is to be determined, not by that law, but by the law of the forum, was followed in *Carpenter v. Lewis*, 60 S. C. 23, 38 S. E. 244; and, in accordance with such doctrine, the contract of the building and loan association in question being usurious by the law of Tennessee, the law of South Carolina, by which usury operates as a forfeiture of all the interest, was applied, rather than the law of Tennessee, which forfeits only the usurious interest.

But it is held in *American Freehold Land & Mortg. Co. v. Jefferson*, 69 Miss. 770, 12 So. 464, that the rule, prescribed by the Mississippi statute, of forfeiting all interest upon a usurious contract, will not be applied to a contract made in another state. The court undoubtedly meant to assume that the contract was not only made in, but was governed by the law of, the other state, so far as matters of substance were concerned.

In *Newman v. Kershaw*, 10 Wis. 333, the court, after holding that the contract involved was governed by the law of New York in respect of usury, held that the provision of the Wisconsin statute making an offer to pay the principal sum loaned a condition of availing one's self of the defense of usury, although general in its terms, did not apply to a contract which was governed by the law of another state, and which by that law was void. The court said that the statute was only intended to apply to contracts governed by the law of Wisconsin, by which the usurious security is valid for the principal loaned. The court further said that the statute in question could not be regarded merely as a part of the remedy, which is always governed by the *lex fori*; that to apply it to a usurious contract made under the laws of New York would make it something beyond a mere remedy, and give it the effect of determining the validity of the contract itself.

The requirement of Wis. Rev. Stat. § 1602, that, to make a plea of usury available, the pleader must prove a tender of the principal sum of money loaned, is not applicable to a case arising under, and governed by, the statute against usury of another state. *Maynard v. Hall*, 92 Wis. 563, 66 N. W. 715.

In *Philadelphia Loan Co. v. Towner*, 13 Conn. 249, it was said that, as the note in question was made in Pennsylvania, and the parties all resided there except one, who was sometimes there and sometimes in Connecticut, the

contract must receive its construction from the law of Pennsylvania, by which the note or contract embracing a usurious consideration is not void, and the plaintiff may recover the principal and legal interest. In this case the note was apparently payable in Pennsylvania.

The position taken by the South Carolina supreme court in the cases above cited, that, after the usurious character of the contract has been determined by reference to the statute of another state, which is assumed to furnish the applicatory law so far as matters of substance are concerned, no further attention is to be paid to the statute, and the extent of the forfeiture is to be determined by the *lex fori*, is opposed to the principles expressly declared in the Mississippi and Wisconsin cases last cited; and seems, also, to be opposed by the tacit assumption of most of the cases in which the question might have been raised; that is, in those cases which have applied the law of another state, with the result of holding the contract usurious. While, as shown in *supra*, IV. a, there is some difference of opinion whether a statute merely providing for a forfeiture is substantive or remedial, the distinction is there treated as one affecting the question whether the statute can be regarded, for the purpose of characterizing the contract, as usurious. There is no intimation in those cases that the foreign statute prescribing a forfeiture can be regarded as substantive for the purpose of characterizing the contract as usurious, and remedial so far as it prescribes the consequences of its usurious character. In *Arnold v. Potter*, 22 Iowa, 194, *supra*, IV. a, for instance, the court having held that the statute of Massachusetts prescribing the forfeiture of threefold the amount of usurious interest was not penal, clearly assumed that, if the contract had been a Massachusetts contract, the Massachusetts statute would have been applied, not only for the purpose of characterizing it as usurious, but for the purpose of measuring the amount of recovery in an action in Iowa upon the contract.

The effect of the South Carolina decisions is to substitute the law of South Carolina, declaring, in effect, that the contract shall be invalid to the extent of the entire interest, for the law of the other state, which declares that it shall be invalid only to the extent of the usurious interest, notwithstanding that, if the contract were not usurious by the latter law, the entire principal and interest could be recovered without reference to the law of South Carolina.

To apply a South Carolina law to measure the amount of recovery upon a North Carolina contract seems to make it something beyond a mere remedy, and give it the effect of determining the validity, to a certain extent, of the contract itself. Though the statute may be remedial in form, it ceases to be so in reality when it necessarily operates to deprive one of substantive rights under the contract. A different question is presented when, as in *Matthews v. Warner*, 6 Fed. 461, *supra*, a party asks for affirmative relief from a usurious contract governed by the law of another state. The question as to the terms upon which such relief shall be granted (assuming that they do not operate to reduce the amount to be received by the other party below what he is entitled to under the law governing the contract) is both in form and in reality a question of remedy. If the relief is denied, the party asking it still has his defense of which he may avail himself when sued upon the contract. It is simply a question whether

he shall be allowed to anticipate an action at law or be compelled to await the commencement of such an action; and the court may properly look to the laws of the forum for the conditions on which it will grant such relief, if the amount to be received by the other party is not thereby reduced below the amount to which he is entitled under the law governing the contract.

When, however, by the application of the *lex fori*, such affirmative relief is granted upon terms that reduce the amount received by the other party below the amount to which he would be entitled under such law, it would seem that the substance is sacrificed to form, a law which is substantive in effect being applied under the guise of a remedial law. *Turpin v. Povall*, 8 Leigh, 93, was a case of that kind.

In that case, the court was inclined to the opinion that a bond executed in Virginia, as security for a pre-existing debt of a third person contracted in Pennsylvania, was a Virginia contract, and to be governed by the law of Virginia in respect of usury. The point, however, was not decided. The court held that, assuming that the contract was a Pennsylvania contract, it being usurious by the law of Pennsylvania, the law of Virginia, as the law of the forum, governed the conditions upon which a bill to cancel it might be maintained; and applied the rule in Virginia whereby the payment of principal only, without interest, is a condition of cancellation, rather than the rule assumed to prevail in Pennsylvania whereby the payment of the principal and interest at 6 per cent is required. The decision and the ground upon which it rests are thus summarized in the subsequent case of *Fant v. Miller*, 17 Gratt. 47: "I understand Judge Tucker's meaning to be that, as the contract was usurious under the law of Pennsylvania the debtor was entitled to relief in equity from the usurious excess, and, as the courts of Virginia could not administer any remedies but such as the law of Virginia affords, the relief can only be given according to that law."

It would seem, as a matter of justice, that if the court of Virginia could only grant the relief upon the conditions imposed by the law of the forum, the relief should have been denied, since the granting of it upon such conditions deprived the other party of the 6 per cent interest to which he was entitled under the law of Pennsylvania, assuming that his contract was a Pennsylvania contract. To apply the law of the forum in such a case seems even more inequitable than when an action at law is brought by the creditor, since in the former case he is an involuntary party.

The opinion in *Fant v. Miller* apparently approves the doctrine thus laid down, but refused to apply it in the case at bar, which involved a note that was governed by the law of Maryland, and was given as a part of a transaction into which usurious interest entered. According to the law of Maryland, however, the only effect of preserving usury was to forfeit the excessive interest, and the contract, so far as the principal and 6 per cent interest were concerned, was not affected. It appeared from the certificate of facts that no part of the usurious charges entered into the notes in suit, but were all embraced in another note executed at the same time. The court held that the doctrine announced in *Turpin v. Povall* did not apply because the contract sought to be enforced in the action, to wit, the contract for the principal and interest at 6 per cent, was allowed under the

law of Maryland. The court said: "The law of Maryland makes a separation between the good and the bad parts of the transaction,—between the money advanced and 6 per cent interest upon it, which is unaffected by the usury, and the excess above 6 per cent, which cannot be recovered. I do not see why the parties may not themselves make this separation in the beginning by giving one security for the debt and lawful interest, and another for the usury; and, if that is done, it seems to me that the law of Maryland will enforce the former, and only avoid the latter, especially if it appears that the latter has not been paid. On this ground I am inclined to think that the consideration for the transfer of the four notes [in suit] is wholly unaffected by the usury."

1. Statute forbidding corporation to plead usury.

A statute of New York, passed April 6, 1850, declares that "no corporation shall hereafter interpose the defense of usury." It was held in *Southern Life Ins. & T. Co. v. Packer*, 17 N. Y. 52, that the statute applied to foreign, as well as domestic, corporations litigating in the courts of New York. The contract in this case seems to have had its situs in New York, but the decision is not limited to such contracts; and it is intimated in *Curtis v. Leavitt*, 15 N. Y. 9, 85, that the statute may be given effect as a prohibition upon corporations against interposing the allegation of usury to invalidate contracts governed by the laws of a foreign country. The result of these two decisions is thus summarized in *Newman v. Kershaw*, 10 Wis. 333: "They would seem to show that, if an English corporation should be sued in New York by an English citizen, on an English contract, that the corporation could not show it usurious and void by the law of England." The judge writing the opinion in the Wisconsin case dissented from this view, and said that it carried the application of the local law farther than either authority or principle would warrant. These two New York decisions give the statute a remedial character as applied to contracts, whether of domestic or foreign corporations which do not have their situs in New York. If that were the only effect of the statute,—in other words, if it were solely and only remedial,—it would, of course, have no extraterritorial operation, and would be available only in a suit brought in New York. But the court, in *Curtis v. Leavitt*, while denying that the statute can operate to repeal the usury law of another state or country, or relieve a contract having its situs in another state or country from the taint of usury imposed by its law, or that it can have any effect as applied to such contract beyond a simple prohibition against interposing the foreign law in a suit in New York, took another view of the statute as applied to a contract having its situs in New York, and intimated that, so far as such contracts are concerned, the statute operates as a repeal of the other usury statutes, thus leaving the contract in full force according to its terms. This view of the statute, as applied to a New York contract, is accepted by the Wisconsin supreme court in *Balleston Spa Bank v. Marine Bank*, 16 Wis. 120, the court saying: "The act of New York Laws of 1850, chap. 172, that 'no corporation shall hereafter interpose the defense of usury' repeals the usury law of that state as to corporations. Such is the opinion of the court of that state, and we do not

differ with them [citing *Curtis v. Leavitt*, and *Southern Life Ins. & T. Co. v. Packer*]. It is immaterial, therefore, to consider whether the notes are New York contracts or Wisconsin contracts." The last remark seems to be explainable upon the theory that if it were a New York contract the statute referred to would apply, and, if it were a Wisconsin contract, it would not be usurious in any event. In *Lyons v. Ewings*, 17 Wis. 62, also, the court, upon the hypothesis that the contract in question, which was executed by a Wisconsin corporation, was a New York contract, held that the statute referred to should be applied. The practical result seems to be, if the position taken by the New York cases is sound, that the statute has a double character, that is, that it prescribes a remedial rule that is to be applied by the New York courts against all corporations, foreign or domestic, irrespective of the situs of the contract, or of the law that would otherwise govern; and, in addition thereto, it prescribes a rule of substantive law that operates upon all contracts having their situs in New York, whether made by foreign or domestic corporations, and wherever the suit may be brought. The courts of other jurisdictions in which suit may be brought may, of course, reject the latter view and refuse to apply the statute. Thus, it was held in *Craven v. Atlantic & N. C. R. Co.* 77 N. C. 289, that the New York statute did not govern a North Carolina corporation sued in North Carolina. This decision seems to have been upon the assumption that the contract had its situs in New York. In the Wisconsin cases, however, as already shown, the effect of the New York statute as a substantive law operating upon all contracts having their situs in New York, wherever suit may be brought, seems to be conceded.

V. Summary.

The authorities hereinbefore reviewed seem to warrant the following statement of the general principles governing this subject:

1. The broad fundamental principle applicable to all aspects of the subject (except that presented by a contract usurious by the law of any place to which it might reasonably be referred, and possibly that presented by the question as to interest *ex mora*) is to ascertain and give effect to the intention of the parties as to the governing law, if they acted in good faith, and not for the purpose of evading the laws of the place to which, in view of the circumstances of the transaction, the contract is really referable. (I.)

2. When the intention is clearly manifested by an express stipulation in the contract that it is made with reference to the law of a certain place, or an equivalent stipulation, the court has merely to test the good faith of such stipulation in view of all the circumstances of the case. (I.)

3. When the intention is not shown by an express stipulation in the contract, it is to be inferred or presumed from the terms of the contract in connection with the circumstances attending the transaction, it being remembered that the presumed or inferred intention is, like the expressed intention, subject to the test of good faith. (I.)

4. Several subordinate principles or rules have been formulated to guide the courts in presuming or inferring the intention when not expressed. It must be remembered, however, that these subordinate principles or rules are

merely prima facie, and may yield to circumstances indicating a contrary intention. (I.)

5. The broadest of these subordinate principles or rules is that the parties are presumed to have contracted with reference to the law of the place of payment, and that that law therefore governs, unless the presumption on which the rule rests is rebutted by other circumstances. This principle has become the basis of well-established rules to the effect:

a. That the law of the place of payment governs as to the rate of interest when interest is stipulated for, but the rate is not specified (II.).

b. That the right to, and the rate of, interest as damages *ex mora* for breach of a contract are determined by the law of the place of performance (III.). It may be doubted, perhaps, whether this rule is properly based on the presumed intention of the parties (see III., *supra*).

c. That the law of the place of payment governs in respect of usury when the contract is usurious by the *lex loci contractus*, but valid by the *lex loci solutionis* (IV. c. 2). This rule, however, has another basis. (See paragraph 6—c, *infra*.)

6. Another subordinate rule or principle in ascertaining the unexpressed intention of the parties is that, in the absence of circumstances indicating a contrary intention, the parties will be presumed to have intended to contract with reference to the law of a place that will uphold, rather than one that will invalidate, their contract. (IV. c. 1.) It is essential to the application of this principle that one or more of the important elements of the contract, or significant circumstances of the transaction, shall have had their situs at the place whose law would uphold the contract. It is impossible to summarize all the possible combinations of facts and circumstances that would justify the application of this principle, but it has become the basis of well-established specific rules to the effect:

a. That when the contract is usurious by the *lex loci solutionis*, but valid by the *lex loci contractus*, the latter will govern, in the absence of other circumstances indicating a contrary intention (IV. c. 3). In this class of cases the presumption that the parties intended to contract with reference to a law that would make their contract valid prevails over the general presumption stated in paragraph 5 that the parties intended to contract with reference to the law of the place of payment.

b. That when the contract is usurious by the *lex loci contractus*, but valid by the *lex loci solutionis*, the latter will govern in the absence of other circumstances indicating a contrary intention. (IV. c. 2.) In this class of cases the general presumption in favor of the place of payment coincides with that in favor of the validating law. This is the same rule stated in paragraph 5-c, *supra*.

c. In some cases the principle has been specifically applied so as to uphold a contract valid by the law of the residence of one or both parties, though usurious both by the *lex loci contractus* and *lex loci solutionis* (IV. c. 1). In these cases, however, there were other circumstances than the mere fact that it would uphold the contract to indicate that the parties intended to contract with reference to the law of the residence.

d. This principle is undoubtedly susceptible of other specific applications depending upon the circumstances of each particular case (IV. c. 1). 62 L. R. A.

7. The subordinate principles and rules above stated, being merely prima facie, and resting upon the presumed intention of the parties, may, of course, be aided or defeated by other circumstances, which are of such great variety and susceptible of so many possible combinations, that it is impossible to summarize them.

There are certain facts and circumstances, however, which frequently recur, and to which different degrees of importance have been attached. Thus, the fact that the contract is secured by a mortgage upon real property in a certain state has often been regarded as a circumstance significant of the intention of the parties to contract with reference to the law of that state (IV. e). And the same is true of the circumstance that the consideration for the contract was to be paid in a certain state (IV. g), and of the circumstance that the money was to be used in a certain state (IV. f). Indeed, some support may be found in the cases for making each one of these circumstances controlling as to the governing law without reference to the intention of the parties; but they have been generally regarded, at the best, merely as circumstances illustrating the intention of the parties, and generally they have been regarded as subordinate to the circumstances above stated which have become the basis of the rules stated in the foregoing paragraphs. In some cases in which those rules have been applied, the circumstances mentioned have aided, and in some cases, have militated against, the presumption upon which the rules rest; but in few, if any, cases has any one of these three circumstances been given controlling effect, when opposed to such rules.

8. When the contract is usurious by the law of each one of the places with reference to which it might otherwise be reasonably inferred that the parties intended to contract, the question, according to the weight of authority, ceases to be one as to the intention of the parties, and falls within the general principle that the *lex loci contractus* governs as to the validity of the contract in the absence of a contrary intention (IV. d). The cases, in stating this principle, generally hypothesize the usurious character of the instrument, merely according to the *lex loci contractus* and *lex loci solutionis*, without expressly hypothesizing its usurious character according to every other possible applicatory law. But this is probably due to the fact that, generally, the range of the presumed intention is limited to the *lex loci contractus* and *lex loci solutionis*, though, as shown above, (IV. c. 1) it is not necessarily so limited.

9. Assuming that the intention of the parties as to the governing law has been ascertained, either from an express stipulation in the contract or by indulging a presumption based upon the terms of the contract and the circumstances of the transaction, the question whether the parties acted in good faith, or in bad faith, and for the purpose of evading the usury laws of the place to which the contract was really referable, depends upon all the circumstances of the case. In building and loan association contracts the question has generally turned upon the fact in respect to the localization of the business of the association in the state where the borrower resided and the real property securing the loan was situated (IV. h). There is a decided tendency to hold that, when the business within the state has been localized through branches or agents, any attempt to make the law of the domicile of the association the applicatory law,

either by an express stipulation to that effect, or by formally making the contract there and providing that it shall be payable there, is in bad faith and evasive of the usury law of the state where the business has been localized, which law will, therefore, be applied. It is extremely difficult to deduce any more specific principle on this subject from the cases. Frequently the cases that apply the law of the domicile of the association do not seem to lay any particular stress upon the fact in respect to localization, and it is often difficult to determine from the cases exactly to what extent the business had been localized, though it is apparent that many of the cases apply the law of the domicile upon the ground that the contract was performable there, notwithstanding a considerable degree of localization of the business in the other state. There is a decided tendency, however, to apply the law of the state where the

borrower resides and the property is situated when the business has been localized there, and perhaps the majority of the cases which expressly discuss the effect of localization are to that effect. It will be observed, however, that the conflict between these cases is not due to any difference of opinion as to the principles stated in the foregoing paragraphs, but to a difference of opinion respecting the applicability of the exception to those principles.

It must be remembered that any principle or rule that may be formulated for ascertaining the governing law is subject within any particular jurisdiction, to alteration or abrogation by local legislation, which expressly or by construction extends to contracts and transactions having foreign elements.

There are other questions not touched upon in this summary, that are discussed in the body of the note.
G. H. P.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

PECK BROTHERS & COMPANY, *Appt.*,
v.

PECK BROTHERS COMPANY *et al.*

(51 C. C. A. 251, 113 Fed. 291.)

1. **Persons connected with a branch of a corporation which has built up a large manufacturing interest with goods of superior excellence, known in the market by its corporate name, who, upon the financial embarrassment of the corporation, purchase the goods in the branch and organize a corporation to continue the business, will, at the suit of purchasers of the name and good will of the corporation, be enjoined from using a name so similar to the old one that customers are misled, where it is not descriptive of the new concern, and could have been assumed for no other purpose than to profit by the good will of the old corporation.**
2. **That a corporation has acquired its corporate name from the state will not prevent a Federal court from enjoining it from using the name at the suit of a corporation of another state, if the statute permitted the corporations to select the name, and it was chosen fraudulently for the purpose of appropriating the good will of the other corporation.**

(January 21, 1902.)

A PPEAL by plaintiff from a decree of the Circuit Court of the United States for the Northern District of Illinois in favor of defendants in a suit to enjoin infringement of plaintiff's rights in its trade name. *Reversed.*

Statement by **Jenkins**, Circuit Judge:

The appellant, a corporation of the state of Connecticut, filed its bill against the corporation "Peck Bros. Co." and the individual defendants, who are its officers and directors, to restrain (1) the use of the name "Peck Bros. & Co." or "Peck Bros. Co." or "Peck Bros." or names substantially identical therewith, in connection with the prosecution of the business of the manufacture, purchase, and sale of plumbing, gas and steam fitting materials and supplies, fixtures, brass and iron goods; (2) from holding out or representing that the goods manufactured by them are the same as those manufactured by the complainant; and (3) from using or interfering with the paramount right of the complainant to the name of "Peck Brothers & Co.," or "Peck Bros.," or "Peck Bros. Co.," in connection with the manufacture and sale of goods of the character stated; and seeking also to recover damages sustained by reason of the alleged unauthorized interference with the complainant's paramount right in the use of the names stated. The bill was answered to, and upon the evidence taken the court below on July 8, 1901, dismissed the bill for want of equity.

Elnathan Peck and his two sons, J. M. Peck and Henry F. Peck, under the firm name of E. Peck & Sons, in the year 1859, commenced the business of the manufacture of brass goods for plumbers and gas and steam fitters at New Britain, in the state of

NOTE.—For other cases in this series as to rights of corporations in respect to names, see American Order of S. C. v. Merrill (Mass.) 8 L. R. A. 320; International Trust Co. v. International Loan & T. Co. (Mass.) 10 L. R. A. 758; Chas. S. Higgins Co. v. Higgins Soap Co. (N. Y.) 27 L. R. A. 42; Grand Lodge A. O. U. W. v. 62 L. R. A.

Graham (Iowa) 31 L. R. A. 133; Supreme Lodge K. of P. v. Improved Order K. of P. (Mich.) 38 L. R. A. 658; Armington v. Palmer (R. I.) 43 L. R. A. 95; and International Committee of Y. W. C. A. v. Young Women's Christian Asso. (Ill.) 56 L. R. A. 888.

Connecticut. In the year 1862, the corporation "Peck Brothers & Co." was organized, and became the successor in business of the firm of E. Peck & Sons. This corporation was composed in part, at least, of the two sons of Elnathan Peck, and the plant of the business at that date had been removed to the city of New Haven. The capital stock of the corporation was originally \$35,000. This was increased from time to time until in March, 1896, it was \$750,000. The business had greatly grown in volume, and its product had become well and thoroughly known to the trade throughout the country as "Peck Brothers' Goods." Branch offices for the sale of its product were established in the cities of New York, Boston, and Chicago,—in the latter city in the spring of 1889. The office in Chicago was placed in the charge and management of the defendants Oliver D. Peck and Albert D. Sanders. The former was then a stockholder in, and the secretary of, the Connecticut corporation, and was its vice president from 1894 to 1896, and is now the president of the defendant corporation. The latter was a stockholder in the Connecticut corporation, and conducted the branch on a salary, and is now the general manager of the defendant corporation. The defendant William A. Ratcliffe was also a stockholder in the Connecticut corporation, and was the principal salesman in the Chicago branch, and is now the secretary of the defendant corporation. On the 14th day of March, 1896, the corporation became embarrassed; and a bill was filed in the superior court of the county of New Haven, Connecticut, by the owners of a majority of the stock, against the corporation for the appointment of a receiver. Oliver D. Peck, one of the defendants in this suit, was a plaintiff in that suit. Receivers were duly appointed, who took charge of the corporation and managed its business. On March 16, 1896, the defendant Oliver D. Peck, with others, filed an ancillary bill in the circuit court of the United States for the northern district of Illinois, upon which the defendant Albert D. Sanders was appointed ancillary receiver of the corporation with respect to its property in the state of Illinois, for the benefit of the principal receivers, appointed by the superior court for the county of New Haven, Connecticut. On June 25, 1896, Henry D. Coghlan, W. J. Naughton, and George C. Morton filed with the secretary of state of the state of Illinois a certificate signed by them, respectively, in which they proposed to form a corporation under the name of "Peck Bros. Co.," for the manufacture and sale of plumbing, gas fitting, steam fitting, sewer pipe, sewer building materials and supplies, also hardware, brass, and iron goods, metals, and

machinery, with a capital stock of \$75,000, divided into 750 shares; the principal office of the company to be located in the city of Chicago. A license was thereupon issued to them as commissioners to open books for subscription for the capital stock. On August 21, 1896, they reported to the secretary of state that the stock was fully subscribed as follows: Oliver D. Peck, 100 shares, amounting to \$10,000; Henry D. Coghlan, 200 shares, \$20,000; William A. Ratcliffe, 72 shares, \$7,200; James L. Ratcliffe, 378 shares, \$37,800,—and that there had been elected as directors the four subscribers to the capital stock and George C. Morton, whereupon on that day the secretary of state issued his certificate "that the said Peck Bros. Co. is a legally organized corporation under the laws of this state." Mr. Coghlan, who subscribed for 200 shares, was the attorney of the Chicago branch, and was one of the attorneys of the defendant Sanders as receiver, and is one of the solicitors of record for the defendants in this suit. The bill charges the fact to be "that, although the name of the defendant Albert D. Sanders does not appear as one of the incorporators of the defendant 'Peck Bros. Co.,' he was directly interested and contributed toward the payment upon the shares of its capital stock, and that as your orator is informed and believes, the 200 shares of capital stock of said corporation subscribed by Henry D. Coghlan were in reality a subscription in trust for and in behalf of the defendant Albert D. Sanders; that the said Henry D. Coghlan was the confidential attorney of the said Albert D. Sanders both before and after his appointment as ancillary receiver; that said Albert D. Sanders immediately upon resigning his said receivership became the general manager of the defendant 'Peck Bros. Co.,' and has continued to be such general manager up to this time, and has taken an active part in the conduct and management of the affairs of said corporation from the time of its creation." To this allegation the defendant Albert D. Sanders answered that he "denies that on the 25th day of June, 1896, he conspired with the defendants William D. Peck and William A. Ratcliffe for the purpose of obtaining the name and good will and business of the firm of Peck Bros. & Company. He denies that he had anything to do with the organization of Peck Bros. Company, the defendant company. He denies that the subscription of Henry D. Coghlan to the capital stock of Peck Bros. Company was a subscription in trust for this defendant. He denies that the said Henry D. Coghlan was his confidential attorney, either before or after his appointment as ancillary receiver, but represents the fact to be that Henry D. Coghlan was

the attorney for Peck Bros. & Company of New Haven, Connecticut, for years prior to its insolvency, and after its insolvency acted in connection with E. A. Otis as attorneys of the receivers in winding up the affairs of Peck Bros. & Company, and that everything done by the said Henry D. Coghlan in the organization of Peck Bros. Company was done for purposes and reasons unknown to this defendant, and in no way connected with him." All the defendants, except the defendant James L. Ratcliffe, "further answering, deny that the plaintiff has the exclusive right to the use of the name 'Peck Bros. & Co.,' 'Peck Bros. Co.,' or 'Peck Bros.,' or the name of 'Peck,' in connection with its said business. These defendants aver and charge that the defendant Peck Bros. Company is alone entitled to the use of the said name or names; that it was duly incorporated under the laws of the state of Illinois long prior to the complainant; that it purchased the assets and good will of the Western branch of Peck Bros. & Co.; that its company is headed by Oliver D. Peck, of the original firm of Peck Bros. & Co., who acts as its president; and that it had been in existence and doing business since June, 1896, and under the name adopted has built up a large business, which it alone is entitled to share and enjoy." No evidence was taken on behalf of the defendants below, except the deposition of one Wilson, the representative of the defendant corporation in the city of New York, touching the location of its office in that city.

There were negotiations in the spring of the year 1896, between the Connecticut receivers and Mr. Sanders, the ancillary receiver, on the one hand, and William A. Ratcliffe, representing a syndicate for the purchase of the property of the Connecticut corporation located in the city of Chicago. It was unknown to the Connecticut receiver who composed that syndicate. After some negotiation a price was fixed for the goods, and the sale was finally consummated in the month of September. The Connecticut receivers heard of the proposed new corporation in Illinois, not from the parties, but from some person on the outside, and on August 8th wired Mr. Sanders as follows: "We object to title of new company. Avoid recognizing in any way," and on the same day addressed to him the following letter:

New Haven, Conn., August 8, 1896.

Mr. A. D. Sanders, Receiver, Chicago.

Dear Sir:—

Since we heard of the organization of the new company to succeed to our business in Chicago, we have seriously considered the matter of allowing them to use the name Peck Bros. in any way, and in conversation 62 L. R. A.

with one of our prominent stockholders, Mr. W. H. Hart, he decidedly objected to it. While the intentions of the projectors might be all right, I can readily see where serious complications might arise from any company doing business in the same line under the name of Peck Bros., and we shall be under the necessity of refusing to recognize this company by making any sale of goods to them. I have just wired you to this effect, and I think, if you will stop to consider the matter, you will readily see the necessity of our entering the protest. I presume there may be some way by which the use of this name might be permitted under restrictions and limitations, but have not had an opportunity as yet, of consulting our attorney in reference to the matter. I thought best to enter the protest, and will notify you and write you further after consultation with our attorney.

Yours truly,

J. M. Peck, Receiver.

On August 14, 1896, he addressed a letter to "Mr. W. A. Ratcliffe, Agent for the Peck Bros. Co.," which contains the following: "We have talked over the matter of the name of the new company, *viz.*, 'The Peck Bros. Co.,' and we could see where it could and might be used by you to the detriment of the business of Peck Bros. & Co., but I had your assurance when in conversation with you that your idea in taking the before-mentioned named was to preserve the present channels of trade for Peck Bros. & Co.'s goods so far as possible, and so far as it could be made mutually advantageous. To this we can see no objection, but if at any time in the future Peck Bros. & Co. should find that goods were on the market not of their manufacture but marked 'The Peck Bros. Co.' we have no doubt but the name of the new company is, in our opinion, so near like the old that it would at least warrant a trial of the matter in the courts. As no such case is likely to arise during the receivership, we think the matter can probably be left to the future board of directors of Peck Bros. & Co. In the meantime we shall consider that you are to sell Peck Bros. & Co.'s goods in Chicago and vicinity, and that all orders for goods shall be referred to you, and that we will not give competing prices against you." On August 24th he addressed a letter to Mr. Sanders, receiver, with reference to an inventory of the property at Chicago, in which he stated: "I did say to both you and Mr. Ratcliffe that I did not think it best for you to have any connection with the new firm until the matter was fully closed out, and I distinctly said that this was for your own interest." The negotiations seem to have at first con-

templated the acquirement of the good will and name of the Connecticut corporation. On September 23, 1896, the Connecticut receiver wired Mr. Sanders: "Receivers have no authority to sell good will nor make contracts extending beyond the receivership. Instructions of August 14th cover all we can do. If those terms are not sufficient, call the deal off, and we will advise you further."

On September 23, 1896, the defendant, Albert D. Sanders, the ancillary receiver, filed his petition in the ancillary suit, representing that the stock of goods in Chicago was valued at \$37,065.60, and that the Illinois corporation, "Peck Bros. Co.," had offered to purchase the same for \$18,830.80 in cash; that he submitted the proposition to the principal receiver of the Connecticut corporation, and had been instructed to procure authority of the court to consummate the sale,—and an order was entered by the court authorizing the sale of the goods, which sale was consummated. The order did not authorize the sale of any good will or tradename, but simply all the stock on hand. In December, 1896, Mr. Porter, the Connecticut receiver, visited Chicago, and called at the office of the defendant corporation. He then found the defendant Sanders engaged in the service of that corporation. Subsequently, and on December 31, 1896, Sanders resigned as ancillary receiver, and on the same day Joseph Porter was appointed ancillary receiver in his place. The reports of the ancillary receiver showed payments of \$500 to Henry D. Coghlan for services as solicitor of the receiver. On December 17, 1897, the New Haven court entered a decree, upon the application of the Connecticut receiver, for the sale of the property of the New Haven corporation and directed "that Joseph Porter, the receiver of Peck Brothers & Company, be, and he is hereby, authorized and empowered to sell all of the property of said company, of every kind and wheresoever situated, including its franchises, name and good will," in such manner as, in the judgment of the receiver would realize the greatest amount. The decree further provided that creditors and stockholders might bid at the sale. The report of the receiver, filed March 11, 1898, declares that the receiver offered for sale at public auction to the highest bidder at the designated date the entire property of the corporation, including its "franchises, name, and good will, and all other assets of every kind, and wheresoever situated." At that sale, P. N. Welch, F. C. Hollins, and H. C. Warren, who were agents for the committee of stockholders of the corporation, purchased the property, good will, etc., for the sum of \$265,520. The report of the sale was on the 62 L. R. A.

same day confirmed, and the receiver was ordered to execute and deliver to such person or persons as shall be designated in the written request of the agents of the committee of stockholders who purchased said property a proper deed of conveyance. On the 4th day of April, 1898, Welch, Warren, and Hollins, as trustees of the stockholders in the original corporation, uniting with others, entered into articles of organization of the "Peck Brothers & Company," the appellant here, which was filed with the secretary of state of the state of Connecticut on the 5th day of May, 1898. The number of shares of the corporation was 24,000, of the par value of \$25 each, and were fully subscribed for. Welch, Warren, and Hollins, as trustees of all the stockholders, subscribed for 23,836 shares. On May 5, 1898, the receivers of "Peck Brothers & Co.," the original Connecticut corporation, having received a written request from the trustees of all the stockholders to deliver a bill of sale to the new corporation "Peck Brothers & Company," conveyed to the last-named corporation all the property of the old company, "together with the franchises, name, and good will, and all trade names, trademarks, and patents, and all other assets of every kind, and wheresoever situated, belonging to said Peck Brothers & Company, or to me as receiver thereof." On May 10, 1898, the receiver reported to the court, among other things, that he had received the final payment for the property and franchises sold; "that a committee representing all of the stockholders of said defendant corporation has purchased all of the property and franchises and name of said company, and has caused a new corporation to be organized for the benefit of the stockholders of the defendant company, and has transferred all of the property and franchises, and the name of the defendant company to said new corporation; and that said committee, representing all of the stockholders of said defendant company, desires that said defendant company shall be dissolved, and has requested the undersigned to apply to this court for an order of dissolution." Thereupon on that date an order was entered by the court reciting the report of the receiver, "and the committee representing all stockholders of said defendant company, appearing by their attorneys, Alling, Webb, & Morehouse, and joining in the prayer for dissolution, and, the facts recited in said report having been found to be true," it was ordered that the corporation in that case be dissolved, and its corporate existence terminated.

The record is replete with evidence touching the question of confusion of goods, and in the sales thereof. The defendant corporation, having its headquarters in Chicago,

reaches out for its trade throughout the east, and throughout the territory covered by the complainant corporation. Its goods are stamped "Peck Bros. Co. Chicago." The stamp of both corporations upon their goods is necessarily in small letters, requiring close inspection to distinguish. The evidence discloses that in repeated instances experienced plumbers had purchased the goods made by the defendant corporation, supposing them to be the goods manufactured by the complainant corporation; and much confusion is proved to have occurred in the delivery of letters, checks, and statements forwarded by mail. Upon the question of confusion of goods there is no dispute.

Argued before *Jenkins* and *Grosscup*, Circuit Judges, and *Baker*, District Judge.

Messrs. Otis & Graves, for appellant:

The complainant, as the successor of the original corporation of "Peck Brothers & Co.," has the sole and exclusive right to the use of its trade name in the business which it carried on and made valuable by thirty-seven years of continuous and successful business.

The complainant stands in the shoes of the original corporation of "Peck Brothers & Co.," and has the paramount and exclusive right to use the name of the old company, or any name substantially like it, in the prosecution of its business.

Le Page Co. v. Russia Cement Co. 17 L. R. A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941; *Sarrasin v. W. R. Irby Cigar & Tobacco Co.* 46 L. R. A. 541, 35 C. C. A. 496, 93 Fed. 624; *Kidd v. Johnson*, 100 U. S. 617, 25 L. ed. 769; *Brown Chemical Co. v. Meyer*, 139 U. S. 547, 35 L. ed. 250, 11 Sup. Ct. Rep. 625; *Warren v. Warren Thread Co.* 134 Mass. 247; *Dr. S. A. Richmond Nervine Co. v. Richmond*, 159 U. S. 302, 40 L. ed. 160, 16 Sup. Ct. Rep. 30; *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 462, 27 L. R. A. 42, 39 N. E. 490; *Russia Cement Co. v. Le Page*, 147 Mass. 206, 17 N. E. 304.

A trade name under which business is conducted is entitled to the fullest protection, and an act, even innocent in its character, is constructively fraudulent if it results in unfair trade, confusion of goods, or interference with the rights of another.

Meyer v. Dr. B. L. Bull Vegetable Medicine Co. 7 C. C. A. 558, 18 U. S. App. 372, 58 Fed. 884; *Pillsbury v. Pillsbury-Washburn Flour Mills Co.* 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 841; *Stuart v. F. G. Stewart Co.* 33 C. C. A. 480, 63 U. S. App. 561, 91 Fed. 243; *Croft v. Day*, 7 Beav. 84; *McLean v. Fleming*, 98 U. S. 258, 24 L. ed. 833; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 324; *Rus-* 62 L. R. A.

sia Cement Co. v. Le Page, 147 Mass. 206, 17 N. E. 304; *Tussaud v. Tussaud*, 38 Week. Rep. 503.

The mere fact that both the parties to this cause are corporations, and the trade names in controversy are the names of corporations, does not change the rules of law in the slightest degree.

William Rogers Mfg. Co. v. R. W. Rogers Co. 66 Fed. 56, Affirmed in 17 C. C. A. 575, 35 U. S. App. 843, 70 Fed. 1017; 26 Am. & Eng. Enc. Law, p. 268; *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 462, 27 L. R. A. 42, 39 N. E. 490; *Holloway v. Holloway*, 13 Beav. 209; *Garrett v. T. H. Garrett & Co.* 24 C. C. A. 173, 47 U. S. App. 250, 78 Fed. 472; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. 94; *Tussaud v. Tussaud*, 38 Week. Rep. 503; *Newby v. Oregon C. R. Co.* Deady, 616, Fed. Cas. No. 10,144.

That the defendant company was incorporated in Illinois, while the complainant is a foreign corporation, will not deprive the complainant of the equal protection of the laws, which is guaranteed to it by the 14th Amendment.

Celluloid Mfg. Co. v. Cellonite Mfg. Co. 32 Fed. 94; *Investor Pub. Co. v. Dobinson*, 72 Fed. 603; *R. W. Rogers Mfg. Co. v. Wm. Rogers Mfg. Co.* 17 C. C. A. 576, 35 U. S. App. 843, 70 Fed. 1017; *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 462, 27 L. R. A. 42, 39 N. E. 490; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 660, 17 Sup. Ct. Rep. 255.

Mr. Henry D. Coghlan for appellees.

Jenkins, Circuit Judge, delivered the opinion of the court:

Upon the evidence in this case, we think we are warranted in saying of this defendant, as we had occasion to say of another corporation under circumstances not dissimilar, that it "was 'conceived in sin and brought forth in iniquity,' that wrong attended at its birth, and that fraud stood sponsor at its christening, imposing upon the corporate child a name to which it was not entitled, and which it had no right to bear." *Kathreiner's Malakaffee, etc. v. Pastor Kneipp Medicine Co.* 27 C. C. A. 351, 53 U. S. App. 425, 82 Fed. 321. The original Connecticut corporation had builded up a large manufacturing interest. Its goods were of superior quality, and commanded higher prices in the market than the goods of other dealers. They were universally known to the trade as "Peck Brothers' Goods." The name indicated the origin, and was a guaranty of the superior excellence of the goods, and was so recognized by all dealing in them. The name and designation was a property right belonging to,

and a valuable asset of, the original Connecticut corporation. Its financial embarrassment caused no suspension of its manufacture or trade. That was continued by the receivers appointed under the bill filed manifestly for the purposes of reorganization. The defendant Oliver D. Peck was at the time the vice president of the Connecticut corporation, and bound by his duty to abstain from injuring its good will and trade name. So, likewise, were the defendants Albert D. Sanders and William A. Ratcliffe thus obligated. Each of them was a stockholder in the Connecticut corporation; the former the manager, and afterwards the receiver, of its Chicago branch, and the latter its principal salesman. So long as they occupied those relations of trust, they were bound in honor to refrain from acts detrimental to the company, and which would undermine its business and affect the value of its trade name. Mr. Coghlan, one of the incorporators of the Chicago company, was the counsel of the Connecticut company for its Chicago branch, and was one of its counsel in the receivership proceedings in the northern district of Illinois; and while that confidential relation continued he also was bound by ordinary professional ethics to take no part in a proceeding which must necessarily prove injurious to his client. Pending the proceedings for reorganization, and before it was known whether the corporation would be reorganized, or its property and assets disposed of to others, Coghlan, with two companions, proposed to form a corporation under the title "Peck Bros. Co." to carry on a like business, and, as events have proved, within the territory occupied by his client. Peck, William A. Ratcliffe, and Coghlan were three of the four subscribers to the stock of that company, and were three of its five directors. They assumed a name to which they had no warrant of right. There were no brothers Peck interested in this new enterprise. There was but one Peck. The name assumed was itself a falsehood, and we must believe that it was so assumed for a purpose. The fact of the proposed incorporation was by these parties either designedly concealed from, or was not made known to, the officers or the eastern receivers of the Connecticut corporation; but the fact that such incorporation was proposed incidentally came to the knowledge of the Connecticut receivers, and as early as August 8th they wired to the defendant Sanders, who manifestly was not unfriendly to the proposed corporation, objecting to the title of the new company, and directing him to avoid recognizing it in any way. This was nearly two weeks before the incorporators met to elect a board of directors. On August 14th the Connecticut receiver addressed

a letter to the defendant William A. Ratcliffe, likewise protesting against the use of the name to the injury of the Connecticut corporation. So that they proceeded with this incorporation, assuming a name to which they had no right, with knowledge that they who were then in charge, as officers of the court, of the rights of the stockholders of the Connecticut corporation, protested against the assumption of the name. Here, therefore, was no mere mistaken action, but a deliberate assumption of a name which, as we think, the corporation had no right to bear. We need not stop to inquire too curiously with respect to the real part played by the defendant Albert D. Sanders in this transaction. That he was knowing to it all cannot be doubted. He and his codefendants, it is true, deny all conspiracy to defraud; but they content themselves with mere denial. Having submitted to answer, they should have answered fully. In view of the allegations of the bill, it was incumbent upon all of the defendants having knowledge to have informed the court whether Coghlan's subscription was for himself or for others, or in part for himself and in part for others; whether his own money paid for his subscription to the stock, or whether it was in whole or in part paid for by others, and by whom. The fact that the defendant Albert D. Sanders was the general manager of the Chicago branch, and that within a few months after the incorporation, and while still receiver, he was, either as general manager or in some responsible position, aiding in the management of the affairs of the new corporation, made it incumbent upon him, not merely to deny without explanation, but to fully explain, especially in view of the fact that it is conceded that he is now a stockholder and officer of the new corporation. But no word of explanation comes. They refrain from thus speaking by their answer. They refrain from testifying upon the hearing. Upon this whole business, and with respect to their connection with it, the defendants are as silent as the sphinx. We cannot but believe that the corporation was formed with a view to obtain, rightfully or wrongfully, the good will and trade name of the Connecticut business. Indeed, the answer asserts that the company was formed "to buy the assets and good will of the insolvent concern," and "for the purpose of taking off the hands of the receiver the assets and good will of the western branch." This affirmative allegation required of them proof of the fact, but that evidence is not forthcoming. If, however, the allegations of the answer were true, while it might acquit the defendants of "original sin," the wrongful assumption of the name and the prosecution of the

business thereunder would, as against the lawful proprietors of the name and business conducted under it, render the enterprise illegal. The new corporation did not acquire any right or title to the trade name or the good will of the Connecticut business. The receivers declined absolutely to deal with the Chicago parties upon any such postulate, and instructed the defendant Sanders, if that were insisted upon, to "call the deal off." The order of sale by the circuit court of the United States for the northern district of Illinois carefully omits any inclusion of the trade name or good will, and all that the defendant corporation acquired by the sale was the stock of goods at Chicago. There is here either original wrongful intent, or, if the design were originally honest, it became wrongful upon failure to acquire by purchase the business and trade name.

It is now so well settled, both by the decisions of the supreme court and of this court, that the wrongful use of one's own name to the injury of another, which results in the palming off upon the public his goods as the goods of that other, will be restrained, that it is not needful to review the authorities. We need only refer to a few: *Elgin Nat. Watch Co. v. Illinois Watch Case Co.* 179 U. S. 665, 45 L. ed. 365, 381, 21 Sup. Ct. Rep. 270; *Meyer v. Dr. B. L. Bull Vegetable Medicine Co.* 7 C. C. A. 558, 18 U. S. App. 372, 58 Fed. 884; *Pillsbury v. Pillsbury-Washburn Flour Mills Co.* 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 841; *Stuart v. F. G. Stewart Co.* 33 C. C. A. 480, 63 U. S. App. 561, 91 Fed. 243. See also *Tussaud v. Tussaud, L. R.* 44 Ch. Div. 678. While one may have the right to use his own name honestly in his own business, for the purpose of advertising, he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business, firm, or establishment, of the article produced, and thus work injury beyond that which results from mere similarity of names. *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625. Here the artifice consisted, not in using one's own name, but in assuming falsely the name "Peck Bros.," there being no brothers of that name in the incorporation. The name, manifestly, was thus assumed for the purpose of obtaining the good will of the established business of the Connecticut corporation, resulting, failing the acquirement by purchase of the business, good will, and trade name, in fraud upon the public, and injury to the legitimate proprietors of the business and trade name.

The stockholders of the original Connecticut corporation "Peck Brothers & Co.," including the defendants Peck, Sanders, and William A. Ratcliffe, reorganized under the 62 L. R. A.

corporate name of "The Peck Brothers & Company," and, under the proceedings in the Connecticut court, acquired the business, good will, and trade name of the old corporation. Beyond question, the right to the trade name passed by the proceedings to the complainant corporation. *Kidd v. Johnson*, 100 U. S. 617, 25 L. ed. 769; *Brown Chemical Co. v. Meyer*, 139 U. S. 547, 35 L. ed. 250, 11 Sup. Ct. Rep. 625; *Dr. S. A. Richmond Nervine Co. v. Richmond*, 159 U. S. 302, 40 L. ed. 160, 16 Sup. Ct. Rep. 30; *Sarrazin v. W. R. Irby Cigar & Tobacco Co.* 46 L. R. A. 541, 35 C. C. A. 496, 93 Fed. 624; *Le Page Co. v. Russia Cement Co.* 17 L. R. A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941; *Bank of Tomah v. Warren*, 94 Wis. 151, 68 N. W. 549; *Warren v. Warren Thread Co.* 134 Mass. 247.

It is objected, however, that equity cannot extend its preventive arm to stay this wrong, because the defendant acquired the right to be a corporation from the state of Illinois, and that its name was given to it by the state, and that, since a foreign corporation can prosecute business in a state only by comity, it cannot obtain an injunction from a Federal court against the formation of a domestic corporation bearing the same name. In support of this contention, thus broadly stated, reliance is placed upon the case of *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.* 142 Ill. 494, 30 N. E. 339. In that case, in the year 1881, one Hazelton, having invented certain improvements in steam boilers, joined with one Kennedy in the business of manufacturing and selling boilers containing such inventions, both of them being then residents of the city of New York. The business was conducted under the name of Hazelton Boiler Co.; and on July 10, 1884, Hazelton assigned his interest in the entire business, including three patents with all reissues and extensions thereof, or improvements in relation thereto, and all inventions which he might thereafter make in relation to steam boilers, to the father of his partner. On June 23, 1888, the business having in the meantime been actively carried on by Kennedy and his brother, a corporation was organized by the three Kennedys, under the laws of the state of New York, under the name of the Hazelton Boiler Co. In February, 1888, Hazelton organized a corporation under the laws of the state of Illinois, under the name of Hazelton Tripod Boiler Co., to manufacture and sell tripod boilers of the same character as those invented by him, the patents for which he had sold to the Kennedys, except some minor changes in the structure of them. The statement of the case asserts the following: "Neither the complainant nor defendant corporation has ever been engaged in the busi-

ness of disposing of its steam boilers by placing the same upon the market; both having confined themselves to dealings directly with customers purchasing for their own use, and not for sale, the sales by each corporation being all made upon orders of customers addressed to it directly in New York or Chicago, as the case happened to be; and neither kept any depository, warehouse, or sales room for the disposition of its engines, except at its home office."

The court held that there were two obstacles to recovery by the complainant, which were insuperable: The first, "that the complainant is a junior corporation seeking to contest with a senior corporation the right of the latter to the use of its corporate name;" the second, that a foreign corporation sought to contest with a domestic corporation the right of the latter to the corporate name given by the sovereignty which created it. Upon these propositions the court held that, as the incorporation of the defendant antedated that of the complainant by nearly four months, if there was any infringement, the complainant, and not the defendant, was the aggressor; overlooking, as it seems to us, the fact that if Hazelton, as was claimed, had by the transfer to Kennedy several years before of the assets of the business transferred also the right to use his name in connection with the manufacture of boilers, he could not rightfully, under any guise or pretense, either individually or by imposing that name upon a corporation, use it in connection with the same business, if thereby the public was imposed upon by reason of the confusion of goods naturally resulting from such use. It may be that the court supposed that the facts above stated with reference to the conduct of the business prevented such confusion. The court also seemed to have overlooked the fact that the New York corporation was composed of the Kennedys, and was merely successor to them in the business, and possessed all the rights which they had thereto, including trade names. Upon the second proposition the court remarked: "But the complainant is in the attitude of a foreign corporation coming into this state and seeking to contest the right to the use of a corporate name which this state, in furtherance of its own public policy, and in the exercise of its own sovereignty, has seen fit to bestow upon one of its own corporations. For such a purpose a foreign corporation can have no standing in our courts. Such corporations do not come into this state as a matter of legal right, but only by comity, and they cannot be permitted to come for the purpose of asserting rights in contravention of our laws or public policy. It is competent for this state, whenever it sees

fit to do so, to debar any or all foreign corporations from doing business here, and whatever it may do by way of chartering corporations of its own cannot be called in question by corporations which are here only by a species of legal sufferance."

We are compelled, with deference, to differ with the learned court, if it intended to hold that incorporation under the laws of the state of Illinois protects one from the consequences of his own wrong. In a certain limited sense the sovereignty of the state had conferred the name. There is, however, in the term "sovereignty," no magic to conjure by. It can confer upon individuals no right to perpetrate wrong. Nor do we think that the sovereignty of the state of Illinois sought to do that. It has a general law of incorporation, by which any body of men combining for the purpose of business may incorporate under any name they may select. The name is not imposed by the law, but is chosen by the incorporators. With that selection the sovereignty of the state has nothing to do. The act of sovereignty allowing incorporation is permissive, not mandatory. It sanctions the act of incorporation under the name and for the business proposed, if that name and that business be otherwise lawful. The sovereign by the act of incorporation adjudges neither the legality of the business proposed, nor of the name assumed. That is a matter for judicial determination by a court having jurisdiction of the subject when the legality of the business or of the name is called in question. If one may not use the name imposed upon him *in invitum* so that it shall work wrong to another, by what token may he become incorporated under a name selected by himself to effect like wrong? And how is the sovereignty of a great state impugned by the denial to incorporators of a right to perpetrate such a wrong? Is it possible that a sovereignty of a state can be thus invoked to perpetrate a fraud? If it may be, then indeed will that sovereignty stand for oppression, and not for justice. Then could one who, in connection with a business to which his name had been attached and had given value to it, having disposed of the right to use that name to another, and so by the law prohibited from using it in connection with a like business under circumstances that would work a fraud, be enabled to effect the fraud by simply becoming incorporated under that name under the sovereignty of the state of Illinois. We cannot bend our judgment to the conclusion that a sovereign state designed thus to confer immunity for wrong. The court, in a review of the evidence, further held that the trade name and good will of the business were, as a matter of fact, not transferred by an as-

signmen; which merely transferred the right of the vendor to the business, "its assets, profits, and emoluments," and that the negotiations for a sale did not comprehend such transfer. Whether this legal conclusion be correct, we need not inquire; but the fact seems to have had influence, for the court seeks to distinguish the case then in hand from its decision in *Frazer v. Frazer Lubricator Co.* 121 Ill. 147, 13 N. E. 639, in which that court held that one selling out an established business, and with his own name to be used in connection with the business, cannot afterwards assume it in carrying on a like business; and this upon the ground that the instrument of transfer in that case expressly authorized the vendee to use the name as a trademark, or as indicating the material or product theretofore manufactured by the vendor, and conferred upon the vendee the exclusive authority to use his name for such purpose. The court seems to have been also influenced by the fact that, as the boilers were made for use by those ordering them, and were not upon the market for sale, there could be but little, if any, confusion or improper interference. If that fact be potential, it is unavailing in the case in hand. Here the defendants reach out into the markets of the east, and persistently and deliberately place goods of their manufacture upon the market, selling them under such guise that experienced dealers are imposed upon. With respect to the denial by the supreme court of Illinois of the right of a foreign corporation to contest in the courts of that state the right of a domestic corporation to the corporate name given it by the state in its articles of incorporation, even if that name be selected in fraud and be used to perpetrate a wrong, we are not concerned. The state of Illinois has the undoubted right to regulate its own courts in its own way, and, if it so will, to turn a deaf ear to a demand for justice. A Federal court, however, is organized in part to listen to the complaints of citizens and corporations of one state against citizens or corporations of another state, and its doors may not be closed by any ruling of a state tribunal. We study the decisions of the highest court of a state with respectful deference, but cannot be concluded thereby in such a case as the present one, when the ruling invoked, in our judgment, works a grievous wrong. We cannot follow the decision in the *Hazellon Case*. The doctrine of the Illinois court, as we conceive, is not in accord with the decisions of the Federal and of other state courts. *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. 94; *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.* 17 C. C. A. 576, 35 U. S. App. 843, 70 Fed. 1017; *Investor Pub. Co. v. Dobinson*, 72 Fed. 603; *Chas.* 62 L. R. A.

S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L. R. A. 42, 39 N. E. 490; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 293, 9 Am. Rep. 324.

In the first of these cases Mr. Justice Bradley of the Supreme Court of the United States, observed: "As to the imitation of the complainant's name, the fact that both are corporate names is of no consequence in this connection. They are the business names by which the parties are known, and are to be dealt with precisely as if they were the names of private firms or partnerships. The defendant's name was of its own choosing, and, if an unlawful imitation of the complainant's, is subject to the same rules of law as if it were the name of an unincorporated firm or company. It is not identical with the complainant's name. That would be too gross an invasion of the complainant's right. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another."

The whole contention is well summed up by Mr. Hopkins in his recent work upon *Unfair Trade* (p. 108): "Where the defendant is a corporation whose corporate name includes a proper name, and was selected by its incorporators with the intent and for the purpose of deceiving the public into the belief that its goods are the goods of the plaintiff, such frauds will, of course, be enjoined."

Here the right to the name belongs to the complainant by virtue of the sale of the right to that name under the proceedings in Connecticut. The stockholders of the original corporation, including three of these defendants, are stockholders of the complainant company. The proceeding was a mere reorganization, and the complainant succeeded to all the rights of the old company, and to the equitable rights of the stockholders representing that company. The court below denied relief because the defendant company was incorporated two years prior to the incorporation of the complainant, overlooking the fact that the complainant corporation does not claim by virtue of its incorporation, but in right of the first corporation and its stockholders to the name it had acquired in the business. The right does not spring from the incorporation, but from the transfer of the trade name and good will. The status of the complainant is precisely the same as though the original Connecticut corporation, continuing to exist and to prosecute business, was the party here complaining of the wrong. The assumption of the name "Peck Bros. Co." was of itself the utterance of a falsehood, for there were no brothers Peck interested in the incorporation. The name assumed was volun-

tarily selected, and, as we must believe, for the purpose of appropriating the good will and trade name of another. If not originally so designed, it is clear that, upon failure to procure the right by purchase, the name was afterwards used for the purpose of misleading the public, and appropriating to itself without right, the valuable trade name of another. That wrong has been effected. Further wrong should be prevented. The remedy, if the defendants be honest, is simple. They have but, under the law, to change the name which they selected, and

which has wrought the injury. In any event, they should be enjoined from further perpetration of the wrong.

The decree is reversed, and the cause remanded, with a direction to the court below to decree for the complainant in accordance with the prayer of the bill.

Rehearing denied.

Petition for writ of certiorari denied by Supreme Court of United States November 3, 1902.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

TEXAS & PACIFIC RAILWAY COMPANY,
Plff. in Err.,

v.

G. R. L. WHITE.

(42 C. C. A. 86, 101 Fed. 928.)

An aggravation of personal injuries, caused by the neglect or failure of the injured person to obtain the needed medical or surgical assistance, cannot be charged against the party by whose negligence the original injury was received.

(May 1, 1900.)

ERROR to the Circuit Court of the United States for the Eastern District of Texas to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Argued before *Pardee, McCormick, and Shelby*, Circuit Judges.

Messrs. T. J. Freeman and W. T. Armistead, for plaintiff in error:

The injured party is bound to lighten the consequential damages as much as he can by ordinary care and diligence.

Secord v. St. Paul, M. & M. R. Co. 5 McCrary, 515, 18 Fed. 221; *Gulf, C. & S. F. R. Co. v. Coon*, 69 Tex. 733, 7 S. W. 492; 1 Sutherland, Damages, 148; *Henze v. St. Louis, K. C. & N. R. Co.* 71 Mo. 642.

It is negligence in the injured party to fail to do anything after the accident that would diminish the damage, and the same

is a bar to any recovery except for the original injury itself.

Brown v. Sullivan, 71 Tex. 470, 10 S. W. 288.

Mr. J. F. Jones for defendant in error.

McCormick, Circuit Judge, delivered the opinion of the court:

G. R. L. White, the defendant in error, brought his action against the Texas & Pacific Railway Company, the plaintiff in error, claiming damages for an injury alleged to have been received by him while a passenger on the railway company's railroad, through the negligence of its servants. He had shipped a car of cattle by this railroad from Jefferson to Abilene, in Texas, and was traveling by contract on a drover's pass for the purpose of caring for the cattle on the way. They arrived at Dallas on the morning of November 25, 1897. At the time of arrival the plaintiff was in the caboose asleep. He was awakened by the conductor of the train, and told that his car of cattle needed his attention, and to get up and look after them, which he proceeded to do. He alleged and testified that in a few minutes after he was awakened he left the caboose, and going towards the car which contained his cattle he met the conductor, and asked him how long the train would remain standing on the side track, and was told that it would remain forty or fifty minutes. He then proceeded to his car, and by the use of a prod pole got up all the cattle that were down, except one in the middle of the car, which he could not get up with such help as he could render from the outside of the car. He therefore entered the car to open the press of the standing cattle, so that he could relieve the one that was down; and as he was about to do this the car was suddenly moved a few feet, and as suddenly stopped, without any warning to him, throwing the weight of half of the cattle in the car against him, and

NOTE.—For other cases in this series as to aggravation of personal injuries by subsequent carelessness or mistake of injured person or physician, see *Owens v. Baltimore & O. R. Co.* (C. C. S. D. Ohio) 1 L. R. A. 75; *Goshen v. England* (Ind.) 5 L. R. A. 253; *Du Bois v. Decker* (N. Y.) 14 L. R. A. 429; *Salladay v. Dodgeville* (Wis.) 20 L. R. A. 541; *Selleck v. Janesville* (Wis.) 41 L. R. A. 563, 47 L. R. A. 691, and *Martinez v. Bernhard* (La.) 55 L. R. A. 671. 62 L. R. A.

pushing him against a trough; whereby he received a serious injury in his abdomen, resulting in causing him great pain, and in producing a serious and painful disease of his bowels, and sharp, severe, and continuing pain in his spine or back, and in producing varicocele. He gives detail of symptoms and suffering unnecessary to recite. The defendant answered by a general demurrer and a general denial. The conductor, the engineer, and the brakeman on the train all testified that the car did not move during the time that the plaintiff was in it. It was shown without dispute that the plaintiff did not at any time mention the fact of his having been hurt to any of the servants of the company; that he proceeded with his car of cattle, riding on the top of that car, from Dallas to Ft. Worth. There the cattle were unloaded, and after a few hours reloaded, during which time he was with the servants of the company, and did not mention having received any injury; that he then proceeded on the train, carrying the cattle from Ft. Worth to Abilene, where the same were discharged, and he and an employee of his took charge of them, and drove them to his ranch in Jones county, a distance of 37 miles from Abilene, the plaintiff traveling on foot; that he remained at his ranch several days, and then walked to Anson, and from there traveled by stage to Abilene, where he took the train, and proceeded to Winnsboro, where his family then were. During this journeying, which consumed about ten days, he made no complaint to any of the servants of the company of having received any injury on the company's car. He testified that he would not have gone into the car had not the conductor told him that the car was going to stand there; that after he was hurt he went to the caboose, and laid down half an hour, and then went and got on the car which had his cattle in it a few minutes before the train left Dallas; that a man named Carpenter, who had some cattle on the same train, went to the caboose with him; that he told Carpenter that he was hurt and suffering, and opened his clothes to see if the skin was broken anywhere. Carpenter testified that he saw the plaintiff before he went into the cattle car, and also saw him immediately after he came out, and saw a difference in him after he came out; that the plaintiff had a bruised place on his side, and said he thought he was badly hurt. He showed Carpenter the bruised place. The plaintiff testified that the reason he did not tell the railroad people about his being hurt at the time was that there was not a railroad man about the caboose when he got back to it. There was no brakeman where he was on the train. He left the caboose, and went to his car, before they got ready to leave. The

railroad men were with the train when it got to Ft. Worth, and there were railroad men in the engine all the way. When the train stopped at Ft. Worth he could have told them about it, but did not do it that he remembers, and he does not know what they could have done for him if he had told them; that he was among strangers there at Ft. Worth. He also testified that he suffered much in going from Abilene to his ranch; that immediately after receiving the hurt—that is, as soon as he recovered and got his balance—he left the car because he was scared; that he did not think then that he was seriously hurt; that, though it pained him considerably, he supposed he would get over it, and the reason he did not have a physician until he got back to Winnsboro was because he had hopes of wearing it out, and that it would pass off; that he wanted to get back to his home, where he could get his family physician; that at Anson, on the way back to Abilene, he suffered so much that those who were with him advised him to get a doctor, but he told them that he was going to try to go home if possible. He testified that there had been no cessation in the pain since he was injured; that he did not call for a doctor as he went through Winnsboro on his way home, nor send for a doctor while he was at home, but, as the suffering continued, he went to see the doctor a few days after he reached his home, and about ten days after receiving the hurt; that on his way home he suffered so much, and his symptoms were so violent, that at Greenville persons who were with him brought a physician to see him, but that he (the plaintiff) hardly remembers this physician being with him. He testified that he was positive that he did need a doctor on the trip; that there were doctors all along through that country, but that he had hopes that he was not hurt seriously, and was willing to endure the pain rather than be out the money that the doctor would charge him, and that he thought he could get along without one; that he did not get any medicine at that time to relieve the pain, because he did not know what to get; that those who were with him gave him medicine at Anson to relieve his pain, and wanted him to get a doctor, but that he determined to try to worry through without one. Many witnesses testified on the trial. There was sharp conflict in the testimony as to the moving of the cattle car while the plaintiff was in it, and as to whether he received any injury, and, if so, as to the nature and extent of it. There was a verdict and judgment for the plaintiff in the sum of \$9,000.

The plaintiff in error assigns as error:
“(1) The court erred in refusing special

charge No. 1 asked by the defendant, as follows: 'Upon the law and the facts in this case, you are instructed to return a verdict for the defendant.' (2) The court erred in refusing to give special charge No. 2 asked by the defendant, as follows: 'The plaintiff does not prove any injury to his spine, and if you should find for the plaintiff under the instructions you will not estimate anything for injury to the plaintiff's spine.' (3) The court erred in refusing to give special charge No. 4 asked by the defendant, as follows: 'If you find that the present condition of the plaintiff could have been averted by proper medical treatment, and the plaintiff failed to use ordinary care in having himself treated, he cannot recover for the pain or suffering, mental or physical, which he has suffered, if any, by reason of his neglect in failing to have himself treated or operated upon by physicians.' (4) The court erred in refusing to give special charge No. 5 asked by the defendant, as follows: 'If you believe from the evidence that the plaintiff was injured as alleged by the defendant company, and that his said injuries were caused by his own negligence, or that his negligence contributed to his said injury, you will find for the defendant.'"

The first error assigned is clearly not well taken, because there is evidence tending to support the plaintiff's case. For a similar reason, the second error assigned is not well taken; for there is evidence tending to show that the plaintiff's spine, or his back, was affected by the injury. The fourth error assigned is not well taken, because it is fully embraced in the charge given by the court. The third assignment of error presents matter on account of which we think the judgment must be reversed. The defendant in error believed that the exigency of his business required him to continue the journey with his cattle, and to continue his care of them until they reached the ranch, and it is not unnatural or unreasonable that he should hesitate to employ physicians who were strangers to him while he could endure the suffering he experienced until he could reach home, to have the advice and attention of his family physician. While these reasons for his action commend themselves to our experience and sympathy, yet if therefrom an aggravation of his injury resulted, from his active attention to his business, or from his failure to obtain the advice and aid of competent physicians who were accessible, such aggravation, whether it resulted from his positive active exertion, or from his neglect or failure to obtain the needed medical or surgical assistance, cannot, in justice, be charged against the defendant railway company in addition to its liability for the original injury to the extent of the damage it

62 L. R. A.

necessarily caused. The subject of the aggravation of damages by reason of his continuing his journey under the conditions shown by the proof is amply covered by the charge of the court. It was, however, as incumbent on the plaintiff to procure the advice of a competent physician and surgeon, if accessible, as it was to refrain from such physical exertion as tended to aggravate his injury. We consider that the requested charge No. 4 is sound in substance, and, while it is not exhaustive, it was error in the court to refuse it without giving an appropriate instruction on the subject to which it relates. *Texas & P. R. Co. v. Patton*, 9 C. C. A. 487, 23 U. S. App. 333, 61 Fed. 250; *Kirby v. Estill*, 75 Tex. 484, 12 S. W. 807. There was proof tending to show that a part of the trouble of which the plaintiff below complained could have been speedily cured, at a small expense and without hazard, by prompt proper surgical treatment. As to the existence, nature, extent, and likelihood of relieving the other troubles of which the plaintiff complained, the evidence is vague, conflicting, and difficult to weigh. It is competent evidence, however, and it is the province of the jury, difficult as it may be, to weigh all competent evidence, and determine issues of fact to which it relates. The difficulties presented by this character of proof furnish the strongest reason for invoking the aid of a jury in civil actions. It is no more difficult to determine whether or not the plaintiff's injuries were aggravated by his failure to procure competent medical and surgical advice and aid, and, if so, to what extent, than it is to determine to what extent, if any, his injuries were aggravated by his pursuing his journey, taking his cattle to their destination, and returning home in the manner shown by the evidence. No witness has testified, or probably can testify, either as to the fact or to the extent of the aggravation of the injury, if any, which may have been caused by the subsequent conduct of the plaintiff, either in the matter of his continuing severe physical exertions, or in the matter of his failure to employ competent medical or surgical advice and assistance. Direct testimony on this subject can hardly be had. From the nature of the case, opinion testimony must be relied on, and in considering opinion or expert testimony the opinion of the jury is the chief factor in reaching ultimate conclusions. The conditions may or may not have required a surgical operation. Prompt and skilful treatment of the bruised locality might or might not have prevented or arrested the bowel trouble complained of, or the affection of the spine or back, but the subject should have been submitted to the jury for their consideration on the proof of-

ferred. On another trial the court may amplify the charge presented in the fourth request, which we hold it was error on the former trial to refuse without giving an appropriate charge on the subject. The learned trial judge recognized the settled doctrine that it was the plaintiff's duty to use reasonable care not to aggravate, or suffer to be aggravated, so far as he could prevent it, the injury which he had received. The application of this doctrine to the subject of the plaintiff's failure to promptly obtain professional medical and surgical assistance is not very clearly shown by the adjudged cases or text writers, so far as we have been able to examine. The plaintiff in error has referred us to only one case (*Se-*

cord v. St. Paul, M. & M. R. Co. 5 McCrary, 515, 18 Fed. 221), which is the report of a trial in the circuit court. Mr. Beach, in his work on Contributory Negligence, §§ 69-71, and the notes thereto, refers to cases more or less analogous to the instant case (*Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20, 50 Am. Rep. 601; *Chase v. New York C. R. Co.* 24 Barb. 273; *Sherman v. Fall River Iron Works Co.* 2 Allen, 524, 79 Am. Dec. 799; and others), some of which we have carefully examined.

The judgment of the Circuit Court is reversed, and the cause is remanded to that court, with direction to award the defendant therein a new trial.

GEORGIA SUPREME COURT.

EQUITABLE LOAN & SECURITY COMPANY *et al.*, *Plffs. in Err.*,

v.

P. Q. WARING *et al.*

(.....Ga.....)

1. The power of the courts to declare a contract void for being in contravention of a sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.
2. The authority of the lawmaking power to interfere with the private right of contract has its limits, and the courts should be extremely cautious in exercising the power to supervise private contracts which the lawmaking power has not declared unlawful.
3. The courts are not authorized to declare a contract void merely because it may be unwise, or even foolish. Folly is not in all cases fraud.
4. The people of this state, as *parens patriæ*, have the power, through the courts, to protect persons of unsound mind, or under other disability, from the harmful effects of unwise or foolish contracts; but the power does not extend to such contracts when made by persons of full age, of sound mind, and laboring under no disability.
5. The possibility or probability of performance of many contracts known to the commercial world is dependent upon so many contingencies that it is only in an extreme case that a given contract can be said, as matter of law, to be so incapable of performance as to evidence a purpose to defraud.

*Headnotes by COBB, J.

6. The courts will always relieve an innocent party from the obligation of a contract which is the result of a fraud; but all contracts which are unreasonable, unwise, or even foolish, are not necessarily fraudulent.

7. The success of many legitimate business schemes, especially those relating to the handling and improving of sums of money, depends largely upon the honesty, wisdom, and business sagacity of those in charge of the scheme; and one who goes into such schemes takes the risks that are always incident to intrusting another with funds for improvement and profit.

8. While forfeitures are not unlawful the law does not favor them, and all ambiguities in a contract are to be resolved against their existence; but where a contract in unmistakable terms provides for a forfeiture, and is otherwise free from legal infirmity, neither a court of law nor a court of equity will relieve against the forfeiture.

9. Joint tenancy, with its incident of survivorship, as it existed at common law, is abolished. While survivorship is not favored by the law of this state, and will never arise by operation of law, it is not prohibited, and, when a contract provides for it in express terms or by necessary implication, the law will allow the contract to be enforced.

10. An investment association, which applies the principle of survivorship to the investments by subscribers, the survivorship depending upon default of the members, instead of death, is not prohibited by law.

11. The mere fact that an enterprise depends for its success, to some extent, on forfeitures and lapses, is not alone sufficient to render the scheme unlawful.

NOTE.—As to what constitutes a lottery, see also, in this series, *People v. Elliott* (Mich.) 3 L. R. A. 403, and *note*; *Yellowstone Kit v. State* (Ala.) 7 L. R. A. 599, and *note*; *Ballock v. State* (Md.) 8 L. R. A. 671, and *note*; *State v. Bonell* (La.) 10 L. R. A. 60; *State ex rel. Kellogg v. Kansas Mercantile Asso.* (Kan.) 11 L. R. A. 430; *Long v. State* (Md.) 12 L. R. A. 89, 62 L. R. A.

and *note*, 12 L. R. A. 425; *Thornhill v. O'Rear* (Ala.) 31 L. R. A. 792; *Lynch v. Rosenthal* (Ind.) 31 L. R. A. 835; *People ex rel. Lawrence v. Fallon* (N. Y.) 37 L. R. A. 227; *Meyer v. State* (Ga.) 51 L. R. A. 406; *State ex rel. Sheets v. Interstate Sav. Invest. Co.* (Ohio) 52 L. R. A. 530; and *State ex rel. Prout v. Nebraska Home Co.* (Neb.) 60 L. R. A. 448.

12. It would seem that, in order to render a scheme unlawful, contrary to public policy, and fraudulent, because it is dependent for success on forfeitures or lapses, it must appear that it is not only largely so dependent, but that it is beyond the range of all reasonable probability that the number of forfeitures or lapses necessary to effectuate the scheme will occur in the time required.
13. An enterprise dependent for success upon forfeitures or lapses, even many forfeitures or lapses, is not, for this reason alone, inherently fraudulent.
14. In order to constitute a lottery, three ingredients are essentially necessary,—consideration, prize, and chance.
15. When a number of persons are entitled, in any event, to a given amount, though it may not be the same amount, and all cannot be paid at one time, the determination by lot of what portion of that number shall be paid at different times would not give the transaction the characteristics of a lottery. It is when the amount to be paid, or the value of the article to be delivered, is itself determined, either in whole or in part, by chance, that the elements of a lottery are present.
16. It is not to be presumed that people intend to violate the law, and the language of their undertakings must, if possible, be so construed as to make the obligation one which the law would recognize as valid. All ambiguities are to be resolved in favor of legality, and against illegality. The contract is to be held illegal only when it will admit of no other construction.
17. While the construction placed upon a contract by one of the parties only is not controlling, still, where a contract is capable of being construed either as legal or illegal, and either party, and especially the party upon whom the main obligation rests, has uniformly placed that construction upon the contract which would render it legal, this fact may be properly considered in determining the validity of the contract.
18. A corporation had authority under its charter to deal in stocks, bonds, etc., to negotiate loans, to loan money, to purchase, improve, and sell property, both real and personal, to guarantee the payment of obligations, and to issue investment certificates, to be paid for by the investor in monthly instalments. A large number of these certificates were issued. The provisions of each certificate were, in substance, as follows: An obligation to pay the holder \$500 at the end of fourteen years, in consideration of the payment by him of \$4 as a membership or initiation fee and instalments of \$1.25 each month until the end of that period. The \$4 was given as compensation to the agent procuring the contract, and 25 cents of each monthly instalment went to pay expenses of the company. Fifty per cent of each monthly instalment and all fines made a redemption fund; 30 per cent a reserve fund. The holder was required to surrender the certificate, whenever called, upon the payment of its redemption value, which was declared to be the full amount paid in, with interest at 8 per cent per annum, and its "proportionate share of all dividends or accumulations from fines, lapses, and interest earned in excess of 8 per cent per annum." Certificates were to be called

for redemption in the order indicated by a multiple table, based on the figure 3, which appeared on the back of each certificate. The redemption fund was to be used to pay off certificates called before maturity, to pay certificates at maturity, to pay estates of deceased certificate holders who were not over fifty years of age at the date of the certificate the amounts paid thereon, with interest at 8 per cent and its proportionate share of profits earned in excess of 8 per cent per annum. The reserve fund was to be used and held for the protection of all live, outstanding certificates. The failure to pay an instalment subjected the holder to a fine of 50 cents each month. If any instalment or fine remained unpaid for six months, all payments were forfeited to the company, provided that the payment of 84 instalments would entitle the holder to a paid-up certificate bearing 4 per cent interest. Legal representatives of certificate holders who were more than fifty years of age at the date of the certificate were permitted to take a paid-up certificate of the character above indicated, or to continue the payment of instalments. The entire assets of the company were to be liable for the payment of the certificates. The funds of the company could be loaned to certificate holders upon terms to be fixed by the directors. No part of the reserve or redemption funds could even be loaned to an officer or director. No officer or director or any member of their families could be a certificate holder. It was further provided in the certificate "that no statement made by anyone, except as herein set forth, shall be binding on this company." At the time the certificates were offered for sale, the objects, purposes, aims, and expectations of the company were set forth in literature which was circulated by the company, and the statements therein were authorized by the company. *Held:* (a) That, properly construed, the certificate does not authorize the redemption of any certificate of a living person until it has earned at least 8 per cent interest on the amounts paid in. (b) That the scheme of the company is not a lottery. The fact that the certificates to be called for redemption are determined by reference to a table of numbers, which, instead of being in numerical order, has an arbitrary arrangement based on multiples of the figure 3, thus making it possible in some cases for certificates to be redeemed before others of older date, does not give the scheme the characteristics of a lottery, or one in the nature of a lottery. (c) That it cannot be said, as matter of law, that the contract is incapable of performance by legitimate methods, or that its performance is so largely dependent upon forfeitures or lapses as to be fraudulent, or contrary to public policy. (d) That, if any statement in the literature of the company is at variance with what is contained in the certificate, what is stated in the certificate must control until it is reformed, or the contract therein contained is rescinded.

19. If the scheme described in the certificate above referred to was a lottery, or in the nature thereof, or was so impossible of performance as to be fraudulent, or opposed to public policy, as was contended by the defendants in error, the question as to whether a court of equity would, at the instance of those who knowingly went into the

scheme, administer the assets for their benefit, is not now decided.

(*Simmons, Ch. J., and Lamar, J., dissent.*)

(April 8, 1903.)

ERROR to the Superior Court for Fulton County to review an order appointing a receiver in a suit brought to settle the affairs and distribute the funds of the defendant corporation. *Reversed.*

The facts are stated in the opinion of the trial court, which was delivered by JUDGE LUMPKIN, and was as follows:

On January 30, 1894, the Equitable Loan & Security Company was incorporated, its capital stock being \$2,500. It began issuing what were called "investment certificates," the certificates first issued being designated as "class A." Before the end of that year the Postoffice Department refused the company the use of the United States mails, holding that the certificates issued by it and the business conducted by it constituted a lottery scheme. After this the company began issuing another set of certificates, which it called "class B." On March 26, 1896, it obtained an amendment to its charter, conferring power, among other things, "to purchase, improve, lease, sell, dispose of, or use in any way it may see fit property of any description, whether real or personal." In March, 1897, McMillan and others filed their equitable petition seeking to have a receiver appointed, alleging, among other things, that the contracts were illegal, and impossible of performance; that the agents of the company who procured them to purchase these certificates made fraudulent representations to them; and that it was insolvent. On the preliminary hearing, the affidavits being conflicting, and the presiding judge not having before him such full light on all the questions involved in the case as he preferred to have before making a final adjudication, he permitted the company to give bond in lieu of appointing a receiver *ad interim*. The case was carried to the supreme court, where this ruling was affirmed as a proper use of discretion, as the case then stood. 102 Ga. 575, 27 S. E. 668. In 1898 it was referred to an auditor to report on all questions of law and fact, together with the evidence on which he based his findings. On December 16, 1899, the auditor filed his report. To this exceptions were filed by McMillan and others, and they came on for a hearing in 1900. Before any decision was reached, the plaintiffs withdrew, and dismissed their exceptions, thus leaving nothing before the court to decide. Under the law of this state (Civil Code 1895, § 4601) there being no longer any exceptions to the auditor's report, the court could do nothing

but frame a decree based on it, which he accordingly did. Plaintiffs on the present hearing introduced evidence seeking to show, and contended, that some sort of agreement or settlement was arrived at between the plaintiffs in that case and the company, and that the withdrawal of the exceptions resulted therefrom. But with this the court had nothing to do. It will be seen that what was apparently a victory for the company was in fact a *pro forma* decree resulting necessarily when the exceptions were withdrawn, and nothing left for the court to decide. The court has in fact never passed upon any of the questions here presented, further than is involved in the fact that in the former case he preferred to have a full and complete investigation before passing final judgment, and therefore permitted a bond or bonds to be given in lieu of appointing a receiver pending the cause. It seems from the evidence in the present case that there has been a misunderstanding of this fact. The report of the auditor was favorable to the company, and this was printed and scattered. On this hearing counsel for some of the certificate holders, who object to the receivership, has urged in argument that he and his clients thought that the court had fully approved of and decided in favor of the company's contentions in the former case; and this has been brought forward as an argument why the court should now decline to appoint a receiver. On the other hand, counsel for the company urge that if the court is in doubt as to the contentions of the parties in the present case, he should refuse the receivership as a matter of discretion; so that the court is put between two horns of an argumentative dilemma—the one being the contention that he should not appoint a receiver, as a matter of discretion, *ad interim*; and the other being that, because he did not do so before, certificate holders took it as a complete victory for the company. It may be stated, however, that the evidence in the present case is different from what it was then, and that the status is different.

In September, 1902, Waring and others (being holders of certificates of the company, on which, together with those of parties who have become plaintiffs, by order had been paid into its treasury some \$35,000 or \$40,000) filed the present equitable petition, seeking, among other things, the appointment of a receiver, to have the scheme of the company declared illegal, to have judgment for what they might justly be entitled to recover, and to have proper disposition of the fund. This petition stated that it was filed "on behalf of the petitioners and of all other holders of certificates of the company." The defendant resists the appointment of a re-

ceiver, and a number of certificate holders, representing quite a considerable amount, have joined in the objection. The hearing on the application for the appointment of a receiver occupied fifteen days; hundreds of affidavits were introduced; the books and records of the company were brought into court; experts on each side have had access to them, and have given testimony concerning them. The managing officers of the company were summoned before a commissioner, and their evidence taken, with full and thorough cross-examination, and argument of counsel on each side has been heard. There is no need for any further auditor to report to the court the facts of the case in order to arrive at a conclusion. If he is not in possession of the facts after this hearing, it is much to be feared he never will be; and no hearing could be of further service to him, so far as deciding the questions now raised is concerned. He feels that he ought to decide the principal legal questions made. Many questions have been raised, and many grounds of attack made upon the company. In the decision which the court will make he will endeavor to base his judgment upon the controlling questions of law, and, as far as possible, to avoid relying on matters of discretionary decision. If it is desired to except to his decree, it can thus be done, and a decision of the Supreme Court reached, which will not be a mere affirmance or reversal of a discretionary judgment, but will pass upon the correctness of the rulings of this court in regard to the law. Several of the points raised by the plaintiffs will be dealt with briefly before going into the main controlling questions in the case.

It was contended by the plaintiffs that the charter of the company, as originally granted, contained no power to invest in real estate; that the amendment which was granted in 1896 was not lawfully accepted by the stockholders of the company; and that such investments were injurious to the holders of certificates, and were illegal. Generally, the question whether an amendment to a charter of a corporation is legally accepted by the corporation or its stockholders is one in which the stockholders and the company alone are interested. If the stockholders are satisfied with and acquiesce in the manner of acceptance, certificate holders cannot set up for them that some one or more of them was absent, or that the manner of acceptance might have been objected to by them, unless there is something in the contracts between the company and the certificate holders, or in the relations between the two, which authorizes the latter to raise the question. There is not in this case.

It is contended by the plaintiffs that the officers of the company have been guilty of

malfeasance and breach of trust in various ways. There have, no doubt, been some errors and irregularities in the affairs of the company and in the keeping of its books. For instance, it would have been better for the secretary not to have sold notes belonging to him as an individual to the company of which he was an officer. Human nature is very weak, and it is not well for a man to be on both sides of a trade. But some errors are apt to occur in a company doing a considerable business, and the evidence does not disclose any such mismanagement or waste on the part of its officers as would require the appointment of a receiver at this time on that ground. Indeed, it may be stated, to the credit of the principal officers, that they have given opportunity for a thorough examination of their books and accounts, and have promptly furnished to the court, in the progress of the hearing, information desired. Upon the whole, the court is of opinion that the evidence does not indicate any personal dishonesty or speculations on their part in dealing with the assets.

The plaintiffs alleged and sought to prove that the agents of the company soliciting persons to purchase these certificates were guilty of making false and fraudulent representations, and that purchasers were misled thereby, and acted thereon. There was some proof indicating that an agent or agents of the company had at times given too free rein to imagination, and had been somewhat economical of the truth. Indeed, no evidence from these agents was introduced in denial of such contentions on the part of plaintiffs. If individual holders of certificates were induced to purchase them by fraudulent representations of the selling agents, while it might become ground for a rescission of the contract so far as they were concerned, it would not necessitate the appointment of a receiver for the entire assets of the company, unless it were shown that a receiver was necessary for the protection of the rights of such persons. There is some question, too, as to whether some of the persons asserting that they were deceived are not prevented from setting up such a claim by agreeing with the company that it should not be bound by the representations of such agents. If, therefore, the scheme of the company is legal, and its contracts valid, if any deception was practised upon certain certificate holders, it would not require the appointment of a receiver.

It is contended that the company is insolvent, and that it cannot perform its agreements. In the ordinary sense of the term, solvency or insolvency is determined by a comparison of assets and liabilities. In certain classes of corporations, such as building and loan associations, a somewhat dif-

ferent meaning has been given to the term; or perhaps the word has been used for want of a better one. See *Toule v. American Bldg. Loan & Invest. Soc.* 61 Fed. 447. It is urged here that, inasmuch as certificates have not yet matured, the company cannot be held insolvent. As it is the intention of the court to rest his decision upon other grounds, he does not deem it necessary to enter into a discussion of the solvency or insolvency of this company as a separate question. In so far as the state of its assets is material to a decision of the legal questions decided, reference will be made to it hereafter. So, also, so far as necessary, consideration will be given later in this decision to the question of the possibility of performance of the contracts.

This brings us to one of the great controlling questions in the case: Is this scheme illegal, or contrary to public policy, as being a lottery, or in the nature of a lottery, or involving a similar scheme or device?

The Penal Code of 1895 of this state contains the following provisions:

"Sec. 406. If any person, either by himself or his agent, shall sell or offer for sale, or procure for, or furnish to, any person any ticket, number, combination, or chance, or anything representing a chance in any lottery, gift enterprise, or other similar scheme or device, whether such lottery, gift enterprise, or scheme shall be operated in this state or not, he shall be guilty of a misdemeanor.

"Sec. 407. No person, by himself, or another, shall keep, maintain, employ, or carry on any lottery in this state, or other scheme or device for the hazarding of any money or valuable thing."

It will thus be seen that the law of Georgia denounces as illegal, not only a lottery, strictly so called, but also any gift enterprise, "or other similar scheme or device," "or other scheme or device for the hazarding of any money or valuable thing." It will not be necessary to set forth at length the definitions of a lottery given by various dictionaries in them. Perhaps as good a general definition as can be found is that given by Mr. Bishop (Statutory Crimes, § 952), as follows: "Any scheme whereby one, on paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may determine." Shrewd differentiation may escape from the definition; but a general statute like ours is aimed to reach the substance of the scheme, regardless of any mere variation in form, and to leave no loophole of escape by mere quibbling with words. *United States v. Wallis*, 58 Fed. 942. A consideration of va-

rious definitions of the word "lottery," and of numerous decisions, indicates that three elements enter into such a scheme, and that if they exist it is a lottery, or "similar scheme or device," and condemned by laws against lottery, no matter what may be the particular form of words or cloak of phrases in which it may conceal itself. These elements are: (1) A consideration; (2) chance; (3) a prize, or some advantage or inequality in amount or value which is in the nature of a prize.

1. The consideration need not be great. It may be in money or other thing of value. Sometimes the attracting of custom to one's business, or other benefit to the person conducting the scheme, is held to be sufficient, although no money is paid directly for the ticket, lot, or chance, but it purports to be given. In the present case money is directly paid by the purchasers of certificates, and there is no controversy as to the existence of the element of consideration.

2. Does chance enter into the scheme? What is chance? It has been defined to be "the unknown or undefined cause of events that to us are uncertain or not subject to calculation; luck; fortune; . . . an event resulting from an assumed fortuitous agency; an accident," etc. Standard Dictionary. The Century Dictionary, among other definitions, gives this: "Fortuity; especially the absence of a cause necessitating an event, or the absence of any known reason why an event should turn out one way rather than another, spoken of as if it were a real agency." Worcester defines it to be "absence of an assignable cause; accident; fortuity; fortune." In an opinion filed by Hon. Harrison G. Barrett, acting as Assistant Attorney General of the United States for the Postoffice Department, on December 5, 1900, he quotes the following: "Chance, in its original meaning, may be defined as that which determines the course of events in the absence of law, ordinary causation, or providence." Of course, in a certain absolute sense there is no chance. Everything in the universe acts according to some law. The card drawn at random from the pack, the fall of the dice, the ticket drawn from the lottery wheel, all obey some law. To Omniscience, the word "chance" has no meaning. But from the standpoint of humanity, these and many other things are results of chance or accident. An event which is the result of calculation, design, or the operation of known laws, does not occur by chance. An event which happens as a result of an unknown or undefined cause that to man is uncertain or not subject to calculation, is the result of chance. Is there or not chance involved in this scheme? The company issues certificates which are numbered

in regular order as they are issued. The purchaser has no option as to the number placed on his certificate. He cannot select any particular number. He cannot foresee or calculate what number the certificate will bear. He sends in his application. The officer or agent of the company cannot select a number for him. Neither can he foresee or calculate in advance what number will fall to any particular applicant. The certificates are numbered just as the applications happen to reach the main office. Some are sent by mail; some have been sent in the past by the soliciting agents by telegram. If several applications arrive by the same mail, they are numbered in the order of their dates. If several bear the same date, there is no mode of selection, except the accident of which one the official picks up first. Suppose one man should send an application by mail from Savannah, or any distant city, and the application of another should be sent by telegraph on the same day. The latter would get the earlier number. If both were sent by mail, and both reached the main office at the same time, it would be the merest accident which would receive the earlier number. If both were sent by telegraph, and both reached the main office at the same time, it would be the merest accident which would receive the earlier number. If one were delivered by a later mail, it would get a higher number. If one mailed an application from a neighboring town, say Decatur, and another on the same day mailed an application from Savannah, at a greater distance, the former, arriving first, would be first numbered. Thus it will be seen that the number which a purchaser gets is not the result of choice or selection of it, either by him or by the agent of the company, but depends on the accident of the time of arrival of his application, the number of applications which happen to arrive on a certain day, or the accident of the picking up of one paper instead of another by the numbering official, if several of the same date arrive at the same time. So that the number which a purchaser obtains is purely the result of chance, so far as he and the company are concerned.

What effect has this numbering, obtained by chance, on the selection of certificates to be redeemed, if the company has a redemption? If certificates are called for payment, those to be paid are to be selected, not by choice, but skipping about according to the use of a table containing a set of numbers, which are called "numerals," and another set of numbers called "multiples." Thus certificate No. 1 is first to be paid, then No. 3, then 9, then 2, then 6, then 18, then 27, then 4, then 12, then 36, then 5, then 15, then 45, then 54, and so on indefinitely, the

62 L. R. A.

distance between numbers to be paid increasing, so that after 100 comes 500, and then 900. When the numbers reach the thousands, they must be quite wide apart. There are now about 6,000 certificates outstanding. It will thus be apparent that whenever the company calls a number of certificates for redemption, whose certificates will be redeemed depends on chance. The holder of a certificate is not allowed to demand its redemption. The company is not allowed to redeem, by choice or by agreement with the holder, any particular certificate. But its redemption is made to depend on the chance of its number corresponding with a number in the multiple table. But it is said the company is not compelled under the contract to redeem before the end of one hundred and sixty-eight months, and that earlier redemption is a privilege, not a requirement. This feature of the contract will be referred to again later. For the present, it is enough to say that the certificate provides that it shall be surrendered if called for redemption; that the avowed policy and governing principles of the company, as set forth in the pamphlets sent out by it, are "security, profit earnings, and speedy returns to investors;" that it has called in and redeemed numerous certificates in the past (several hundred of class B at various times); and that the determination of the numbers to be redeemed is and was fixed by chance, as already shown. Indeed, it is the boast of the company that the selection is by chance (though that word is not used), and not by design or choice, for on the face of the certificate occurs this statement: "That, in order to prevent favoritism or partiality being shown by the company, certificates paid before maturity shall be paid by numbers, and only according to the multiple table which is printed on the back hereof." In a letter from its president to W. M. Bent, dated May 30, 1902, he says: "We pay only as provided in the table on the back of each certificate, and cannot ourselves determine when any certificate will be paid." Thus, the company holds out as its plan of action the use of chance, and actually uses it.

Another element of chance involved is from lapses or forfeitures by certificate holders who fail to keep up their payments of instalments. This further introduces chance, both as to the amount on hand which may be divided, and also as to the numbers to be redeemed; for, if there is a lapse, and the lapsed number should otherwise be subject to redemption, it would drop out, and some other number would become subject, not from any selection or choice, but from the accident of the lapsing of one or more numbers, over which the holder of the redeemed

certificate had no control. The element of new business would also add to the redemption fund which can be used to redeem other numbers, thus making the payment to them greater, and also increase the chance numbers in the redemption possibilities according to the table. If this scheme does not involve chance, it is hard to conceive one which does.

It is urged that the element of chance alone, unless connected with the element of prize, does not constitute a lottery, or similar scheme. This may be treated as correct, but the question of combination of chance and prize in this scheme will be spoken of later. The purpose now is to show that, if the element of prize does exist, the element of chance also coexists with it, thus making it a lottery scheme. In *MacDonald v. United States*, 12 C. C. A. 339, 24 U. S. App. 25, 63 Fed. 426, it is said that, "where the value of bonds in an investment company depends upon their number and the numbering is done by the secretary according to the order in which the applications happen to reach him, the result of a purchase of such bonds is so dependent on chance as to render their sale a lottery." In *United States v. Fulkerson*, 74 Fed. 619, it is said (p. 628): "The element of chance, however, is especially and clearly discernible in the facts that the numbers of the coupons which any particular applicant receives depends upon the order in which his application goes into the company, and that the determination of what coupons shall be paid is made to depend upon a device of numbers whose operations are such that it is utterly impossible for anyone to know the result until the same has been accomplished." So it is here.

3. Does this scheme include an element of prize? The word "prize" has been defined by Webster as "that which is obtained against the competition of others; anything carried off as the result or award of a contest; the thing striven for; and hence anything offered to be competed for, or as the inducement to or reward of effort; that which is won in a lottery." One definition given by the Century Dictionary is "that which is won in a lottery, or in any similar way." Among the definitions of the word given in the Standard Dictionary are "anything to be striven for; also anything offered as an inducement to participate in a scheme of chance." As used in connection with anti-lottery laws, the word "prize" comprehends anything of value gained (or, correspondingly, lost) by the operation of chance, or any inequality in amount or value in a scheme of payment of money or other thing of value as a result of the use of chance. The gain need not be large to

constitute a prize. If there are a number of purchasers of tickets, bonds, certificates, or whatever the thing sold may be called, who enter on equal terms, but in the payment by the company or manager the scheme includes the making of an inequality in amounts by the employment of chance, so that one gets more than another similarly situated, it is a lottery. The inequality may not be great, nor in favor of the person selected by chance. It may be against him. He need not lose all or gain all. Partial gain (or loss in the hope of gain) is sufficient to constitute a prize. That a scheme wherein inequality in payment or distribution is to result from chance is a lottery, see *Dunn v. People*, 40 Ill. 465 (3). The fact that each gets something, or even gets the value of what he pays, will not save the scheme, or make it legal. In *Meyer v. State*, 112 Ga. 20, 51 L. R. A. 496, 37 S. E. 96, it is said: "A merchant who gives to a designated class of customers an opportunity to secure by lot or chance any article of value additional to that for which such customers have paid, violates the provisions of § 407 of the Penal Code, which declares that no person 'shall keep, maintain, employ, or carry on any lottery in this state, or other scheme or device for the hazarding of any money or valuable thing.'" A number of cases are reviewed by Mr. Justice Cobb in the opinion. In *United States v. Wallis*, 58 Fed. 942, a similar ruling is made, and it is also said that "the word 'lottery' embraces the elements of procuring through lot or chance, by the investment of money or something of value, some greater amount of money or thing of value." In *Ballock v. State*, 73 Md. 1, 8 L. R. A. 671, 20 Atl. 184, it is held that any device whereby money or any other thing is to be paid or delivered on the happening of any event or contingency in the nature of a lottery is illegal under the laws relating to lotteries and lottery tickets; and that the fact that there are no blanks to be drawn, but all get something, and the scheme provides for the ultimate return of the entire investment, with interest, will not legalize it, if the time for such return to certain holders of bonds depends on chance, and the inducement for investment is the possibility of getting a bonus, which is to be determined in the same manner. See also *United States v. Politzer*, 59 Fed. 273, 277-280. In *Horner v. United States*, 147 U. S. 449, 462, 37 L. ed. 237, 242, 13 Sup. Ct. Rep. 409, the same Austrian bonds which were involved in the Maryland case were considered. The Supreme Court of the United States rendered an interesting and learned decision, approvingly citing the decision of the supreme court of Maryland, and holding substantially the same doctrine. The following

brief excerpts may be of interest: "It cannot be said this is not a species of gambling, and that it does not tend in any degree to promote a gambling spirit, and a love of making gain through the chance of dice, cards, wheel, or other method of settling a contingency. It certainly cannot be said that it is not in 'the nature of a lottery,' and that it has no tendency to create desire for other and more pernicious modes of gaming.

. . . In *Reg. v. Harris*, 10 Cox C. C. 352, it was held that a lottery in which tickets were drawn by subscribers of a shilling, which entitled them at all events to what purported to be of the value of a shilling, and also to the chance of a greater value than a shilling, was an illegal lottery within the statute. In *Sykes v. Beadon*, L. R. 11 Ch. Div. 170, 190, there were holders of certificates, who subscribed money to be invested in funds, which were to be divided amongst them by lot, and divided unequally,—that is, those who got the benefit of the drawings got a bond bearing interest and a bonus, which gave them different advantages from the persons whose certificates were not drawn; and it depended upon chance who got the greater or lesser advantage. The scheme was held to be a subscription by a number of persons to a fund for the purpose of dividing that fund among them by chance, and unequally; and Sir George Jessel, Master of the Rolls, characterized the scheme as a lottery." In *State ex rel. Atty. Gen. v. Interstate Sav. Invest. Co.* 64 Ohio St. 283, 52 L. R. A. 530, 60 N. E. 220, it is held that "contracts of investment, security debentures, or certificates which, by the device of a 'numeral apart,' may be called in and redeemed at any period before they would regularly accumulate a credit in the reserve fund equal to the stipulated endowment value, and otherwise giving unequal advantages to the certificate holders, contain the elements of chance and prize, constituting a lottery, and are unlawful." See also *United States v. McDonald*, 59 Fed. 563; same case on review by court of appeals, 12 C. C. A. 339, 24 U. S. App. 25, 63 Fed. 426; *People v. Elliott*, 74 Mich. 264, 3 L. R. A. 403, 41 N. W. 916; *United States v. Fulkerson*, 74 Fed. 619; *Re National Indemnity & E. Co.* 142 Pa. 450, 21 Atl. 879; *State v. New Orleans Debenture Redemption Co.* 51 La. Ann. 1827, 26 So. 586, 589; *McLaughlin v. National Mut. Bond & Invest. Co.* 64 Fed. 908; *Peltz v. Supreme Chamber, O. of F. U.* (N. J. Eq.) 19 Atl. 668, (2) 671.

It is urged that the facts in the cases cited were not the same as in this case. It may be said, in general terms, that no two cases are precisely alike. But if the principle decided in the one applies in the other, it is sufficient as a precedent. The ingenuity

with which schemes of chance are varied to avoid the statutes, or add new and alluring features, is little short of wonderful. As fast as statutes are passed or decisions made, some skilful change is devised in the plan of operations, in the hope of getting just beyond the statutory prohibition; but, so long as the inherent evil remains, it matters not how the special facts may be shifted, the scheme is still unlawful. In this company, class A certificates having been declared by the postal authorities obnoxious to the lottery laws, and the mails closed to them, a change was made: but the scheme of calling in certificates issued according to chance, and dependent on chance numbers for redemption, was left in class B certificates: and it will presently be shown that the inequalities existing under these redemptions constituted prizes, within the meaning of the lottery laws. A few illustrations of the exercise of the ingenuity which yet failed to avoid the law may not be uninteresting: Prize candy boxes. *Holoman v. State*, 2 Tex. App. 610, 28 Am. Rep. 439. Allowing purchasers of goods to a certain amount a guess at the number of beans in a globe, with an offer of a watch to the one making the nearest guess. *Hudson v. State*, 94 Ind. 426, 48 Am. Rep. 171. Sale of clothes to a certain amount, payable in instalments, with drawings entitling some to goods without further payments, though each eventually should receive clothes of the value paid. *State v. Moren*, 48 Minn. 555, 51 N. W. 618. Selling tea; some envelopes containing tickets entitling the holder to a handkerchief, chicken, etc.; holder selecting his own envelope. *State v. Bonell*, 42 La. Ann. 1110, 10 L. R. A. 60, 8 So. 298. A gift sale of books. *State v. Clarke*, 33 N. H. 329, 66 Am. Dec. 723. Prize concerts. *Com. v. Thatcher*, 97 Mass. 583, 93 Am. Dec. 125. And the list could be almost indefinitely extended. The word "lottery" must be construed with a view of remedying the mischief intended to be prevented, and to suppress all evasions for its continuance. *State ex rel. Kellogg v. Kansas Mercantile Assn.* 45 Kan. 351, 11 L. R. A. 430, 431, 25 Pac. 984.

It is said that the contract in class B certificates does not require the company to redeem, but provides only that the holder shall surrender the certificate "for payment and cancelation whenever the same shall be called, before maturity," and that this leaves the company or its managers to determine when certificates shall be called in. As already noticed, several hundred have actually been called in. The following are a few extracts from the pamphlets sent out by the company to obtain custom, construing the contract and declaring the purpose of the

company: "Its governing principles are security, profit earning, and speedy return to the investor." "The company is now calling its class B certificates for redemption, and the following numbers have been paid" [giving a list]. "The chief attraction and most prominent feature of our plan is to call and pay off certificates [printed in red ink] as rapidly as our business will permit, at their then value, which value shall always be the full amount of the first payment and all instalments paid on them, with 8 per cent interest, and their proportionate share of all dividends or accumulations from fines, lapses (forfeitures), and interest earned in excess of 8 per cent per annum. For the express purpose of thus calling certificates for payment [red ink] as early and as rapidly as possible a redemption fund [red ink] has been created to which is placed 50 per cent (62½ cents) of each instalment paid and all fines." "To Guarantee [red ink] our certificate holders the largest profit and quickest possible returns," no officer or director familiar with the inside workings of the company is allowed to hold certificates. Again, "thus rendering possible an early payment of certificates at a handsome profit above the rate of interest agreed upon." "Redemption Fund. Fifty per cent. (62½ cents) of each instalment paid and all fines shall be placed to a redemption fund which can be used for paying off and retiring certificates before their maturity." "All certificates pay their holders their equitable ratio of profit, whether called for redemption the 12th, 24th, 36th, or any other month." "Insurance companies kill the man and pay the policy: The Equitable Loan & Security Company kills the certificate and pays the man, thereby insuring a speedy return to living members." "A thorough knowledge of our plan will also show that it is absolutely perfect in point of security, profit earning, equity, and a speedy return to the investor." These, and like statements, repeated again and again in various publications, show conclusively the announced policy and declared intention of the company, and the claim that the scheme was safe, feasible, and practicable.

The certificates themselves state that the instalments of \$1.25 per month on each, received from the holders, shall be divided into three parts; 50 per cent going to a "redemption fund," 30 per cent going to a "reserve fund, which shall be used and held for the protection of all live outstanding certificates," and 20 per cent to the expense fund. Now, why name a fund the "redemption fund," unless it was intended to use it to redeem, or at least to convey that idea? The different things which it is stated in the fourth paragraph of the certificates that the 62 L. R. A.

redemption fund may be used to pay do not negative the idea that it is intended to be used to pay, not to hold for investment. If there is no difference between the "redemption fund" and the "reserve fund," why the division? And why provide only as to the reserve fund that it shall be held? In a letter from the president of the company to W. M. Bent, dated May 29, 1902, he says: "We redeem certificates each month." Thus, by the terms of the certificates themselves, by the declared policy, and "governing principles" of the company, as stated again and again in print, and to some extent by its actual practice, redemption and "speedy return to the investor" are integral parts of this scheme.

The fact that no specific time or plan for the operation of the chance redemption or drawing has been determined upon at the time the ticket, bond, certificate, or whatever the token may be called, is sold, will not save the scheme, if it is otherwise tainted as a lottery scheme. *Thomas v. People*, 59 Ill. 160. Nor if the matter is dependent on the choice or selection of the managers. *State v. Shorts*, 32 N. J. L. 398, 90 Am. Dec. 668. In the case of *State ex rel. Atty. Gen. v. Interstate Sav. Invest. Co.* 64 Ohio St. 283, 52 L. R. A. 530, 60 N. E. 220, *supra*, the certificates in "Series A" provided that the first six months' payments were to be passed to the credit of the reserve and expense fund, and of subsequent payments 65 per cent was placed to the redemption fund, 20 per cent to the reserve fund, and 15 per cent to the expense fund. "Not less than 20 per cent of the total amount contributed to the redemption fund is applied every month to redeem," etc. "Regular redemptions. The company reserves the right to call in and pay this certificate at any time previous to its maturity. . . . The directors reserve the right to modify this method of redemption at such a time and in such a manner as will, in their judgment, be to the best interests of certificate holders." But it was held to be a lottery scheme, in spite of the use of this form of language. Note also the permissive form of language used in the *Case of McLaughlin*, 64 Fed. 908, *supra*, and that the certificate was "subject" to redemption by the company at any time before maturity, and that there was to be appropriated to the certificate "its proportionate share of the reserve fund."

In the *New Orleans Debenture Redemption Co. Case*, 51 La. Ann. 1827, 26 So. 586, the certificate was "subject to redemption." Compare, also, the determination allowed in 40 Ill. 465, *supra*. If mere permissive forms of words would change the character of a scheme from a lottery to no lottery, why could not any lottery openly operate an

agency in every county of the state by merely having printed on the tickets that the directors "may" call in the tickets or have drawings when they think sound business principles will authorize, actually calling in and redeeming some by a chance determination, and holding out as an inducement to buyers that this was a governing principle of the company? It is not the form of words used, it is the nature of the scheme, which determines its legality or illegality. Nor does the fact that the prizes in some of the cases cited are large make any difference. A scheme, if illegal as tainted with a lottery feature, would not become legal by reducing the size of its prizes. If so, all lotteries with small prizes would be legal. It is the element of gain or inequality arising from the use of chance which condemns a scheme, not the size of the prizes. To quote an expression from one of the sages of the law, "The office of the judge is to make such construction as will suppress the mischief and advance the remedy, and to suppress all occasions for the continuance of the mischief." *Magdalen College Case*, 11 Coke, 71b. See also *Thomas v. People*, 59 Ill. 160, *supra*.

Is there inequality in distribution, resulting from chance? The secretary of the company has made an affidavit showing how he claims amounts paid on certificates heretofore redeemed since April, 1901, were arrived at. For the present purpose, we may assume his calculations to be correct. So doing, he says that each certificate which has been redeemed has received an amount equal to the first payment of \$4, plus the sum of the instalments of \$1.25 per month, with interest for the average time at the rate of 93 per cent per annum. Or that if the first payment of \$4, and the 25 cents per month, which went to expenses, be not considered, but only the \$1 per month paid into the redemption and reserve funds, on each certificate called in, there has been paid to the holder the \$1 per month, with 15.56 per cent per annum, compounded quarterly, and that the basis for this calculation was the net assets appearing on the books of the company in April, 1901. On the trial the company introduced in evidence the affidavit of an expert accountant, showing what was called an "apportionment of profits;" that is, what any particular certificate would be valued at on August 31, 1902, on the basis of the books as they then stood, and therefore what the holder of such a certificate would be paid if it were called for redemption. His affidavit shows that, if a certificate were then or since called, there would be paid, by such calculation, the \$1 per month paid into the redemption and reserve funds, with 14 per cent interest, compound-

ed quarterly. So that, if these two affidavits be true and correct, those who have had certificates called in for redemption by the use of the chance device already explained, even including a redemption in August, received 15.56 per cent on the monthly payment of \$1, compounded quarterly, while certificates redeemed after August 31st would have received payment at the rate of 14 per cent, compounded quarterly,—a difference of 1.56 per cent compounded quarterly; and the man who received this difference received it as a result of the mode of redeeming by chance. A small error in entries on the books was afterwards found, but as what would be taken off of one account would go to another, and there was a small increase of both assets and liabilities, it made no material change in the calculation.

Seeing this trouble, no doubt, the secretary of the company stated in another affidavit, in substance, that the valuation of assets appearing on the books was not correct, but much too small; that, taking estimates of certain real-estate dealers and others, and considering the assets at a low estimate, an "apportionment" will show that the present value of a certificate would be fixed by calculating interest on each monthly payment of \$1 into the reserve and redemption funds at the rate of 18.36 per cent, compounded quarterly, or perhaps slightly more. Suppose this is true; what then? In the first place, the value of certificates heretofore redeemed since April, 1901, has been determined with reference to a book valuation of that time. The books on August 31, 1902, showed assets on the basis of which the expert employed by the company calculated. Now, it being evident that the book valuation shows that certificates already redeemed received more than is left for any of the certificates still unredeemed, the book valuation is to be rejected entirely, and a new estimate made, although the company had printed and sent out as true the statement of August 31st, showing what it called its assets and liabilities. Very well. Suppose the new estimate, which the secretary says is low, be taken; what is the result? The certificates redeemed, even down to and including August, just before this suit, have been paid on the basis of 15.56 per cent on the \$1 per month, compounded quarterly. Those still in, and which may now be redeemed, will get paid on the basis of 18.36 per cent on the \$1 per month, compounded quarterly,—a difference of 2.80 per cent, or nearly 3 per cent, on the \$1 per month, compounded quarterly. If the calculation of the expert employed, and whose evidence was introduced by the company, is correct, certificates which were redeemed up to the filing of this petition ob-

tained an advantage over those remaining unredeemed, by having their values fixed at a rate of interest $1\frac{1}{2}$ per cent higher, compounded quarterly. If the last calculation of the secretary, be taken as true, those redeemed lost at the rate of nearly 3 per cent, compounded quarterly. It is a matter of indifference which is taken as true. Either one shows that those redeemed and those undredeemed are not equal. This inequality, being brought about by the chance method of redemption already described, makes a lottery feature. As the company seeks to show equality and repel the idea of prizes by using per cents, that form of expression is followed, so that it may appear by mere comparison of the affidavits introduced by the defendant that there is inequality, not alone in time of redemption, but also in amounts, between the redeemed and the unredeemed. One very significant expression is used by the secretary in seeking to explain why the calculation of the expert showed a less valuation for certificates unredeemed. After speaking of a real estate purchase, etc., since the process of redeeming began, he says that "that period [i. e., April, 1901] was nearer to the time of the great number of lapses following the McMillan suit." In other words, what falls in by the chance of lapses is paid out, at least in part, by a chance table.

Another thing which will emphasize the risk of loss is this: As will be remembered, the first payment of \$4 goes to the agent; 25 cents of each monthly instalment is used for expenses; and only the \$1 remains to earn and build up. It will readily be seen that it will require several years, even at the rates of interest estimated by defendant and its expert witness, before the \$1 can earn back the primary \$4 and the 25 cents a month. To illustrate: The holder of a certificate on which the first monthly dues were paid in October, 1901, paid in \$4 to enter, and \$1.25 per month, aggregating to the end of August, 1902, \$17.75. According to the calculation of the expert, its value (or what is more resonantly called its apportionment of profits) on August 3, 1902, was \$11.79. Therefore, if by the multiple table that number should be reached for redemption, the owner would receive actually less than he had paid in by \$5.96. Again, the holder of a certificate on which the first monthly payment was made in May, 1899, paid the preliminary amount of \$4 and forty instalments of \$1.25, making \$54. Its value is fixed at \$51.06. These are not isolated cases. The same is true of a large number of certificates. In fact, on certificates running back to January, 1899, the allotment is less than the amount actually paid in, regardless of interest. Similar results appear from the 62 L. R. A.

secretary's calculation of values on April 1, 1901. Suppose that by the multiple table the redemption number should fall on any one of these; is it not evident that the holder would get less than he paid in, regardless of interest, and suffer an actual loss? It is said that this has not happened, and perhaps not. But under the multiple table, the numbers subject to redemption rapidly get wider apart. Already, since redemption began in 1901, the skipping process has stretched from the beginning of the table to number 3,141; and it is apparent that in the course of time, by continuation of this process, a number or numbers will be reached, which, if redeemed, will not only pay the holder no profit, but will cause him actual loss. If the company honestly abides by its scheme, and continues to redeem according to the declarations quoted, it cannot prevent the result. It is no answer to this to say that the company may devise some way to meet it. Such a suggestion met with no favor in 59 Ill. 160, and 33 N. H. 329, 66 Am. Dec. 723, *supra*. There is another thing which seems to run through all the calculations of the company. If a certificate holder fails to pay his instalments for one or more months, they seem to ignore him as a person to whom payment may have to be made, treating him as not "in good standing." In apportioning out the assets and determining the values for redemption, they include the amounts paid by him as assets, but leave him entirely out as a possible claimant. At least, this seems to be true. And in one affidavit of the expert he made a correction on account of some persons in this condition, who in fact paid their fines and dues, and returned to "good standing." By the terms of the certificates, a man does not lose all right, or his certificate lapse, until after six months' default. He can pay up, with the fines imposed for delay. So that to leave a number of such persons out of the calculation is to ignore quite an important factor.

It is practically admitted that the certificates belonging to class A are illegal. But it is contended that those in class B are so different as to avoid the illegality. There are several points of difference, and the certificates belonging to class A are more clearly and plainly illegal. But in the opinion of this court the illegality is preserved in the certificates of class B. In class A the maturity value was \$505.54, maturing after 130 instalments of \$1.25 had been paid. In class B \$500.00 is fixed as the maturity value after 168 months. As will appear more fully later on, neither can be accomplished by the legitimate investment of money, nor without the aid of large lapses. As to calls for redemption before maturity, each uses the form: "That the holder shall

surrender for cancelation this certificate when the same shall be called, upon the payment to him of its then redemption value." In class A certain amounts are named if the certificate should be called at certain times. In class B it states that "redemption value shall be the full amount of the first payment, and all instalments paid hereon with interest on said amount at 8 per cent per annum and its proportionate share of all dividends or accumulations from fines, lapses, and interest earned in excess of 8 per cent per annum." One of these fixes the sum to be paid outright. The other fixes it by giving certain elements from which the minimum amount can be calculated, with the hope of more held out. It promises to pay certainly the amount fixed by the payments of the certificate holder, with 8 per cent interest, regardless of the time of call, and regardless of whether 8 per cent had been earned or not. It is suggested that the added words "and its proportionate share," etc., above 8 per cent, indicates that it was not subject to call until more than 8 per cent had been earned. This does not seem to the court the proper construction. But in any event the multiple table does not select certificates according to what the payments on them have earned. It selects them by chance application of numbers. The difference between the two classes in this respect is one of degree, rather than of quality. One is worse than the other, but both are bad. Other differences need not be noticed.

Stripped of all technical lore, can anyone seriously believe that the scheme of the company's business was merely to take the money of purchasers of certificates, invest part of it, and give them back what the part invested earned, or that this was held out to purchasers as the real scheme? Does anyone believe that purchasers have turned in their money to this company, paid it \$4 for the privilege of starting, and one fifth of all instalments as expenses, simply for the privilege of letting the company invest the other four fifths and give them back such profits as it made? Is it not plain enough to be seen that the real attraction was the appealing to cupidity, and the hope of getting large returns by the use of chance?

The contentions in regard to lapses, the impossibility of the scheme, and the insolvency of the company, may be treated together. It is an error, in dealing with these matters, to treat each as separate and distinct, instead of considering their relation to the scheme as a whole. The fallacy in this mode of treatment may be illustrated by a case of fraud. Considered separately, there is nothing illegal in a man's giving his house and lot to his wife as a home, though he may own nothing else. So, too, as a separate

statement, there is nothing illegal about a man's owing debts. But, if the two be put together, it is fraudulent for a debtor to give away all of his property to his wife so as to defeat his creditor. In this case, where the real question is as to the legality of the scheme of the company, it will not do to segregate the elements of the complaint, and deal separately with each, without regard to the whole. To cite the law governing a plea of impossibility of performance, where filed to a suit on a contract confessedly legal, is quite different from considering the nature and character of the promise, and the company's scheme of performing it, in determining whether the scheme is legal or illegal. Thus, it is urged in behalf of the company that a provision in a contract for a forfeiture on failure to pay, or a "lapse," is not illegal. While forfeitures are not favored, and equity in proper cases grants relief against them, yet a provision in a contract for a forfeiture, or a lapse on failure to pay, does not *per se* render the contract illegal. But whether a number of certificate holders will or will not fail to pay, and how many will fail, and at what stage of the proceeding, and what amount of previously paid instalments will thus be forfeited or gained by the company, necessarily involves an element of chance. While a forfeiture may happen without involving illegality in the individual contract, and accretions be added to the funds, yet if a company whose business is the issuing of bonds, certificates, or promises to pay, must depend for its ability to do so upon this chance element, it is an illegal scheme, fraudulent in law, and contrary to public policy. A company may contract with a certificate holder that a forfeiture of amounts already paid, or a "lapse," shall occur on a failure to make payments. But if a company's business is to promise large numbers of certificate holders to pay them certain amounts, and, as an essential element or ability to pay some of them the agreed amounts, it must depend upon the chance of lapses or failure on the part of others to keep their contracts, and consequent forfeiture of sums already paid in, the scheme is essentially one of chance. The mere existence of some good fortune or bad fortune, though involving an element of chance, does not necessarily render a business illegal, if chance is not an integral or essential part of it. Thus, the seasons affect the farmer and the merchant. The success or failure of other merchants or dealers may affect one's collections, and his profits and losses. And many other illustrations might be given. Indeed, it may be said that all success in business is more or less affected by circumstances beyond the control of the individual considered, and therefore,

in a loose and vague way, called chance. But in legitimate business the employment of capital or labor (physical or mental), or both, form the foundation, and their legitimate product the primary reward; and the element of chance is not the essential element of the enterprise. This is a wholly different thing from organizing or carrying on a scheme in which chance is a basis or essential element.

As sustaining a contrary theory, the case of *Union Invest. Asso. v. Lutz*, 50 Ill. App. 176, is cited by defendant's counsel. An examination of that case will show that the paragraph of the opinion dealing with this important subject embraces eleven lines, and cites one decision which involved quite a different organization from a bond company dependent on lapses. Rapp's Harmony Society was a religious association, in which each surrendered his property into one common stock for the mutual benefit of all, during their joint lives, with right of survivorship, with provisions in regard to furnishing necessities to the member and his family, and with privilege to secede during the lifetime of the member. *Schriber v. Rapp*, 5 Watts, 351, 30 Am. Dec. 327. The Illinois decision does not consider the distinction pointed out above, nor does it refer to any chance or lottery feature in the mode of distribution. If it meant to hold that for a company to conduct a scheme in which it is dependent upon chance lapses or forfeitures for its ability to comply with its promises to pay some of its certificate holders, and where those called in for payment shall be fixed by chance, is legitimate business, it would be neither sound in principle nor sustained by authority, and would be in the teeth of decisions already cited. The court says, of the scheme then being considered, that it "applies the principle of joint tenancy to the investments by the subscribers, the survivorship depending upon default of the members instead of death." The analogy invoked does not apparently exist. Death is a certainty, resulting from the operation of natural laws. The time may not be known, though it may be estimated with some probability by the use of mortality tables. Default or lapse is a mere chance, which may never happen at all. If the statement of the Illinois court be correct, such an attempt to apply to a chance event the principle of joint tenancy can have little weight in this state, where joint tenancy itself has been abolished. Civil Code 1895, § 3142. This court does not believe that the supreme court of Illinois meant to hold any such doctrine. To do so would be out of consonance with the trend of its decisions.

The effort is made to analogize this sort of scheme to the business of insurance, and 62 L. R. A.

especial reference is made to tontine insurance. What has been said above indicates a wide difference. It would prolong this opinion beyond reasonable limits to enter into a full discussion of the methods of insurance, and the legality of lapses as incident thereto. Suffice it to say that outside of co-operative and assessment companies, where the insured are also insurers of each other, all respectable life insurance companies at this day are believed to lay aside from premiums paid on ordinary life policies a reserve, which, invested at some reasonable rate, will produce the amount of the policy within the time of the expectancy of the insured. Many states have laws fixing the rate of interest in calculating life insurance reserves or net value of policies. In this state 4 per cent is used, except where a company has a cash capital fully paid up of not less than \$100,000, when the insurance commissioner may, in his discretion, employ a rate of from 3 per cent to 6 per cent. Civil Code 1895, § 2049. The rate of interest which is employed in many states is 4 per cent, compounded annually. This is what is considered a reasonable insurance reserve, and a practicable rate of interest; not 14 per cent, 15 per cent, or 18 per cent, compounded quarterly, as this company uses in its calculations to figure out estimated results. A tontine policy has been defined to be "a policy of insurance in which the policy holder agrees, in common with the other policy holders under the same plan, that no dividend, return premium, or surrender value shall be received for a term of years called the tontine period, the entire surplus from all sources being allowed to accumulate to the end of that period, and then divided among all who have maintained their insurance in force." Century Dictionary. This is a modification based upon the original tontine, which was an annuity shared by subscribers to a loan, with benefit of survivorship. Lorenzo Tonti could hardly have foreseen that his plan of survivorship would be claimed as applicable to or as legalizing a company which maintains a redemption fund of 50 per cent of monthly instalments paid, which depends for its ability to carry out its promises on the chance of lapses, and which redeems, not by equitable division of all profits among the insured at the end of the tontine period, but calls some for redemption by the use of chance. No insurance company of any standing can probably be found which does any such tontine insurance. If it does, it is running a lottery, not an insurance business. The modern trend of legislation and decisions is rather in the direction of limiting than extending what is loosely called the "tontine" principle.

Judge Grosscup, in his charge in the Mc

Donald Case, 59 Fed. 565, 566, makes use of the following language: "Take, for instance, the life insurance companies,—those that proceed on the stock plan, or on the assessment plan. They require of the member that he pay in a certain amount of money. That is the pecuniary consideration. That money is invested, or supposed to be invested, in securities, and, when the member dies, a certain amount, stipulated in the policy, is paid to his heirs or the beneficiary named in the policy. That is the return. The man may have been insured but a month, and have paid in but a few dollars, and have received back \$5,000 or \$10,000. In such instances as that, a much larger sum has been returned than the consideration, but the fact that there was such a return does not make it an unlawful enterprise. Why? Because the prize is not determinable by, or dependent upon, chance or lot. It is dependent upon the life of a man, and the life of a man is determined by the laws of nature, and not by the chances of lot." So, also, he deals with investment in real estate, which enhances in value. In *State ex rel. Atty. Gen. v. Interstate Sav. Invest. Co.* 64 Ohio St. 283, 52 L. R. A. 530, 60 N. E. 220, *supra*, it is said that "contracts of investment security, debentures, or certificates which cannot reasonably be expected to accumulate a reserve fund equal to the stipulated endowment values within the stated period, without aid from lapses or appropriation from premiums on new business, are fraudulent, contrary to public policy, and unlawful." This was not a *dictum*, as insisted. It was a direct decision of a point involved in the case. The above is a copy of a headnote made by the court itself. Courts will use extreme caution in declaring a transaction void on grounds of public policy, and will not lightly infer such contrariety or such adverse public policy. But can there be any question that in this state there is a public policy, clear, certain, beyond doubt, against gaming in every form, or by any name, and against lotteries and lottery schemes or devices, by whatever name called, or under whatever verbiage covered up?

The enumeration of certain contracts as contrary to public policy in § 3668 of the Civil Code of 1895 is not intended to be exhaustive, but illustrative. Two citations will suffice to prove this to be true. See *Mercier v. Mercier*, 50 Ga. 546, 553, 15 Am. Rep. 694; *Western & A. R. Co. v. Bishop*, 50 Ga. 472, 473.

This company's capital is only \$2,500, of which about one half has been paid in, partly in a desk and office furniture. It has issued hundreds of thousands of dollars worth of certificates; so that the capital is merely 62 L. R. A.

nominal, and furnishes no real security. The certificate holders must look to the amounts arising from the contracts or certificates. Class B certificates begin thus: "The Equitable Loan & Security Company of Atlanta, Georgia, hereby promises to pay to the order of ———, at its home office in Atlanta, Ga., \$500 subject to the following express terms and conditions: 1st. That the holder has paid \$4 therefor, and agrees to pay to the maker hereof at its home office, without any other or further notice, an instalment of \$1.25 on the fifth day of each and every succeeding month hereafter, until one hundred and sixty-eight instalments shall have been paid, time being of the essence of this contract, then this certificate shall become due and payable for its full face value." As stated above, the first payment of \$4 goes to the agent, and 25 cents per month of the instalments goes to expenses, leaving \$1 per month of which 62½ cents goes to the redemption fund, and 37½ cents to the reserve fund. The redemption fund may be used to redeem, and, as already shown, the declared policy of the company is to make redemptions or "speedy returns to investors." The only fund specifically provided to be held in reserve is 37½ cents per month. In one hundred and sixty-eight months this would aggregate \$63. If the entire \$1 per month were held in reserve, it would aggregate \$168. According to the sworn calculation of an expert, which has not been denied, \$1 paid monthly for one hundred and sixty-eight months (fourteen years), if invested as received at 8 per cent (the highest legal rate in Georgia), and compounded annually, would aggregate, both principal and interest, at the end of the time, \$302.20, as against \$500 maturity value. It is perfectly evident that no rational or reasonably possible investment of, or interest on, either \$63 or \$168 can produce \$500 in the given time. Especially is this true when it is remembered that the entire amount is not received at the beginning of the period, but is paid in monthly instalments, and therefore has an average earning capacity for only one half of the whole time.

It is suggested that there is no real binding promise to pay \$500; that the naming of that amount is not a substantial part of the contract: that the company may redeem all of its certificates at any time previous to maturity, even to the last minute, at a less amount, and can thus, at its option, avoid ever having to pay the full sum. The error of this suggestion is twofold: In the first place, the certificates have been issued at various dates, running through several years. They, therefore, will fall due all along at different times. If the company adheres to its table, it cannot select to pay

any particular certificates as they are about due, less than the full amount, on account of its redemption privilege before maturity. Nor can it select and call them before maturity, unless they happen to bear the tabular numbers for calling, or unless it can and will wind up and pay off all certificates when the first fall due, which is evidently not the purpose or scheme, for new certificates are continually being issued (though called by a different class name). The second error in this suggestion (though evidently not thought of in making it) is this: The very first thing in the certificate is a promise to pay \$500 at maturity. It is printed in large type,—the most prominent thing in the certificate. It is true that it says that this is subject to “the following express terms and conditions,” which are then printed in small type, and some of them in rather uncertain, if not ambiguous, expressions, as will be seen by reading them. But in one of its pamphlet publications, stated on its face to have been copyrighted in 1895 by its secretary, and therefore emanating, not from its soliciting agents on the road, but from headquarters, occurs this statement: “Twenty certificates purchased in the Equitable Loan & Security Company, if carried to maturity, will pay you Ten Thousand Dollars, yielding a clear profit of \$5,720.00.” Beyond question the company held out, as part of its plan of operation, the paying of \$500 on some certificates. To hold that it printed its \$500 promises in bold type, and sent abroad its pamphlets construing and illustrating its plan, but never really intended any such thing, and that these statements are mere surplusage in the contract, and not to be considered in ascertaining the duties or the liabilities of the company, or the legality of the scheme, would look very much like branding it as fraudulent in its origin. This court prefers to give the company a more liberal and charitable view, and not to hold men of the character and standing of the president, ex-president and others who have been connected with it, guilty of wilful fraud. A scheme which, for its carrying out and distribution of payments, must rely upon the element of chance, may be illegal, but it is less reprehensible than if it were branded as fraudulent, misleading, and deceptive. The one may involve a mistaken notion of what the law will permit; the other would involve moral turpitude.

The only rational possibility for the company to ever pay off certificates as they mature at \$500 each, or any considerable part of them, depends on the chance element that a large number of certificate holders will fail to keep up their payments, and thus what they have already paid in will be forfeited.

It is not necessary to appeal to conflicting evidence to show what part lapses play in this scheme. In one of the affidavits of the expert offered in evidence by the company, he says: “The books of the defendant show \$306,460.62 to the credit of the redemption fund, and \$221,912.40 to the credit of the reserve fund, making a total to the credit of the two accounts of \$528,379.02. In making up his statement, deponent did not consider these accounts as they appear on the books, but took instead the amount actually paid into these accounts by certificates in good standing (\$408,408.00). The difference in the two amounts shows the profits from lapses, to wit, \$119,971.00, which amount is included in total profit of \$243,709.82, shown on foregoing statement.” In other words, out of \$243,709.82 stated as profits, and treated as such in determining the values of and ability to redeem certificates, this witness estimates \$119,971 as the profit from lapses. In a published statement dated February 28, 1902, it appears that prior to that time there was a “total amount paid on certificates that have lapsed (forfeited), \$153,659.00.” In one of the pamphlets already referred to as issued by the company occurs the following: “We issue without a single forfeiture, but we know from experience and statistics that more or less of our certificate holders will lapse, and that accretions from fines will be an additional large source of profit, but from the very terms of our certificates every dollar realized from both of these sources must go to the credit of those who do not lapse, and not for the private profit of a few, thus rendering possible an early payment of certificates at a handsome profit above the rate of interest earned upon loans.” Note the words, “thus rendering possible,” etc. Do not lapses form an essential element, a *sine qua non*, of the scheme?

Of the cases relied on by counsel for the company, in *Chancy Park Land Co. v. Hart*, 104 Iowa, 592, 73 N. W. 1059, where a body of land, comprising a number of lots according to a survey, was sold, and various persons subscribed, and agreed that the lots should be divided or apportioned among them “in such manner as they might decide,” and where they did hold a meeting and adopted a plan to assign the various lots by drawing slips from boxes, suggested by one of their own number, and not induced or caused by the promoters of the sale, took the lots so respectively assigned, and gave contracts therefor, it was held that there was no scheme of lottery on the part of the promoters of the sale, preventing a recovery of the purchase price. If the sellers had distributed lots of unequal value by chance, it would have been different.

Wooden v. Shottwell, 23 N. J. L. 465; *Kohn v. Koehler*, 96 N. Y. 362, 48 Am. Rep. 628, and *Ex parte Shobert*, 70 Cal. 632, 59 Am. Rep. 432, 11 Pac. 786, are in conflict with the decision of the Supreme Court of the United States in the *Horner Case*, and are there expressly disapproved; and also in *Ballock's Case*, 73 Md. 1, 8 L. R. A. 671, 672, 20 Atl. 184, by the supreme court of Maryland.

From the foregoing discussion it will be seen that, by the evidence introduced by the company itself and its letters and published statements, the following things are established: (1) The payment of a consideration; (2) the use of chance; (3) prizes, consisting in inequality of payments, resulting from the use of chance; and this inequality is not in time only, but in amounts, and does not result merely from increase or decrease of assets from loans or investments (if, indeed, that would be legal where the certificates redeemed or subjected to this inequality are determined by chance), but primarily from the chance element of lapses and amounts arising therefrom. And from the same sources, together with the application of a simple calculation, it appears (4) that the business of this company is to issue a large number of certificates or promises to pay, and that depends, and must depend, for its ability to comply with them, upon the chance of many lapses or forfeitures. As matter of law, the court holds that such a business or scheme is illegal, and is contrary to public policy.

6. It is contended by the company that if the court should hold the scheme or plan of its operations to be tainted with illegality, as embodying a lottery feature or similar device, nevertheless plaintiffs and others who purchased certificates may be classed as *participes criminis* and *in pari delicto*, that is, equally at fault, and can have no relief in equity. A number of decisions have been cited on this subject, a review of all of which would require much time and be unnecessary. It may be said, generally, that where an illegal contract is executory it will not be enforced by the courts, nor can damages be recovered for its breach. Wherever a party has to set up and rely on such a contract to sustain his claim, the courts will not aid him. So, too, an illegal contract will not be indirectly enforced, as, for instance, to furnish a measure of damages in a suit against a telegraph company for a mistake in sending a message. *Cothran v. Western U. Teleg. Co.* 83 Ga. 25, 9 S. E. 836. While the decisions are not uniform on the subject, the weight of authority, including decisions of the supreme court of this state, is that one party to such a contract cannot generally have an accounting in equity against 62 L. R. A.

the other for the proceeds or profits of the mutual illegal venture. Nor, it has been said, will a court enforce equities in such illegal proceeds, where to do so would be substantially to enforce the contract. *Exchange Bank v. Loh*, 104 Ga. 446, 459, 44 L. R. A. 372, 31 S. E. 459 (though in fact the contract there was held to be legal, and what was said on this subject was perhaps unnecessary). In these and similar cases, whether specific performance, damages, injunction, or accounting for proceeds or profits between the parties was sought, it was a necessary part of the case to set up and rely on the illegal contract or illegal conduct of a party *in pari delicto*. So far as this may be sought, it cannot be granted. In *Ingram v. Mitchell*, 30 Ga. 547, 550, it is said: "The rule hitherto applied by this court, and perhaps by the English courts, is this: that whenever the plaintiff can make out his case without invoking the illegal contract to his aid, he is entitled to recover." In *Raleigh & G. R. Co. v. Swanson*, 102 Ga. 754, 30 L. R. A. 275, 28 S. E. 601, it is said that "a party to such a contract cannot recover in an action which does not seek to disaffirm, but to enforce, it by suit for its breach." In *Clarke v. Brown*, 77 Ga. 606, it was held that, "where a principal deposited money with his agents to be used in the purchase of futures in pork and grain, he could recover from such agents the amount so deposited, in an action for money had and received. He could not set up the illegal contract to recover profits realized thereunder, nor could the agents set up the illegal contract for the purpose of defeating a recovery by the principal of the money deposited with them, and which was held by them. It did not matter whether the money sued for by the principal was the identical money furnished by him, or whether the agents deposited the money . . . in bank with other deposits of theirs, and used such money for filling margins for futures, and afterwards replaced them to the credit of the principal. The question is, Whose money is it, the agents' or the principal's? Nor does this stand in the position of an executed contract, in which both parties are *in pari delicto*." See also *Tenant v. Elliott*, 1 Bos. & P. 3; *Farmer v. Russell*, 1 Bos. & P. 290; *Cook v. Sherman*, 4 McCrary, 20, 20 Fed. 167, 170.

If an illegal contract is executed, and the parties are *in pari delicto*,—that is, equally in fault,—equity will not aid one against the other in recovering what has been paid, but will leave them where it finds them. If executed in part only, the rule cannot be stronger than if executed in full. But if the parties are not *in pari delicto*, the rule does not apply. "When both parties are at fault,

and equally so, equity will not interfere, but leaves them where it finds them. The rule is otherwise if the fault of one overbalances, decidedly, that of the other." Civil Code 1895, § 3037. In *Clark, Contracts*, 493, 494, occurs the following: "This rule is expressed in the maxim *In pari delicto potior est conditio defendentis*; that is to say, where the parties are equally at fault, the condition of the defendant is the better.

... There are some exceptional cases, however, to which this maxim does not apply,—cases in which a man may be relieved from an illegal agreement. These may be grouped as: (a) Cases in which a *locus penitentiae* remains, and, while the agreement is unperformed, money or goods delivered in furtherance of it are allowed to be recovered. (b) Cases in which the parties are not regarded as being *in pari delicto*, as (1) where the party asking relief was induced to enter into the agreement under the influence of fraud or strong pressure, or (2) where the law which makes the agreement unlawful was intended for the protection of the party asking relief." In the case of *Raleigh & G. R. Co. v. Sicanon*, 102 Ga. 760, 39 L. R. A. 275, 28 S. E. 601, the supreme court of Georgia quotes this authority with approval, and says that the exceptions stated by the author "are undoubtedly sustained by good authority." In *Clark, Contr.* 500, it is said: "It is also held that the parties are not to be regarded as being *in pari delicto* where the agreement is merely *malum prohibitum*, and the law which makes it illegal was intended for the protection of the party asking relief." In 15 Am. & Eng. Enc. Law, 2d ed. pp. 1004, 1005, 1007, similar principles are announced, but even more strongly; and it is further said: "And when a contract is prohibited by statute, and a penalty is imposed on only one of the parties for a violation of the statute, the parties are not necessarily *in pari delicto*, and, when equity requires it, the court may afford relief to the party upon whom no penalty is imposed."

In *Jaques v. Golightly*, 2 W. Bl. 1073, it was held that money paid to a lottery office keeper as a premium for an illegal insurance of a ticket may be recovered. It is said that "the statute is made to protect the ignorant and deluded multitude, who, in hopes of gain and prizes, and not conversant in calculations, are drawn in by the office keepers." See the notes to that case. In *Browning v. Morris*, 2 Cowp. 790, 792, 793, it was held that a lottery keeper could not recover money paid by him, he being the principal offender. Lord Mansfield said: "It is very material that the statute itself, by the distinction it makes, has marked the criminal, for the penalties are all on one side,—upon

the office keeper." So, in Georgia, the punishment is placed upon the person selling or furnishing lottery tickets, not upon the purchaser. In *Atlas Bank v. Nahant Bank*, 3 Met. 581, 585, 586, it is said: "To have decided otherwise would have given effect to an illegal contract in favor of the principal offender, and would have operated as a reward for an offense which the statute was intended to prevent." There is no *par delictum* in the present case, either as matter of law, or of fact. See also 1 Pom. Eq. Jur. § 403; 2 Pom. Eq. Jur. §§ 929, 941, 942; 1 Story, Eq. Jur. 13th ed. 300; *Duval v. Wellman*, 124 N. Y. 156, 26 N. E. 343; *Mount v. Waite*, 7 Johns. 434, 441 (insurance paid on lottery ticket recovered); *Parkersburg v. Brown*, 106 U. S. 487 (3) 27 L. ed. 238, 1 Sup. Ct. Rep. 442; *Thomas v. Richmond*, 12 Wall. 349, 20 L. ed. 453; *White v. Franklin Bank*, 22 Pick. 181; *Borditch v. New England Mut. L. Ins. Co.* 141 Mass. 292, 295, 296, 55 Am. Rep. 474, 4 N. E. 798; *Ford v. Harrington*, 16 N. Y. 285 (opinion of Bowen, J., concurred in by five of the other justices, there being eight in all); *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Davidson v. Carter*, 55 Iowa, 117, 7 N. W. 466; *Bateman v. Robinson*, 12 Neb. 508, 11 N. W. 736 (2); *Reynell v. Sprye*, 1 De G. M. & G. 680; *Sykes v. Beadon*, L. R. 11 Ch. Div. 197, *supra*; *Callaway v. Milledgeville*, 48 Ga. 311, where it is said: "It is hardly possible to conceive a case, except in certain instances of *pari delicto*, where a party illegally obtaining money cannot be made to pay it back." In *Branham v. Stallings*, 21 Colo. 211, 40 Pac. 396, the case was not between the company conducting the scheme and the purchaser, but the plaintiff was an organizer and active participant, and was *in pari delicto*.

7. A few words as to the pleadings. That there are some parts of the plaintiff's pleadings which are not well set forth, and cannot withstand a special demurrer, but will have to be amended, is quite clear,—for instance, to copy an affidavit as a part of a paragraph of a petition is more rhetorical than exact; and there are other instances. There is also some contrariety of views among the pleaders on certain subjects. But this is not surprising. If holders of certificates thought the scheme illegal, there was an auditor's report for them. If some of them think the court has approved the plan, and now ask about redemption, they are met with a statement that the company is not compelled to redeem. If they say that it cannot pay the \$500 named in the certificate, the reply is that it is not bound to do so, but may pay less at any time before maturity. If the redemption fund is asked

about, the answer is that the company "may" redeem before maturity, but need not. If they point to the statements of the company and its agents as to its basal principles, it is said that these are not in the certificate. Is there any wonder that the petitioners and interveners have brought their legal woes, and piling them in a sorrowful, if somewhat inartistic, mass before a court of equity, have asked such aid as equity could give? On a smaller scale, comparison may be made with the pleadings in 7 Johns. 434, *supra*; Civil Code 1895, § 4833. If amendment is necessary, it can be made.

Among other things the pleadings do make the points treated of in this opinion; allege that the scheme of defendants is fraudulent, unlawful, and contrary to public policy, that it is impossible now for defendant company to redeem its certificates at redemption value, and that it will be equally impossible for it to redeem its certificates at the maturity value; and they pray for a receiver, to have the amounts paid in by certificate holders determined, and for judgments for the sums which may be respectively due them, etc. That some may file a petition on behalf of themselves and others is rudimentary law. Civ. Code 1895, § 4842. Nor does the fact that some of the certificate holders have joined with the company change this. If so, there could never be a representative petition by bondholders, stockholders, or the like, if officers of the company attacked, or their friends should see fit to buy some bonds or stock, and join with the company in the fight. What appeared at first blush to be a voluntary uprising of quite a lot of certificate holders was explained to a considerable extent by evidence which showed that the company or some of its employees conferred with a friendly certificate holder, and furnished a list of addresses to him, and that a circular letter was sent out setting forth an effort to wreck the company, and suggesting the signing of a blank form inclosed, authorizing an attorney to represent the signers in opposing a receivership, without any charge of fee against them. The attorney does not seem to have had anything to do with this, but on behalf of himself and some others bona fide objected to a receiver, and he was, no doubt, surprised at the amount of moral support which was offered him, unaccompanied by any fee. He is, however, in no way subject to criticism.

It is suggested that this is not a representative petition. But why not? A holder of a class A certificate, and numerous holders of class B certificates are parties. By the terms of the certificates of Class B it is said that all the assets are liable; so that, if both were valid, class C would be subordinate, or, at least, not superior, to class B. 62 L. R. A.

But if the scheme is illegal, as has been held, the real classification is as to certificate holders or persons whose money has been paid to the company for certificates, and it is immaterial whether the illegality is classified as A, B, C, or some other letter. If an order of court is needed to declare this a representative proceeding, it can and will be granted.

8. Shall a receiver be appointed? Precedent on this subject is necessarily limited, because companies of this sort are modern inventions. In *McLaughlin v. National Mut. Bond & Invest. Co.* 64 Fed. 908, *supra*, it was held that a receiver would be appointed. In *Parkersburg v. Brown*, 106 U. S. 487 (4), 27 L. ed. 238, 1 Sup. Ct. Rep. 442, *supra* (not a case concerning a bond company, but one of illegal contract where the parties were not *in pari delicto*), there was a prayer for a receiver, but none was applied for; but it was held that equitable methods would be applied. See also *Peltz v. Supreme Chamber, O. of F. U.* (N. J. Eq.) 19 Atl. 668, 671, *supra*. In regard to this very company the supreme court has recognized that a receiver might have been appointed without error, but under the facts as then presented held that the requirement of bond was not an abuse of discretion. *McMillan v. Equitable Loan & Secur. Co.* 102 Ga. 575, 27 S. E. 668. The facts in the present case are far stronger than in that. Civil Code 1895, §§ 4900, 4904; *Wolfe v. Claflin*, 81 Ga. 64, 6 S. E. 599; *Cohen v. Meyers*, 42 Ga. 46; *Orton v. Madden*, 75 Ga. 83; *Albany & R. Iron & S. Co. v. Southern Agri. Works*, 76 Ga. 135. If the preceding part of this decision is correct, here is a corporation, with a nominal capital stock of \$2,500, the visible portion of which in hand is in the shape of some office furniture, taken secondhand eight years ago, conducting a business which this court holds is illegal, and as a result of it in possession of several hundred thousand dollars of assets, arising from payments by many people, who, not being *in pari delicto* with it, are entitled to recover on account thereof, and which fund the company is not entitled *ex æquo et bono* to hold against them. Many of these payments are small, and to remand each of the persons who made them to a separate suit would be a practical denial of justice to them, would entail a great number of suits, and large amounts in costs. If the company is allowed to continue to operate and use the fund or assets in ways herein held illegal, these numerous parties are in danger of loss. It is said that most of the cases in regard to "investment" or "debenture companies" arose on criminal prosecutions for conducting lotteries or proceedings to forfeit charters. But it must be remem-

bered that in criminal cases laws are construed strictly; and, if the schemes were lotteries to the extent of being criminal, it would certainly furnish no argument against a like holding in a civil case. The trouble with this scheme is not a mere excrescence which may be lopped off, and the wound covered with a new letter of the alphabet. It is fundamental. To eradicate it is to eviscerate the scheme itself. Under our Code, if a charter is forfeited, after paying "debts" the balance is to be divided among the stockholders. Surely, it cannot be claimed that, if the scheme of this company's business is illegal, the sole remedy is to forfeit the charter, and give to its three or four stockholders payments made by the certificate holders. The public may also have a remedy. But this does not affect the rights of individuals to proceed for their protection.

Finally, it is urged that the appointment of a receiver will work injury. But the courts did not originate the scheme, nor is there anything in the charter indicating the use of chance or the like. If there is injury to the company from its methods, it cannot complain that it gets hurt. To those who wish to proceed in the hope of winning prizes by chance from the failure or misfortune of others, this chance will be lost. They cannot lawfully do so. But to the many whose small monthly payments represent days of toil and nights of waiting and who would fall by the wayside (in the language of the company), "thus rendering possible an early payment of certificates at a handsome profit above the rate of interest agreed upon," something may be saved, and their little accumulations may be rescued from the coming "lapses." In surgery or in law, the knife always hurts, but on proper occasion it must be applied. As already stated, this decision does not quote affidavits introduced for the plaintiffs in cases of conflict. To do so would make the case much stronger. But the court deems it made out by the evidence and statements of the defendant company and its officers. It may be assumed that they thought they had gotten beyond the prohibition of the law; but the court cannot agree with them. It matters not how personally honorable may be the gentlemen connected with this company, or how mistaken they may be; the law must be declared. The legal principles involved ought to be as they have been, fully decided, that others may not make the same mistake. Or, if it should be held to be a legitimate scheme of business, and violative of no public policy, to gather in by chance lapses and divide unequally by the use of chance numbers, to hold out as an inducement "handsome profits" to be thus derived and divided, and so to

62 L. R. A.

foster the spirit of gain by chance, it should be known that such is the law of this state; so that other companies which have been stopped in Ohio, in Pennsylvania, in Louisiana, and in other states may change the formula of their certificates, and, using words of permissive sound, may find protection beneath the three-pillared arch, and feel that they have a guardian sentinel in him who stands with drawn sword in every impress of the great seal of Georgia.

Having accidentally omitted one or two things in the opinion filed January 3, 1903 (though its length might not indicate any omission), the court files this brief supplemental decision:

In addition to the authorities cited to show that § 3668 of the Civil Code of 1895 does not, and does not intend to, enumerate all contracts contrary to public policy, see *Central R. Co. v. Murphey*, 113 Ga. 514, 516 *et seq.*, 53 L. R. A. 720, 38 S. E. 970; *Sessions v. Payne*, 113 Ga. 956, 39 S. E. 325; *Berry v. Cooper*, 28 Ga. 543 (4); *Hutchinson*, Carr. 2d ed. § 250. In the first case cited, and other like cases, where a contract has been included in a bill of lading, seeking in whole or in part to exempt the common carrier from the effects of the negligence of itself or its servants, the shipper, though signing the contract, could recover for damages, as such, accruing from negligence of the carrier, notwithstanding such limitation, and the bill of lading could, of course, be used in evidence. The public policy was against allowing the stipulation for exemption, and was in favor of the protection of the public. To hold that because the shipper signed the contract he would be *in pari delicto* would defeat the very end which the public policy sought to accomplish. And in the present case public policy is best subserved by allowing a recovery of their money by buyers of certificates, rather than by enriching the company, or what the English courts call the "office keepers." They are not at all on a plane of equality.

After stating that the allotment made by the defendant's expert fixed the present value of many certificates at less than the actual amount paid in, it is stated that this is true of certificates running back to January, 1899. This is believed to be the correct date, and that all certificates issued since then are in the condition mentioned. But whether that date is exact or only approximate would not make the slightest difference in the principle announced, or in the illustration then being given. The point being made was to show that in the allotment or "apportionment" the present value fixed on a large number of certificates—including those issued during several years past—was less than the actual cash paid by the pur-

chasers to the company, and if, under the multiple table, the number for redemption should reach one of these, there would be actual loss. Back of that time are quite a large number of certificates as to which the allotment or "apportionment" fixes values at more than the actual cash paid in, but less than such payments, with 8 per cent interest, named in the certificate. If the redemption number should fall on one or more of these, they would get something above actual payments, but not as much as 8 per cent interest on them. Then there are some as to which the values fixed or estimated equal or exceed the amounts paid in with 8 per cent interest. It is true that the company has made a calculation based on the \$1 per month which went to the redemption and reserve funds; but, besides this, the certificate holder has paid the preliminary amount of \$4. and 25 cents per month; and the valuations do not include these or make any reference to them. Besides, interest runs regularly according to date. The multiple table does not, but skips according to a sort of geometrical progression.

Messrs. Candler & Thomson, Hoke Smith & H. C. Peeples, Rosser & Brandon, H. E. W. Palmer, and E. W. Butler, for plaintiffs in error:

Where the language of an instrument is susceptible of two constructions, one of which will render it valid and the other invalid, the former will be adopted.

17 Am. & Eng. Enc. Law, 2d ed. p. 17.

There must be a combination of (1) consideration, (2) chance, (3) prize, to make the contract unlawful.

MacDonald v. United States, 12 C. C. A. 339, 24 U. S. App. 25, 63 Fed. 426, 59 Fed. 563; *United States v. Zeisler*, 30 Fed. 499; *Horner v. United States*, 147 U. S. 449, 460, 37 L. ed. 237, 242, 13 Sup. Ct. Rep. 409; *United States v. Fulkerson*, 74 Fed. 619; *Re National Indemnity & E. Co.* 142 Pa. 450, 21 Atl. 879; *Ballock v. State*, 73 Md. 1, 8 L. R. A. 671, 20 Atl. 184; *United States v. Politzer*, 59 Fed. 273; *McLaughlin v. National Mut. Bond & Invest. Co.* 64 Fed. 908; *State ex rel. Atty. Gen. v. Interstate Sav. Invest. Co.* 64 Ohio St. 283, 52 L. R. A. 530, 60 N. E. 220; *State v. New Orleans Debenture Redemption Co.* 51 La. Ann. 1827, 26 So. 586; *Meyer v. State*, 112 Ga. 20, 51 L. R. A. 496, 37 S. E. 96; *Chancy Park Land Co. v. Hart*, 104 Iowa, 592, 73 N. W. 1059; *Union Invest. Assn. v. Lutz*, 50 Ill. App. 176.

Not one of the cases cited applies the lash of the law to a plan where all the sums paid in, except a reasonable amount for expense, are invested in loans, real estate, stocks, and bonds, where there is a fixed maturity value, where redemptions are not

made save upon the basis of earnings, and where the amounts paid on redemptions vary only from time to time with the age of the certificate redeemed, and business successes or reverses, with lapses as an incident.

Difficulty or improbability of accomplishing the undertaking will not avoid.

Ga. Code, §§ 2663, 3725; *The Harriman*, 9 Wall. 161, 170, 19 L. ed. 629, 632; 1 Addison, Contr. 327; 1 Parsons, Contr. 476, 478; 2 Parsons, Contr. 786; Chitty, Contr. 734; Bishop, Contr. §§ 611-613, 619, 625; Clark, Contr. pp. 182, 678; *Beebe v. Johnson*, 19 Wend. 500, 32 Am. Dec. 518; *Public Schools v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373; *Jones v. Anderson*, 82 Ala. 302, 2 So. 911; *McCreery v. Green*, 38 Mich. 172; *Morewood v. Pollok*, 1 El. & Bl. 746; *Switzer v. Pinconning Mfg. Co.* 59 Mich. 488, 26 N. W. 762; *Paradine v. Jane*, Aleyn, 26; *Debenham v. Metropolitan Bd. of Works*, L. R. 6 Q. B. Div. 115; *Jones v. St. John's College*, 40 L. J. Q. B. N. S. 80, 23 L. T. N. S. 803, 19 Week. Rep. 276.

The profits do not depend alone, nor for the most part, upon loans. The company deals in real estate, these dealings having been immensely profitable, and it is legally possible for real-estate profits to fulfil the contract. It does a very large business in purchasing notes at a heavy discount, not involving usury, and from these profits and the accompanying interest the contract is legally possible.

Campbell v. Morgan, 111 Ga. 200, 36 S. E. 621.

Plaintiffs below cannot complain of usury.

Zellner v. Mobley, 84 Ga. 748, 11 S. E. 402; *Phillips v. Ogle*, 21 D. C. 199; *Moses Bros. v. Home Bldg. & L. Asso.* 100 Ala. 465, 14 So. 412; *Scott v. Williams*, 100 Ga. 540, 28 S. E. 243.

To avoid a contract for usury it is necessary that it should itself be tainted with this offense.

3 Parsons, Contr. 124; *France v. Smith*, 87 Iowa, 552, 54 N. W. 366; *McCrae v. Gunter*, 14 Ky. L. Rep. 5, 18 S. W. 1034; *Ratliff v. Buckler*, 22 Ky. L. Rep. 1790, 61 S. W. 472; *Smith, Contr.* 151; *Thornburg v. Harris*, 3 Coldw. 163; *Hanover Nat. Bank v. First Nat. Bank*, 48 C. C. A. 482, 109 Fed. 426.

Though it may be foolish to contract for forfeitures, it is not illegal, and the law is not the guardian of the contracting parties.

Southern Bldg. & L. Asso. v. Anniston Loan & T. Co. 101 Ala. 582, 29 L. R. A. 120, 15 So. 123; *Union Invest. Asso. v. Lutz*, 50 Ill. App. 176; 26 Am. & Eng. Enc. Law, pp. 61, 62; *New York L. Ins. Co. v. Statham*, 93 U. S. 24, 30, 31, 23 L. ed. 789, 791; *Klein v. New York L. Ins. Co.* 104 U. S. 88, 26 L. ed.

562: *Shakey v. Hawkeye Ins. Co.* 44 Iowa, 540; *Blakesley v. Continental Ins. Co.* 5 Ky. L. Rep. 423; *Epstein v. Mutual Aid & Benef. L. Ins. Asso.* 28 Ia. Ann. 938; *Beadle v. Chenango County Mut. Ins. Co.* 3 Hill, 161; *Redfield v. Paterson F. Ins. Co.* 6 Abb. N. C. 456; *Union Cent. L. Ins. Co. v. Chowning*, 8 Tex. Civ. App. 455, 28 S. W. 117; *Abell v. Penn Mut. L. Ins. Co.* 18 W. Va. 400.

To declare any contract void, as *contra* to public policy, is a dangerous and delicate task.

Smith v. DuBosc, 78 Ga. 435, 3 S. E. 309.

Granting, for the sake of the argument, that the scheme of the company was illegal, plaintiffs were not entitled to relief.

Livingston County v. Henneberry, 41 Ill. 181; *Griffin v. Piper*, 55 Ill. App. 213; *Chicago, M. & St. P. R. Co. v. Wabash. St. L. & P. R. Co.* 9 C. C. A. 659, 27 U. S. App. 1, 61 Fed. 993; *Walters v. Comer*, 79 Ga. 796, 5 S. E. 292; *National Bank v. Cunningham*, 75 Ga. 366; *Johnston Bros. v. McConnell*, 65 Ga. 129; *Tompkins v. Compton*, 93 Ga. 520, 21 S. E. 79; *Polk v. James*, 68 Ga. 128; *Bugg v. Towner*, 41 Ga. 315; *Alford v. Burke*, 21 Ga. 46, 68 Am. Dec. 449; *Carey v. Smith*, 11 Ga. 547; *Houell v. Fountain*, 3 Ga. 182, 46 Am. Dec. 415; *Dorsett v. Garrard*, 85 Ga. 734, 11 S. E. 768; *Ingram v. Mitchell*, 30 Ga. 547; *Exchange Bank v. Loh*, 104 Ga. 446, 44 L. R. A. 372, 31 S. E. 439; *Tufts v. Du Bignon*, 61 Ga. 328; *Parrott v. Baker*, 82 Ga. 372, 9 S. E. 1068; *Benton v. Singleton*, 114 Ga. 548, 58 L. R. A. 181, 40 S. E. 811; *Raleigh & G. R. Co. v. Newinson*, 102 Ga. 754, 39 L. R. A. 275, 28 S. E. 601; *Barrett v. Verdery*, 93 Ga. 526, 21 S. E. 64; *Singleton v. Bank of Monticello*, 113 Ga. 531, 38 S. E. 947; *Postelle v. Rivers*, 112 Ga. 850, 38 S. E. 109; *Cothran v. Western U. Teleg. Co.* 83 Ga. 25, 9 S. E. 836; 2 Parsons, Contr. 789, 869; *Branham v. Stallings*, 21 Colo. 211, 40 Pac. 396; *Goodrich v. Houghton*, 134 N. Y. 115, 31 N. E. 516; *Watson v. Murray*, 23 N. J. Eq. 257; *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Brooks v. Martin*, 2 Wall. 70, 17 L. ed. 732; *Leonard v. Poole*, 114 N. Y. 371, 4 L. R. A. 728, 21 N. E. 707; *Vulcan Powder Co. v. Hercules Powder Co.* 96 Cal. 510, 31 Pac. 581; *Shaffner v. Pinchback*, 133 Ill. 410, 24 N. E. 867; *King v. Winants*, 71 N. C. 469, 17 Am. Rep. 11.

So far as illegal contracts have been executed, the court will not disturb them, but leave the parties as it found them: and, so far as they are not executed, will afford no aid whatever to enforce them.

Houell v. Fountain, 3 Ga. 176, 46 Am. Dec. 415; *Carey v. Smith*, 11 Ga. 540; *Bugg v. Towner*, 41 Ga. 315; *Puckett v. Roquemore*, 55 Ga. 235; *Dorsett v. Garrard*, 85 62 L. R. A.

Ga. 734, 11 S. E. 768; *Western U. Teleg. Co. v. Davis*, 95 Ga. 520, 20 S. E. 497; *Nix v. Beil*, 68 Ga. 664.

At common law, gaming contracts, when fair and free from cheating, are assumed by the court, without discussion, to be valid.

14 Am. & Eng. Enc. Law, p. 586; *Da Costa v. Jones*, 2 Cowp. 729.

The loser in a gambling contract cannot recover unless specifically authorized to do so by statute.

14 Am. & Eng. Enc. Law, p. 623; *Cook v. Barnett*, 25 Ga. 664; *Higdon v. Heard*, 14 Ga. 255.

The doctrine of relief to the repentant has never been sustained by the courts of Georgia. The petition cannot properly be treated as in the nature of a representative bill.

Mozley v. Alston, 1 Phill. Ch. 790; 1 Dan. Ch. Pl. & Pr. 240, 242; 17 Am. & Eng. Enc. Law, 2d ed. p. 185.

Messrs. G. T. & J. F. Cann, John L. Hopkins & Sons, Brown & Randolph, H. M. Dorsey, Arthur Heyman, J. D. Bradwell, and Tompkins & Alston for defendants in error.

Cobb, J., delivered the opinion of the court:

This case is here upon a bill of exceptions of the Equitable Loan & Security Company assigning error upon an order of the judge of the superior court of the Atlantic circuit placing its entire assets in the hands of a receiver for administration. The reasons for appointing the receiver were that the scheme of the company, if not a lottery, was, to say the least of it, in the nature of a lottery, and was therefore illegal; that the contracts evidenced by its certificates were impossible of performance by legal methods; that such contracts were contrary to public policy. The court did not base its judgment upon the grounds that the officers of the company had been guilty of malfeasance, misfeasance, or breach of trust. The court found that the officers of the company had not been guilty of any personal dishonesty or speculation in dealing with the assets of the company, but held that the scheme was illegal. The court also found that, if the scheme of the company was legal and its contracts valid, any deception which may have been practised upon any of the certificate holders was not of such a character as to require the appointment of a receiver; that, while such certificate holders might have their remedy for a rescission of the contract, there was nothing in the evidence authorizing the appointment of a receiver on this ground. The court did not appoint a receiver on the ground of the insolvency of the company, and did not make any finding in terms on the question as to

its solvency or insolvency. The court also found that the company, under its charter, was authorized to make investments in real estate, and that the certificate holders had no right to complain that the charter had been amended so as to authorize the company to engage in this business. It will thus be seen that the first question to be determined is whether the scheme of the company was illegal.

In order to fairly pass upon the question of the legality of the scheme, it is necessary to take into consideration the origin and history of the company. The original charter of the company was granted on January 30, 1894, under an order of Fulton superior court. It authorized the company to carry on the business of dealing in stocks, bonds, notes and securities of every description, with a right to negotiate loans, charge commissions, and loan money upon collaterals, mortgages or other security. It also authorized the company to issue investment bonds and certificates to be paid for by the investor in monthly instalments or otherwise, the plan to be fully set forth in the certificates or bonds. The amount of the capital to be employed was fixed at \$2,500, with the privilege of increasing it to \$100,000. By an amendment to the charter, granted March 26, 1896, the company was authorized to purchase, improve, lease, sell, and dispose of, or use in any way it might see fit, property of any description, real or personal; to execute notes, bonds, and other obligations, and to secure the same by deed of trust or other form of security, including the right to guarantee the payment of obligations of other persons, natural or artificial; to pursue the plan of national or other building and loan associations, should its directors see fit to adopt such plan of operation in whole or in part. This amendment to the charter was accepted by the company on March 31, 1896. Shortly after its incorporation, the company issued an investment certificate, which is styled "class A." The following is a copy of one of such certificates:

The Equitable Loan and Security Company, of Atlanta, Georgia, promises to pay to — of — or order, at its home office in Atlanta, Ga., five hundred and five dollars and fifty-four cents (\$505.54) upon the following express terms and conditions:

1st. That there shall be paid by the holder to the maker hereof, at its home office in Atlanta, Ga., without any other or further notice, an instalment of one dollar and twenty-five cents (\$1.25) on the fifth day of each and every succeeding month hereafter until 130 instalments shall have been thus 62 L. R. A.

paid, time being of the essence of this contract.

2d. That the holder hereof shall surrender for cancellation this certificate, whenever the same shall be called, upon the payment to him of its then redemption value: the maker reserving the right to call and pay the same before maturity, under the following rules and regulations. Certificates paid before maturity shall be paid in the following order, to wit: The first paid shall be number 1, the second paid shall be number 3, the third paid shall be number 9, the fourth paid shall be number 2, the fifth paid shall be number 6, the sixth paid shall be number 18, the seventh paid shall be number 27, the eighth paid shall be number 4, the ninth paid shall be number 12, the tenth paid shall be number 36, and so on, according to the table which is printed on the back hereof, and which table is hereby referred to and made a part of this contract.

3d. That the redemption value of this certificate, if paid prior to its maturity, shall be fifteen dollars if paid one month after date, eighteen and 5/100 dollars if paid two months after date, twenty-one and 11/100 dollars if paid three months after date, twenty-four and 18/100 dollars if paid four months after date, twenty-seven and 26/100 dollars if paid five months after date, thirty and 35/100 dollars if paid six months after date, and so on, the redemption value increasing \$3 with each instalment paid, besides interest at the rate of 4 per cent per annum on the redemption value of said certificate for the month next preceding the date of redemption hereof.

4th. That of each and every instalment paid as aforesaid, the maker hereof shall place 25 cents to a reserve fund, which shall be used and held for the protection of all live outstanding certificates issued by this company; and 75 cents to a redemption fund, which may be used as follows: (a) For paying certificates issued by this company in the order and manner that they shall mature; (b) for paying off and retiring certificates prior to their maturity according to the terms hereinbefore stated; (c) for paying the heirs, executors, or administrators of any deceased holder hereof the sum that instalments paid by such deceased may have contributed to the redemption and reserve funds, provided said certificate is in full force at death of holder and satisfactory proof of such death is furnished the maker hereof within sixty days after death occurs; and the remaining 25 cents and all transfer fees, shall be used for the expenses of said company.

5th. That a failure to pay any one of said instalments when due subjects the holder hereof to a fine of 50 cents, which, together

with the omitted instalment, must be paid by the fifth day of the next succeeding month, and if said instalment and fine are not paid within the said time, then this certificate shall be null and void, and of no value, and the holder hereof forfeits all payments and fines; provided, however, that this company will reinstate said certificate at any time within three months after such forfeiture, upon the holder hereof first paying all dues hereon, together with fines assessed at the rate of 50 cents for each payment in default. If this certificate shall, according to the plan of redemption herein stated, become payable after it shall have been forfeited, and before its reinstatement, then it shall be entitled to payment the next month after its reinstatement. And provided further, that after sixty monthly instalments shall have been paid in the manner herein provided, and all other stipulations herein shall have been fully complied with by the holder hereof, and such holder shall thereafter default in any subsequent instalment, the maker agrees to issue to such defaulting holder a new certificate which shall bear the next unsold number, for an amount equal to the payments made on such defaulted certificate, less the amount deducted for expenses, which new certificate thus issued shall be nonassessable and shall bear interest at the rate of 4 per cent per annum, and shall be payable in its regular order as per plan of redemption herein stated; provided application for such new certificate shall be made to the home office of the company and the old or defaulted certificate surrendered within three months after such defaulted certificate shall be canceled on the books of the company.

6th. That all receipts from fines shall be paid into the redemption fund.

7th. That the contributions to the reserve and redemption funds may be loaned to the holders of certificates issued by this company upon terms and security to be accepted by the board of directors; provided that not more than \$100 can be loaned on account of any one certificate, and no loan can be made for a longer time than five years.

8th. That after the reserve fund shall have reached the sum of \$100,000, the interest earnings therefrom may, at the option of the board of directors of this company, be applied to the redemption of certificates then in force issued by this company. And when the reserve fund shall have reached the sum of \$200,000, then 50 per cent, or any other portion of all the further current contributions thereto, may be applied to the redemption of certificates in force in like manner with the interest thereon, when the board of directors shall so authorize.

9th. That no transfer of this certificate

shall be valid or binding on the maker hereof until such transfer has been made in writing hereon, and the same duly recorded on the books of the company at its home office; and for each transfer a fee of \$1 must be paid before a transfer will be made.

10th. That each and every transferee of this certificate accepts it subject to all the stipulations herein.

11th. That no statement made by anyone except as herein set forth shall be binding on this company.

12th. That no part of the reserve, redemption, or other fund shall ever be loaned to any officer or director of this company.

13th. That no part of the reserve or redemption fund shall be loaned, except (A) upon improved real estate within the incorporate limits of the city in which it is located, and then not in excess of 50 per cent of its cash market value; (B) upon government, state, county or city bonds that have never defaulted the payment of interest; and this provision can never be changed except by the consent of every holder of live certificates issued by this company in class "A."

In witness whereof, this company has caused this certificate to be executed in its name and behalf, under its corporate seal, by its president and secretary. [Dated and signed.]

The following is a copy of the table referred to in the certificate, which appears upon the back of the same:

Table Referred to in the Body of this Certificate.

READ FROM LEFT TO RIGHT.				
Numeral Col.	1st Mult. Col.	2d Mult. Col.		
No.	No.	No.		
Pay first 1	then 3	then 9		
Then 2	then 6	then 18		
		then 27		
Then 4	then 12	then 36		
Then 5	then 15	then 45		
		then 54		
Then 7	then 21	then 63		
Then 8	then 24	then 72		
		then 81		
Then 10	then 30	then 90		
Then 11	then 33	then 99		
		then 108		
Then 13	then 39	then 117		
Then 14	then 42	then 126		
		then 135		
Then 16	then 48	then 144		
Then 17	then 51	then 153		
		then 162		
Then 19	then 57	then 171		
Then 20	then 60	then 180		
		then 189		
Then 22	then 66	then 198		
Then 23	then 69	then 207		
		then 216		
Then 25	then 75	then 225		
Then 26	then 78	then 234		
		then 243		
Then 28	then 84	then 252		

Numeral Col.	1st Mult. Col.	2d Mult. Col.
No.	No.	No.
Then 29	then 87	then 261
Then 31	then 93	then 270
Then 32	then 96	then 279
Then 34	then 102	then 288
Then 35	then 105	then 297
Then 37	then 111	then 308
Then 38	then 114	then 315
Then 40	then 120	then 324
Then 41	then 123	then 333
Then 43	then 129	then 342
Then 44	then 132	then 351
Then 46	then 138	then 360
Then 47	then 141	then 369
Then 49	then 147	then 378
Then 50	then 150	then 387
Then 52	then 156	then 398
Then 53	then 159	then 405
Then 55	then 165	then 414
Then 56	then 168	then 423
Then 58	then 174	then 432
Then 59	then 177	then 441
Then 61	then 183	then 450
Then 62	then 189	then 459
Then 64	then 192	then 468
Then 65	then 195	then 477
Then 67	then 201	then 486
Then 68	then 204	then 495
Then 70	then 210	then 504
Then 71	then 213	then 513
Then 73	then 219	then 522
Then 74	then 222	then 531
Then 76	then 228	then 540
Then 77	then 231	then 549
Then 79	then 237	then 558
Then 80	then 240	then 567
Then 82	then 246	then 576
Then 83	then 249	then 585
Then 85	then 255	then 594
Then 86	then 258	then 603
Then 88	then 264	then 612
Then 89	then 267	then 621
Then 91	then 273	then 630
Then 92	then 276	then 639
Then 94	then 282	then 648
Then 95	then 285	then 657
Then 97	then 291	then 666
Then 98	then 294	then 675
Then 100	then 300	then 684
	and so on.	then 693
		then 702
		then 711
		then 720
		then 729
		then 738
		then 747
		then 756
		then 765
		then 774
		then 783
		then 792
		then 801
		then 810
		then 819
		then 828
		then 837
		then 846
		then 855
		then 864
		then 873
		then 882
		then 891
		then 900

A large number of these class A certificates were issued. The Assistant Attorney General of the United States for the Post-office Department having given an opinion that the scheme indicated in these certificates was a lottery, by an order of the Postmaster General the mails were closed against the company; and under the usual rules of department in such cases, all letters addressed to the company were stamped as fraudulent and returned to the writer. An appeal was made to the department to reverse this ruling, but the department adhered to the same, and the Postmaster General refused to rescind the order closing the mails to the company. There were at the time the present case was instituted only seventy of these certificates outstanding, and the holder of only one of them is a party to the present proceeding. It is not necessary to determine whether the scheme indicated in this class of certificates was legal. From the evidence it appears that the officers of the company, so far as they were able to do so, protected the holders of these certificates, notwithstanding their condemnation by the Postoffice Department; and that all the holders, except the number above referred to, have been settled with upon terms which were, so far as the present record discloses, entirely satisfactory to the holders; and that the company has in hand a fund derived entirely from receipts and investments from this class of certificates, which can and will be used, as far as practicable, in settlement with the holders of these certificates. The evidence further shows that the funds derived from this source have never been mingled with other funds of the company, nor have other funds been used in any way in the settlement or discharge of certificates of this class. We will therefore not pass upon the legality of the scheme indicated in this class of certificates, and will eliminate from the discussion anything in reference to this class of certificates, except so far as their history may throw light upon the legality of the schemes indicated in certificates subsequently issued. The judge did not appoint a receiver on account of the illegality of these certificates. The reason he gave for the appointment was that he thought subsequently issued certificates were illegal. If the receiver had been appointed solely on account of class A certificates, the order of appointment should and would have been limited in its operation to the fund in the treasury of the company which was set apart for the payment of these certificates. Whether there should be a receiver appointed for this fund, alone, has not been passed upon by the judge, and will not now be passed upon by us.

Upon the refusal of the Postmaster Gen-

eral to rescind the order closing the mails against it, the company promptly ceased to issue certificates of the class above referred to, and did all that it was possible to do under the circumstances to protect those who had in good faith bought the certificates. The company then issued a certificate known as "class B," a copy of which is as follows:

The Equitable Loan and Security Company of Atlanta, Georgia, hereby promises to pay to the order of _____ of _____ at its home office in Atlanta, Ga., \$500, subject to the following express terms and conditions:

1st. That the holder has paid \$4 herefor, and agrees to pay to the maker hereof at its home office, without any other or further notice, an instalment of \$1.25 on the fifth day of each and every succeeding month hereafter, until 168 instalments shall have been thus paid, time being of the essence of this contract, then this certificate shall become due and payable for its full face value.

2d. That the holder hereof shall surrender for payment and cancelation this certificate whenever the same shall be called, before maturity upon the payment to him of its then redemption value, which value shall be the full amount of the first payment, and all instalments paid hereon, with interest on said amount at the rate of 8 per cent per annum, and its proportionate share of all dividends or accumulations from fines, lapses, and interest earned in excess of 8 per cent per annum.

3d. That in order to prevent favoritism or partiality being shown by the company, certificates paid before maturity shall be paid by numbers, and only according to the multiple table which is printed on the back hereof, which table is hereby referred to and made a part of this contract.

4th. That of each and every instalment paid as aforesaid, the maker hereof shall place 50 per cent and all net receipts from fines to a redemption fund, which may be used: (a) For paying off certificates prior to their full maturity term, according to the terms above set forth; (b) for paying certificates in the order and manner that they shall mature at the end of the full term; (c) for paying to the legal representatives of any deceased holder hereof the full amount of the first payment, and all instalments paid hereon, with interest at the rate of 8 per cent per annum and its proportionate share of all dividends or accumulations from fines, lapses, and interest earned in excess of 8 per cent per annum; Provided, this certificate is in good standing and legal and sufficient notice of such death is furnished the maker hereof within sixty days after death occurs, or fines

will be enforced as provided for in § 5th hereof; and provided, further, that if the holder hereof at the date of this certificate was more than fifty years of age, that the said legal representatives of such deceased shall not have the right to surrender this certificate for payment upon conditions above set forth, and the maker hereof cannot be required to pay the same under this section hereof, but will issue in lieu hereof a paid-up certificate for the amount of instalments that have been paid hereon, with 4 per cent per annum interest, according to the provision regulating paid-up certificates in § 5th hereof, or this certificate may be continued as though death had not occurred; and 30 per cent to a reserve fund which shall be used and held for the protection of all live outstanding certificates; and the remaining 20 per cent, and all transfer fees shall be used for the expenses of the company.

5th. That a failure to pay said instalments when due subjects the holder hereof to a fine of 50 cents each month for each and every instalment in arrears, and if any instalment or fine shall remain unpaid for six months, then this certificate shall become null and void, and of no value, and the holder hereof shall and does forfeit all payments and fines made hereon; Provided, that at any time after 84 monthly instalments have been paid hereon the holder may surrender this certificate, if it is in good standing, and receive for it a new, nonassessable and nonforfeitable certificate for the amount of instalments that have been paid hereon, with interest at the rate of 4 per cent per annum, which new certificate shall bear the next unsold number, and shall bear interest at the rate of 4 per cent per annum and be payable on or before the expiration of the tontine period from the time it is then issued.

6th. That the entire assets of this company shall at all times be liable for the full payment of all obligations incurred in its certificates.

7th. That the funds of this company may be loaned to the holders of certificates, upon terms and security to be approved and accepted by the board of directors.

8th. That no part of the reserve or redemption funds can ever be loaned to any officer or director of this company.

9th. That no transfer hereof shall be valid or binding on the maker until it has been approved by the directors and recorded on the books of the company at its home office, and a fee of \$1 paid for making such record. Each and every transferee hereof accepts this certificate subject to all the stipulations herein.

10th. That no officer or director of this

company, or any member of his or their families, can purchase or own this certificate.

11th. That no statement made by anyone except as herein set forth shall be binding on this company.

In witness whereof this company has caused this certificate to be executed in its name and behalf, under its corporate seal, by its president and secretary, this _____ day of _____ 189-. [Executed by the company.]

The multiple table referred to in this certificate is the same as that which appears upon the back of certificates of class A. The scheme of the company as indicated in these certificates was approved by the Assistant Attorney General of the United States for the Postoffice Department, and from the time it began to issue these certificates the company had the same unrestricted right to the use of the mails as any other person engaged in a lawful business. Whether the certificates of class A were legal or illegal, it is to be said to the credit of the company and its officers that they abandoned the use of the same as soon as the authorities of the Postoffice Department had declared them to be illegal, and did not issue any other form of certificate until the same had been approved by the law officer of that Department. These facts indicate that it was the intention of the officers of the company at all times to obey the law of the land, and to heed the voice of its authorized officials.

Is the scheme of the company as indicated in certificates of class B of such a character that it must be declared unlawful, violative of sound public policy, and calculated to defraud? Let us first look at the scheme as indicated by the certificate, independently of other evidence throwing light upon the character of the contract. The certificate is an obligation on the part of the company to pay to the holder the sum of \$500 subject to the terms and conditions named in the certificate. Is it reasonably probable that the scheme indicated by these certificates can be carried into execution? While it does not appear in terms in the certificate, the fact is, as admitted, that the \$4 paid by the certificate holder is allowed the agent obtaining the certificate as a fee, and that this sum does not go into the treasury of the company. Twenty-five cents of each monthly instalment is set apart for expenses. It is therefore to be determined whether it is reasonably probable that the company can legitimately realize with the monthly instalments of \$1 at the end of fourteen years, a sum sufficient to pay the holder of the certificate \$500. Of course, if the contract is considered as simply a con-

tract to receive \$168 in monthly instalments of \$1, and to pay the holder of the certificate 8 per cent interest thereon, the contract is incapable of performance, for 8 per cent upon \$168 paid in monthly instalments would not, of course, realize the sum of \$500. But that is not the contract embraced in the certificate, taken in the light of the purposes for which the company was organized. The contract is to take the money paid to it in monthly instalments and improve it according to well-known legitimate business methods, and guarantee to the certificate holder that at the end of fourteen years the company will pay to him the sum of money named in the certificate, which the company considers by its guaranty as the legitimate earnings of the money of the certificate holder, turned over and over and over again during the period that it is in the hands of the company. If the company in the handling of this money was limited to investments of the money at 8 per cent simple interest annually, then no person of ordinary intelligence would for a moment purchase one of these certificates, for it would be manifest not only to a man of average intelligence, but to the man far below the average, that such a contract was an impossibility. The legitimate resources of the company under its charter, which may be called into exercise for the purpose of improving the funds belonging to its certificate holders, are far more numerous than loans upon simple interest at the rate of 8 per cent per annum. The company is authorized to loan money at 8 per cent, and may contract for the interest to be payable annually, semiannually, quarterly, monthly, bimonthly, or in even shorter periods. Such transactions would be perfectly legitimate, and are not subject to the charge of being usurious. But suppose it should be said that interest payable monthly or for shorter periods is unusual, and that it is improbable that the company would transact business upon this plan. The reply is that it is legal, and is one of the legitimate resources of the company, and it cannot be said that it is impossible, or even improbable, that the company will realize funds from this source. Loans of money, with interest payable at short intervals of time are not unusual in the business world. They are constantly made by banks and other moneyed institutions. In addition to this, the company has a right to purchase negotiable paper, and in the purchase is not restricted under the law of this state to discount at the rate of 8 per cent, and the proceeds that in all probability can be derived from this source of income would aid very much in the improvement of the fund placed under the contract in the hands of the officers of the company for improvement

for the benefit of the certificate holder. The company is authorized to engage in the purchase of property, either real or personal, and experience has demonstrated that wise and prudent business men make handsome profits in a business of this character. Indeed, there is scarcely any limit to the possible profits to be derived from such investments, wisely made. The company is also authorized to deal in stocks, bonds, etc., and to guarantee the payment of obligations of other persons, both natural and artificial. All of these methods of business are lawful, and, if wisely adhered to, are profitable, and this company has authority to engage in them. In addition to these, there are other resources of the company for the benefit of the persistent certificate holder who continues to the end. Under the terms of the certificate, if any member desires to discontinue payments of instalments at the expiration of seven years, he may do so, taking a paid-up certificate, bearing only 4 per cent interest; and the legal representatives of deceased members who were more than fifty years of age at the date their certificates were issued may take paid-up certificates of similar character. Another resource is redemption of certificates; still another is fines; and, lastly, lapses of forfeitures for nonpayment of assessments during the first seven years. The company holds out to the world that it will take the money of others and improve it in these various ways, and pay back at the end of fourteen years a guaranteed sum. Let it be conceded for the moment that all of the sources of profit above referred to are legitimate and proper; can it be said, as matter of law, that the scheme of the company is so far beyond possibility or probability of performance that those who engage in it are engaged in a fraudulent scheme, which should be branded as being contrary to a sound public policy? Have not legitimate financial institutions in the past taken the money of investors and improved it in such a way that the profits were far in excess of the profits intended to be realized under this contract? Are not sound financial institutions at this time engaged in lines of lawful and legitimate business where profits of this character are realized for investors who intrust their money to them? It has been said that the "power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." *Richmond v. Dubuque & S. C. R. Co.* 26 Iowa, 202. It will not do for courts to declare contracts void, simply because they are apparently unwise or even foolish. The authority of the 62 L. R. A.

lawmaking power to interfere with the private right of contract has its limits, and certainly the courts should be extremely cautious in supervising private contracts when the lawmaking power has not declared them to be unlawful. The possibility or the probability of one being able to perform many of the contracts known to the commercial world is dependent upon so many considerations that it is only in an extreme case that the courts should hold that a given contract is of such a character that its performance is impossible or improbable, and that those who entered into it must have done so with a fraudulent intent. Of course, it is the duty of the courts to put their stamp of disapproval upon all contracts which are fraudulent, and for this reason calculated to deceive the confiding and the credulous. But all foolish contracts are not fraudulent, and it is not either the duty, or within the power, of the courts to relieve a person from a contract merely because it is in its terms unwise, or even foolish. Taking the contract evidenced by the certificate under consideration, with all of the resources of the company which can be called into operation for the purpose of improving the funds intrusted to its care, we cannot say, as matter of law, that the contract is so unreasonable and incapable of performance as to be void because opposed to a sound public policy. The company may be able to comply with the contract. On the other hand, it may not. Contracts, although not exactly of a similar nature, but involving as much risk of loss, have been complied with. On the other hand, contracts involving less risk of loss than is apparent in this one have not been complied with. The success of the scheme of this company depends largely upon the honesty, wisdom, and business sagacity of its officers, and those who place their money in the hands of the company take the chances that are always incident to intrusting to another the handling and improvement of a sum of money.

In thus dealing with the question, we have assumed that the company had at its command all of the sources of income above referred to. It will, of course, be conceded that those resources which relate to the purchase and sale of property, the guaranteeing of obligations, and the loan of money at lawful rates of interest, are perfectly legitimate and proper, and persons engaging in business of this character lay themselves subject to no penalty or criticism. It is said, though, that the company relied upon lapses, and that lapses are based upon forfeitures, and that forfeitures are abhorred, and that contracts which depend for their performance entirely upon forfeitures are contrary to law and opposed to sound public policy.

Forfeitures are not favored, and where a contract is ambiguous, and is incapable of being construed so as to provide for a forfeiture and so as not to so provide, the courts uniformly hold that they will construe the contract so as to avoid the forfeiture. But the law permits a man to make a contract which will result in a forfeiture, and, when it is clear from the terms of the contract that the parties have so agreed, a court of law, as well as a court of equity, will enforce the forfeiture. The time of payment specified in a contract may be material, and by its terms a failure to pay within that time may involve an absolute forfeiture; and, if it does, this forfeiture will not be relieved against, even in a court of equity. Mr. Justice Bradley, in *New York L. Ins. Co. v. Statham*, 93 U. S. 30, 31, 23 L. ed. 791, in referring to the forfeiture of an insurance policy for nonpayment of premiums says: "Forfeiture for nonpayment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all, for out of the coexistence of many risks arises the law of average, which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality, and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company. This has always been the understanding and the practice in this department of business." See also *Klein v. New York L. Ins. Co.* 104 U. S. 88, 26 L. ed. 662. In *Union Invest. Assn. v. Lutz*, 50 Ill. App. 176, it was held: An investment association which applies the principle of joint tenancy to the investments by the subscribers—the survivorship depending upon default of the members, instead of death—is not prohibited by law; and neither is such an association prohibited because the theory on which profit is promised is that one half or more of the subscribers will fail to keep up their dues, and whatever money is paid in by defaulting subscribers will inure to the benefit of those who do not default. See also 26 Am. & Eng. Enc. Law. p. 61. The mere fact that the business or scheme de-

pends to some extent upon forfeitures or lapses will not be sufficient to render the entire scheme invalid. If the scheme is dependent largely upon lapses, and it is apparent that a sufficient number of lapses to effectuate it will probably not occur during the period provided for the maturity of the contract, the question would be altogether a different one. In such a case the scheme might be illegal. In *State ex rel. Atty. Gen. v. Interstate Sav. Invest. Co.* 64 Ohio St. 283, 52 L. R. A. 530, 60 N. E. 220, it was held: "Contracts of investment security, debentures, or certificates, which cannot reasonably be expected to accumulate a reserve fund equal to the stipulated endowment values within the stated period without aid from lapses or appropriation from premiums on new business are fraudulent, contrary to public policy and unlawful." In the opinion, Davis, J., said: "A scheme which can succeed only by lapses is manifestly a scheme which will enrich some at the expense of others who embark in the same enterprise. It holds out the inducement that those who may be strong enough to survive will find their profit in the weakness, the misfortunes, and the discouragements which cause a larger number of their associates to fall by the way. Moreover, since the salvation of the company depends on these lapses, it necessarily tends to encourage and produce them. True enough, all of these certificates are nonforfeitable after 36 monthly payments, but that only signifies that a larger number must fail in the first three years, or that the whole scheme must fail, for the vice of the plan is not that some may fail, but that many must fail, in order that all continuing certificates shall mature." 64 Ohio St. 283, 52 L. R. A. 543, 544, 60 N. E. 220. See also *Peltz v. Supreme Chamber, O. of F. U.* (N. J. Eq.) 19 Atl. 668; *State v. New Orleans Debenture Redemption Co.* 51 La. Ann. 1827, 26 So. 586.

If these authorities simply hold that where it is apparent that the scheme is so dependent upon lapses that it could not succeed without them, and where the number of lapses necessary to effectuate the scheme is beyond all reason, and would in all probability not occur, the scheme would be fraudulent, we will not now undertake to combat the proposition thus laid down. If, however, the holding goes to the extent that every scheme dependent upon lapses—even many lapses—is inherently fraudulent, we cannot recognize such a ruling as in the slightest degree sound. In a case where lapses are simply a part of the scheme, and it cannot be said with certainty they form even a large part of it, the court should not declare the contract invalid, as being op-

posed to a sound public policy, simply because the success of the scheme is in part dependent upon forfeitures and lapses. If this was the law then not only would the business of life insurance in all of its branches be at an end, but many contracts in other lines of business would come under condemnation. If absolute forfeitures and lapses would not make the contract invalid, then, of course, partial forfeitures, such as result from the voluntary retirement of a member at the expiration of seven years, would not make the contract illegal. Nor would partial forfeiture resulting from the death of a member affect the legality of the contract. Considering as a whole the resources the company may resort to for the purpose of carrying out the contract, it cannot be said, as matter of law, that the contract is either fraudulent, or violative of the law of the land, or contrary to a sound public policy. It may be that the contract is unwise. It may be that it is a contract attended with risk—even great risk. But these are all questions to be determined by the investor, and we know of no law which prohibits him from taking the risk of such a contract.

Our learned brother of the circuit bench held that the scheme was a lottery, or, at least, in the nature of a lottery. There are various definitions of a lottery, some of the broadest being as follows: "A scheme for distributing prizes by chance or lot, where a valuable consideration is given for the chance of drawing a prize: especially where such chances are allotted by sale of tickets." Standard Dictionary. "A scheme by which a result is reached by some action or means taken, in which result man's choice or will has no part, and which human reason, foresight, sagacity, or design cannot enable him to know or determine until the same has been accomplished." Bouvier, Law Dict. "Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it." Anderson's Law Dictionary. "Any scheme for the disposal or distribution of property by chance among persons who have paid, or promised or agreed to pay, any valuable consideration for the chance of obtaining such property, or a portion of it, or for any share of or interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a 'lottery,' a 'raffle,' a 'gift enterprise,' or by whatever name the same may be known." Black's Law Dict. Lotteries and similar schemes are prohibited by the law of this state. Penal Code 1805, §§ 406, 407; *Meyer v. State*, 112 Ga. 20, 51 62 L. R. A.

L. R. A. 496, 37 S. E. 96. There are three essential ingredients in a lottery,—consideration, prize, and chance. One of these ingredients is certainly present in the scheme now under review, that is, consideration. Are the other two present? If the element of prize exists at all, it is to be found in the second clause of the certificate, which is as follows: "That the holder hereof shall surrender for payment and cancelation this certificate whenever the same shall be called, before maturity, upon the payment to him of its then redemption value, which value shall be the full amount of the first payment, and all instalments paid hereon, with interest on said amount at the rate of 8 per cent per annum, and its proportionate share of all dividends or accumulations from fines, lapses, and interest earned in excess of 8 per cent per annum." If this clause of the contract can be properly construed to mean that the company is compelled to, or even may call for redemption any certificates before they have earned 8 per cent interest per annum on the full amount of the first payment and on all instalments paid, then there is an element of prize in the contract. But can the clause of the contract be properly so construed? It provides that the holder of a certificate shall surrender it before maturity, whenever the same shall be called, upon payment to him of its then redemption value. This redemption value is then declared to be the full amount of the first payment and all instalments paid on the certificate, with interest thereon at the rate of 8 per cent per annum, and its proportionate share of profits earned in excess of 8 per cent. The certificate cannot be called until it has a redemption value, and that redemption value is fixed at a sum not less than 8 per cent, but it may be more than 8 per cent, provided a greater sum than this has been earned. Does the contract mean other than that the company may call for redemption those certificates which have earned at least 8 per cent on the amount paid in? Is not this the real meaning of the clause? Do not the words "earned in excess of 8 per cent" necessarily imply that there can be no call for redemption until at least 8 per cent has been earned? This seems to us a proper and reasonable construction of the contract. But suppose the clause is ambiguous. It is familiar law that if a contract is of doubtful meaning, and one construction would make it legal, and another illegal, the courts are bound to adopt that construction which will not impute to the parties an intention to disobey the law. It is not to be presumed that people intend to violate the law, and the language of their undertakings must be always construed, if possible, in such a way as to make the obligation one which the law

would recognize as valid. This view of the matter is strengthened when we consider that it is the construction which the company has always placed upon this clause in the contract. The evidence in the present case shows that the officers of the company have construed this clause of the contract to mean that there was not to be any redemption until the certificate had earned at least 8 per cent on the amount paid in. The secretary of the company testified: "A certificate is not eligible for redemption until it has earned 8 per cent at least. If a man has not been in but six months, his certificate has not a redemption value until that sum has been earned, starting always with the \$1. No certificate was redeemed until its *pro rata* part of the assets of the company equalled the full amount paid to the company on account of said certificate, with interest thereon at the rate of 8 per cent for the average time." If under the contract no certificate can ever be called for redemption until it has earned at least 8 per cent, then there is no element of prize in the contract. If the affairs of the company are in such condition that some of the certificates have earned at least 8 per cent upon the amounts paid in, then, under the contract, it is a question for the company to determine whether it is to the interest of the company to retire such certificates, either in whole or in part. The holders have all agreed to surrender their certificates whenever they are tendered this amount; and whenever the company is in a position where it can tender this amount, or more, it is simply a question as to what shall be the policy of the company,—to retire a portion of such certificates at their then value, or to retain the entire fund to be used and improved for the benefit of the certificate holders. When the company determines that it is to the interest of all concerned that a portion of the certificates shall be redeemed, then the question arises as to how many of such certificates shall be redeemed, and how shall it be determined which certificates shall be called for redemption. The holders of these certificates place their money with the company for the purpose of increase and profit, and each investor thus placing his money with the company does so upon express condition that, whenever a point has been reached where his certificate has earned 8 per cent or more, the company has the right to tender him the value of his certificate, and compel him to surrender the same. It might be more to the interest of all the certificate holders to continue to the end, but, by the very terms of the contract, every certificate holder has agreed with the company that it may settle with him at the value of his certificate at any time after it has earned

62 L. R. A.

8 per cent. This being the contract of each certificate holder, and it being foreseen that it would not be wise in all instances to redeem every certificate that had a redemption value, some method had to be adopted by which it would be determined who should be entitled to have their certificates redeemed if redemption was desirable, or who should be compelled to surrender their certificates if redemption at that time was undesirable. The whole purpose of the company was to make money for its certificate holders. Under the contract, it may come to a settlement with some of its certificate holders at any time when the assets of the company would authorize a settlement at a sum made up of at least the amount paid in, and 8 per cent interest thereon. When it should have this settlement, was left to the discretion of the company. The number who should be entitled to such settlement at any given time was also left to the discretion of the company. The manner in which the number should be selected was not left to the discretion of the company, but was to be determined by reference to what is called the "multiple table," a copy of which is set forth above. When the company has determined how many certificates shall be called, a reference to this multiple table and the books of the company showing the outstanding certificates will show exactly what are the numbers of those certificates which will be then called. It can be determined as absolutely what numbers are embraced in a given call under the multiple table as if the plan had been adopted to redeem the certificates in numerical order. Some plan had to be adopted for ascertaining what numbers should be called when it was not desired to call all certificates that had a redemption value. Any plan adopted would be purely arbitrary, and any plan adopted would have some element of chance in it, using that word in its broad sense. If the plan had been to pay certificates in their numerical order, there would have been the same element of chance as there is under the plan actually pursued, because the time at which the certificates shall be called would be governed in each instance by the order in which the applications reach the secretary and numbers are placed upon the certificates.

But let it be conceded that there is an element of chance: the scheme is not a lottery, or in the nature of a lottery, unless there is also the element of prize. We can see no element of prize in the scheme whatever. Certificates are called for redemption and matured at their own value, without reference to the redemption value of other certificates. It may be that the redemption value of a certificate will be the same as that of another certificate of another date, or

it may be that its redemption value will be smaller or greater. But the holder gets no prize, in the sense that term is used in lottery law. Each holder receives a return of the money which he has paid in, together with what it has earned, and can be compelled to receive this at any time that the earnings are 8 per cent or more. The company makes the contract to pay a certain amount at the end of fourteen years, if in the management of the business it sees proper to retain the money during that entire period. It reserves the right to settle with each holder before the end of that period, at any time after the earnings of the company are such that his certificate would have the redemption value fixed in the contract; and it reserves the right to determine whether at such a time it will pay him, or pay another certificate holder whose certificate is ready for redemption, by a reference to the multiple table above referred to. It must be admitted that the plan of redemption by reference to the multiple table is unique, and may even be said to be "catchy," speaking colloquially, and was probably resorted to for the purpose of attracting attention. But it would never do for the courts to hold that unique and unusual methods make enterprises unlawful or contrary to public policy. After the most careful investigation and anxious consideration of this matter, we are unable to see in this contract anything which partakes of the element of prize. It seems to us that the contract is one of investment, where the investor relies upon the honesty, probity, and business sagacity of those in charge of the affairs of the company, and intrusts his money to them with the expectation of receiving satisfactory, and, it may be, large, profits at the end of the period fixed in the contract, but at the same time expressly undertaking to withdraw his money at any time the company is in a position to offer him as earnings on that money the minimum amount fixed as a redemption value of his certificate: and this, too, at a time when other certificate holders, whose certificates are of greater or less redemption value than his, or, it may be, exactly equal with his, are not compelled to retire. It is said, though, that under the operation of the multiple table a certificate might be called at a time when it had not earned the amount necessary to make the redemption value. The secretary of the company testified: "We have never reached a multiple when the certificate has not earned 8 per cent interest on the original \$4 and the \$1.25 paid in." Under the contract as we construe it, the company would not have a right to call for redemption a certificate which had not earned its minimum redemption value, and 62 L. R. A.

as the company by reference to its multiple table and the list of outstanding certificates, can tell, when it fixes the number of certificates to be called, exactly what will be the numbers embraced in the call, it is not to be presumed that the company will make a call that embraces a number which could not be lawfully redeemed. The evidence just referred to shows that so far in the operations of the company no certificate has been called which was not entitled to be redeemed under the contract as we have construed it. To make a lottery, as above stated, three ingredients must be present,—consideration, chance, and prize. We find in this contract certainly the element of consideration, possibly the element of chance, but under no circumstances the element of prize. Chance alone will not make a lottery; and chance, even when coupled with consideration alone, will not make a lottery. When a number of persons are entitled, in any event, each to a given amount, though it may not be the same amount, and all cannot be paid at one time, the determination by lot or chance or drawing of what portion of that number shall be paid at different times would not give to the transaction the characteristics of a lottery. It is when the amount to be paid, or the value of the article to be delivered, is itself determined, either in whole or in part, by lot, drawing, or chance, that the elements of a lottery are present. Corporations issue bonds, and reserve the right to call in for redemption a portion of the bonds before they are due. It is not unusual in such cases for the contract to stipulate that the numbers of bonds to be called shall be determined by lot or chance. Such a transaction as this has never been held to be a lottery, although there was the element of chance in regard to whose bonds should be called. It is not a lottery, because there is no element of prize. The value of the bond is not increased or diminished by the drawing. Each bond is paid its value at the time it is called,—no more, no less,—and the only question determined by lot is whether the bond of A shall be called instead of the bond of B, or the bond of one number in preference to the bond of another number. Many schemes and devices have been held to be lotteries. From the briefs of counsel we select the following as a portion of the many cases that might be found relating to this subject: *Meyer v. State*, 112 Ga. 20, 51 L. R. A. 496, 37 S. E. 96; *McLaughlin v. National Mut. Bond & Invest. Co.* 64 Fed. 908; *Hornner v. United States*, 147 U. S. 449, 37 L. ed. 237, 13 Sup. Ct. Rep. 409; *State v. Clarke*, 33 N. H. 320, 66 Am. Dec. 723; *Thomas v. People*, 59 Ill. 180; *Re National Indemnity & E. Co.* 142 Pa. 450, 21 Atl. 879; *United States v. Politzer*, 59 Fed. 273;

Dunn v. People, 40 Ill. 465; *Sykes v. Beadon*, L. R. 11 Ch. Div. 170; *MacDonald v. United States*, 12 C. C. A. 339, 24 U. S. App. 25, 63 Fed. 427; *United States v. Fulkerson*, 74 Fed. 619; *Hudelson v. State*, 94 Ind. 426, 48 Am. Rep. 171; *State v. Morcn*, 48 Minn. 555, 51 N. W. 618; *Ballock v. State*, 73 Md. 1, 8 L. R. A. 671, 20 Atl. 184; *State ex rel. Kellogg v. Kansas Mercantile Assn.* 45 Kan. 351, 11 L. R. A. 430, 25 Pac. 984; *State v. Boneil*, 42 La. Ann. 1110, 10 L. R. A. 60, 8 So. 298; *Reg. v. Harris*, 10 Cox C. C. 352; *United States v. Zeisler*, 30 Fed. 409; *United States v. Wallis*, 58 Fed. 942; *State v. Shorts*, 32 N. J. L. 398, 90 Am. Dec. 668; *Coms v. Thacher*, 97 Mass. 583, 93 Am. Dec. 125.

We do not think it would be desirable or profitable to discuss in detail the facts of these numerous cases that have been called to our attention. Many of them are merely cases relating to general principles in reference to the law of lottery, about which there is no dispute. Some of them relate to investment companies, but none of these are, in our judgment, either in their facts or in their reasoning, close enough to the present case to be followed by us, even if they were decisions which were binding upon us as authority. In those cases where the facts were at all similar to those of the present case, there were some facts which, in our opinion, materially distinguished the cases from that which we now have under consideration. There was a union in each case of chance, prize, and consideration, or the contract was of such a character that it was so largely dependent upon lapses as to make it fraudulent and void. If in the foregoing discussion we have been so fortunate as to have clearly set forth what we understand to be the scheme of the contract involved in the present case, we feel perfectly safe in saying that a mere casual examination of the cases cited will be all that is necessary to differentiate every one of them from the one now under review, though it is not at all incumbent upon us to show that any distinction between the cases exists. The courts have in many cases made rulings which were intended to protect the public from being imposed upon by fraudulent devices in the form of investment companies, and it is proper that the strong arm of the courts should be used in cases where the scheme is fraudulent and calculated to deceive and defraud. But no case has been called to our attention where any court of last resort has ever held a contract like the one under consideration, understood as we think it should be understood, and as the entire scheme requires it to be understood, to be unlawful or incapable of enforcement.

It was not insisted, as we understand it, 62 L. R. A.

that there was any infirmity in that clause of the certificate which provides that the legal representatives of a deceased certificate holder, who was not more than fifty years of age when the certificate was issued, should be settled with by the payment of all amounts which had been paid in, with 8 per cent interest thereon, and its share of earnings in excess of that amount; and if the deceased holder was more than fifty years of age when the certificate was issued, and his legal representatives did not desire to continue the certificate as though death had not occurred, they should be settled with by the delivery of a paid-up certificate for the amounts paid in, bearing 4 per cent interest per annum. Nor was it claimed that there was any infirmity in that part of the contract which provided that one who had paid for eighty-four months should be entitled to a paid-up certificate for such amounts, bearing 4 per cent interest per annum. It might be that under the contract the legal representatives of a holder who was not more than fifty years old when the certificate was issued would receive the full amount paid in, with 8 per cent interest thereon, at a time when this amount had not earned 8 per cent; but as this payment would be due to him by the happening of the death of the certificate holder, which is an event coming in due course of nature, this would not make the scheme any more illegal than it would make every contract of life insurance fraudulent and void. Taking the contract as a whole, and viewing the same as it has been construed by the officers of the company, and in the light of the manner in which the affairs of the company have been administered, we find nothing in the contract that would justify us in condemning the same as illegal.

It is said, though, that the company issued literature which was calculated to impress the public and those who invested in the company with the idea that the business carried on was the business of a lottery, and that this literature was misleading, and did not set forth the character of the enterprise as now contended for by the company. We will set forth some of these extracts from the literature of the company. Certain circulars of the company sent to prospective investors contained the following statements: "The Equitable Loan and Security Co. is an established financial institution, whose governing principles are security, profit earnings, and speedy returns to the investor." "All certificates pay their holders their equitable ratio of profits, whether called for redemption the 12th, 24th, 36th, or any month after their issuance." "Insurance companies kill the man and pay the policy; the Equitable Loan and Security Co.

kills the policy and pays the man, thereby insuring a speedy return to living members." "A thorough knowledge of our plan will also show that it is absolutely perfect in point of security, profit earnings, equity and speedy returns to the investor." "To guarantee our certificate holders the largest profits and quickest possible returns, no officer or director of this company, or any member of his or their families can ever own or purchase certificates, thus preventing those who are familiar with the inside workings of the company from speculating on delinquent investors and realizing any profits at the expense of prompt and persistent holders." "Twenty certificates purchased in the Equitable Loan and Security Company, if carried to maturity, will pay you ten thousand dollars, yielding a clear profit of \$5,720.00." "The chief element and most prominent feature in our plan is to call and pay certificates as rapidly as our business will permit at their value, which value shall always be the full amount of first payment and all instalments paid on them, with 8 per cent interest, and their proportionate share of all dividends, accumulations from fines, lapses (forfeitures), and interest earned in excess of 8 per cent per annum. For the express purpose of calling certificates for payment as rapidly and as early as possible, a redemption fund has been created." etc.

These extracts from the literature of the company contain a few of the many alluring attractions which are held out to prospective certificate holders. They embrace, we believe, those which are principally relied on in the present case to show misrepresentation and fraud in reference to the character of the company's business. It must be admitted that these declarations in the literature of the company evince a hopeful and sanguine spirit on the part of the officers of the company, and it is evidently their desire to impress the public and possible investors with this same spirit. Is what is said in this literature anything more than an effort to call attention to the character and business of the company in an attractive, enticing, and fascinating way? Are not such methods usual in the commercial world with those who have something to sell? Are they not permissible when not false or fraudulent? When these statements are read and understood, there is really nothing inconsistent with the plan of the company as we have held it to be. But suppose we are wrong in this, and that what is said amounts to misrepresentation and fraudulent misrepresentation. So far as the present case is concerned, it will avail the defendants in error nothing, for the reason that the court has not placed its order appointing a receiver on any such ground. On the contrary, it

has distinctly held that, if the individual holders of certificates were induced to purchase them by the fraudulent representations of the selling agent, or of the officers of the company, it might be ground for a rescission of the contract, so far as they were concerned, but it would not necessitate the appointment of a receiver to take charge of the entire assets of the company, unless it was shown that a receiver for the entire assets was necessary for the protection of the rights of such persons; and that, if the scheme of the company is legal and its contracts valid, if any deception was practised upon the certificate holders, it would not require the appointment of a receiver. So far as these misrepresentations may have been made by the agent of the company, it was not bound by them, if they were at all in conflict with what was stated in the certificate, because in the face of each certificate is a distinct stipulation that no statement made by anyone, except as therein set forth, shall be binding upon the company. This language is broad enough to apply even to statements made by the officials of the company. The contract relations between the certificate holder and the company are absolutely controlled by the certificate, as long as it stands as evidence of the contract. Let it be conceded that the literature of the company which was sent out and authorized by it was calculated to impress upon those who read it that contracts of a nature not provided for in the certificate were intended, and that the applicants for certificates made their applications expecting to obtain certificates of a character indicated by the literature and different from those indicated by the certificates. When they received the certificates with the statement in them above referred to, and could see by a simple reading of the same that it was different from what was contained in the literature, they would be bound by the terms of the certificates after they became acquainted with what was contained therein, or a reasonable and sufficient time elapsed for them to acquaint themselves with its contents after the certificate had come into their possession. The certificate was the evidence of the contract. When it was delivered to the certificate holder, it was his duty to read it, and ascertain what was the contract relation that existed between himself and the company, and, if the literature of the company proposed a different contract, he could have, within a reasonable time, claimed a rescission and recovered back what he had paid, if the contract contained in the certificate was substantially and materially different from that proposed in the literature of the company. Certainly, he cannot come into court as a certificate holder, and claim

rights under a contract not only not contained in the certificate, but directly antagonistic to the statements made therein, after having received and treated the certificate as evidence of the contract between himself and the company. The plaintiffs do not ask either a rescission or a reformation of the contract. They claim that they are holders of the certificates as issued, and as such only do they pray for relief, and the relief asked for is not of a nature which the contract contained in the certificate would authorize. It may be that they have been deceived and defrauded and wronged by the misrepresentations of agents, or even of the officers, contained in authorized literature of the company. If so, they should not come into a court of equity endeavoring to use their position as certificate holders to enforce a contract not contained in their certificates, but their appropriate remedy was in due time to have applied for a rescission of the contract, and ask that the company be required to pay to them the sums which it and its agents had received from them as a result of the fraud which had been perpetrated upon them. Fraud on the part of the agents and officers of the company would be a sufficient ground upon which to base an application for a rescission of the contract; but fraud of the worst type would not authorize a court of equity, in the absence of a prayer for a reformation of the contract, to decree that the certificates issued providing a contract of one character should, on account of the misrepresentations made at the time they were issued or applied for, be declared a contract of an entirely different character.

It appears from the evidence that a large part of certificates of "class B" are outstanding, and that the company has ceased to issue certificates of this class. At the time this suit was filed the company was issuing certificates known as "class C." A copy of one of such certificates is as follows:

In consideration of the written application for this certificate (a copy of which is on the back of this certificate) and the statements and agreements therein contained, which are hereby made a part of this contract, the Equitable Loan and Security Company, hereby promises to pay to the order of — of —, at the home office of the company, \$500, subject to the following express terms and conditions:

1st. That the holder hereof agrees to and shall surrender this certificate for payment and cancellation whenever the same shall be called before maturity upon the payment to him of its then redemption value, which value shall be the full amount of all instalments paid hereon, with a guaranteed profit 62 L. R. A.

of 8 per cent per annum (which profit must be earned before this certificate shall be eligible for redemption) together with its proportionate share of all profits or accumulations arising from interest, fines, and lapses in excess of 8 per cent per annum.

2d. That of each and every instalment paid hereon the maker hereof shall place 50 per cent and all net receipts from fines to a redemption fund, which may be used: (1st) For paying off certificates prior to their full maturity according to the terms herein set forth: (2d) for paying certificates in the order and manner that they shall mature at the end of the full term; (3d) for paying to the legal representatives of the deceased holder hereof the full amount of all instalments paid hereon with a guaranteed profit of 8 per cent per annum together with its proportionate share of all profits or accumulations arising from interest, fines, and lapses in excess of 8 per cent per annum; Provided, this certificate is in good standing and legal and sufficient notice of such death is furnished and this certificate satisfactorily released and surrendered to the maker hereof within ninety days after death occurs; otherwise this certificate cannot be so surrendered, and all conditions will be enforced as provided for in § 5th hereof; (4th) for paying all licenses and taxes: Thirty per cent to a reserve fund which shall be used and held for the protection of all live outstanding certificates; and the remaining 20 per cent and all transfer fees shall be used for the expenses of the company and such other purposes as the directors may approve.

3d. That the holder has paid \$1.50 hereof and agrees to pay to the maker hereof at its home office, without any other or further notice, an instalment of \$1.50 on the fifth day of each and every succeeding month hereafter, until 168 instalments shall have been thus paid, time being of the essence of this contract; then this certificate shall become due and payable within thirty days from the date of said last payment for its full face value of \$500.

4th. That, in order to prevent favoritism or partiality being shown by the company, certificates paid before maturity shall be paid by numbers, and only according to the multiple table which is printed on the back hereof, which table is hereby referred to and made a part of this contract.

5th. That a failure to pay said instalments when due subjects the holder hereof to a fine of 15 cents per month for each month on every instalment in arrears, and if any instalment shall remain unpaid for six months, then this certificate shall become null and void, and of no value, and the holder hereof shall and does forfeit all payments

(including fines) made hereon; Provided, that at any time after 84 monthly instalments have been paid hereon, the holder hereof may surrender this certificate, if it is in good standing, and receive for it a new, nonassessable and nonforfeitable certificate for the full amount of instalments that have been paid hereon, with interest at the rate of 4 per cent per annum, which new certificate shall bear the next unsold number, and shall bear interest at the rate of 4 per cent per annum, and be payable on or before the expiration of the tontine period, from the time it is then issued.

6th. That no transfer hereof shall be valid or binding on the maker hereof until it has been approved hereon by the secretary and recorded on the books of the company at its home office, and a fee of \$1.50 paid for making such record. Each and every transferee hereof accepts this certificate subject to all the stipulations herein. This company shall have a prior lien upon this certificate for any indebtedness due said company by the owner hereof as shown by the books of this company.

7th. That no statement made by anyone except as herein set forth shall be binding on this company.

8th. That no part of the reserve or redemption funds can ever be loaned to any officer or director of this company.

9th. That the funds of this company may be loaned to the holders of certificates, and otherwise invested, upon terms and security to be approved and accepted by the board of directors.

10th. That no officer or director of this company, or any member of his or their families, can purchase or own this certificate.

In witness whereof, this company has caused this certificate to be executed in its name and behalf, under its corporate seal, by its President and Secretary, this — day of —, 190—.

Equitable Loan & Security Company,

By —, President.

—, Secretary.

The multiple table referred to in this certificate is the same as that set out above, except that at the bottom of the table appears the following: "If at any time any multiple number next in the regular order of redemption should not have to its credit a sufficient per cent profit to permit of its redemption according to the terms of this certificate, payment may revert back to the lowest numeral and multiple numbers coming next in order, and on which the profit is sufficient to justify their redemption, and this process continued until the suspended multiple numbers shall have enough earned
62 L. R. A.

profit apportioned to their credit to render them eligible for redemption, according to their terms, when they may be called."

If the contracts contained in certificates of class B are lawful, it follows necessarily that the contracts contained in certificates of class C would be lawful. In fact, it was practically conceded that the issue in this case depended upon the validity of certificates of class B. Upon the invalidity of these certificates the court based its order appointing a receiver, and we think it is evident that the judgment appointing a receiver of the entire assets of the company was not based upon the certificates of either class A or class C. The court based its decision appointing a receiver solely upon the ground that the scheme of the company was unlawful, and not upon the ground that the company was not carrying out in good faith the scheme authorized by the charter, and indicated by the contracts made with the certificate holders. We are constrained, for the reasons above given, to disagree with our learned brother in reference to the legality of this scheme. We have set forth what we believe to be the true interpretation of the contract. If the company is not keeping within the limits of its charter powers, or if it is not managing the assets in the manner provided in its contracts with the certificate holders, of course they have their appropriate remedy to bring the company within the limits of its charter and the scheme as set forth in the certificates. Whether the company has exceeded its charter powers, or whether it has managed the assets of the company in any improper way, it is not incumbent upon us to determine at the present time. The finding of the judge to the contrary precludes any inquiry into the subject, so far as the present case is concerned. In our opinion, the judgment must be reversed on the ground that the court erred in its interpretation of the contract, and, as upon this ground alone a receiver was appointed, the order appointing the receiver should be vacated, and the assets of the company restored to the possession of the officers of the company, to be administered by them in accordance with the charter, the contracts, and the law of the land.

From the view we have taken of the case, it is unnecessary for us to investigate the question whether a court of equity would, under any circumstances, take charge of the assets of a lottery company at the instance of one who knowingly went into the unlawful scheme. On first impression, it would seem to us that the purchaser of a lottery ticket was *in pari delicto* with the seller, and, if the scheme of the company was as the learned judge of the court below held, the holders of certificates would be in no bet-

ter position than the purchasers of lottery tickets. Upon this question, however, we refrain from expressing any matured opinion. Certain it is, however, that if the scheme of the company was in the nature of a lottery, and a court would, at the instance of one who went into the scheme, take charge of the assets of the company, then every person who ever paid one cent into the company would be entitled to participate in the distribution of these assets, even though by reason of his default his certificate had been forfeited. The assets should not be administered for the benefit alone of certificate holders who are in. They obtain no rights under their certificates, because the contracts would be illegal. If they have any rights, they arise from the fact that they paid money into an unlawful enterprise, and the holders of certificates who have paid in and lapsed are just as much entitled to participate as those who have paid in and have not lapsed. If a court of equity will take charge of these assets, in order to prevent them from being used for this unlawful business, these assets should be returned to the true owners of the fund,—that is, the holders of certificates at the present time, and all persons who have contributed to the fund at any time. One reason why it appears to us that it is not the province of a court of equity to soil its hands in distributing a fund of this character is that after all persons who have ever contributed to the fund have been repaid the amount contributed, with lawful interest thereon, and even the costs of suit and of the receivership have been paid, there will probably be remaining a surplus in the hands of the court, and it would be necessary to determine to whom this surplus belonged. A court of equity would certainly not give this fund to the holders of the lottery tickets, as it were. If it did, it would encourage people to buy lottery tickets, and would be giving to those who bought the tickets a part of the profits of the illegal enterprise. If the fund remaining in the hands of the court was not given to the purchasers of the tickets, it would have to be divided among the operators of the illegal scheme; and it would certainly be an unusual spectacle for men who had been promoters of a lottery scheme, and who had had a fund raised by them taken from them by a court of equity, to wait around the doors of the court until the fund had been administered, to see how much a court of equity would return to them as the promoters of the scheme. At no time in the history of the court of chancery have persons in possession of a fund procured by unlawful means been known to wait around the doors of the court for the time to arrive when a portion of such a fund should be re-

62 L. R. A.

turned to them by the court, for the reason that the owner could not be found, and the court must make some disposition of it. The doors of a court of equity are closed against such persons, and should never open to admit a fund which would have to be so administered that a time would arrive when the lawbreaker loitering at the doors of the court in anxious solicitude as to the time and terms of the final decree must be sent for in order that the court might deliver to him a part of the fund remaining unadministered in its hands. The unadministered part of the fund in such cases cannot, consistently with any rule of law or equity, be paid to those who were enticed into the illegal scheme, and a court of equity has no right to confiscate even the property of a lawbreaker: and, at the end of litigation of the character indicated by the above reflections, the only course open to the court would be to call in the transgressor of the law, and deliver to him a fund which, according to the rules of law and equity, could not with propriety be delivered to anyone else. However, as said above, we do not decide this question. These are simply some reflections growing out of the possibilities that might result from an attempt by a court of equity to administer a fund which in its inception and growth is tainted and impure. It does now seem to us that the only court that should ever open its doors to him who would improve his fortune by methods not authorized by law is that court which has jurisdiction to punish offenders against the law. Of all courts, a court of equity should not be opened to the lawless, to settle controversies concerning their spoils. The lawless should neither be allowed to pass the threshold of such a court, nor permitted to linger around its portals in anticipation of a benefit to be derived from its decrees.

Having reached the conclusion that the individuals engaged in this enterprise are not subject to the criticism that they are the managers of a lottery, or promoters of a scheme which is unlawful, we are saved the necessity at the present time of deciding what would have been the rights of these certificate holders if their contentions had been sound.

Judgment reversed.

All the Justices concur, except **Lumpkin**, P. J., absent on account of sickness, and **Simmons**, Ch. J., and **Lamar**, J., dissenting.

Lamar, J., dissenting:
I cannot assent to the majority opinion,

and have attempted in the headnotes* to indicate as briefly as possible what I conceive to be the law applicable to this case, in which I am authorized to say that Chief Justice Simmons concurs. The reporter has been requested to incorporate in the official report the learned and able opinion of his honor, Judge J. H. Lumpkin, of the Atlanta circuit, and this makes it unnecessary to go into any elaborate examination of the authorities, or to set out at greater length the facts appearing in the record.

A petition for rehearing having been filed, Cobb, J., handed down the following response:

The application for a rehearing in this case is based upon numerous grounds. A

rehearing is asked upon the ground that the case was heard by only five justices, and the judgment rendered was concurred in by only three. It is now asked that the case be reheard before a full bench of six justices. These facts alone furnish no sufficient reason for a rehearing. Under the Constitution and laws, three justices may render a judgment in any case heard before less than six justices. Even if, under any circumstances, a litigant has a right to ask that his case be heard before a full court of six justices, the application must be made before the case is heard. The fact that one or more of the justices is absent, and the judgment is rendered by three justices only, constitutes no ground for a rehearing at the instance of a party. While it does not appear in the offi-

*The company issued certificates ("class A") by which it promised to pay the holder \$505.54 on condition that he should pay \$1.25 monthly for one hundred and thirty months, he agreeing to surrender his certificate for redemption at a value fixed by a sliding scale, by which, if redeemed one month after date, \$15 was to be received, if two months, \$18, and so on, the value increasing \$3 with each instalment paid. Certificates to be redeemed were not selected in numerical order, but according to a table using multiples of 3, and under the operation of which younger certificates could be called in before those of older date. A cash payment of \$4, besides 25 cents per month for one hundred thirty months, was to be applied to expense account. Certificates not matured by the multiple table were, at the end of one hundred and thirty months, to receive \$505.54 for \$166.50 paid in. On failure to pay any monthly instalment a fine of 50 cents was imposed, and, if not paid by the succeeding month, the certificate lapsed, and the holder forfeited all payments and fines. The United States postal authorities held this to be a lottery, and the mails were closed against the company.

Retaining the scheme of lapses, and the device of a multiple table to determine what certificates should be redeemed, the company thereupon issued another form of certificate ("class B"), substantially like the foregoing, except that it promised to pay \$500, instead of \$504; the number of instalments was raised to 168; certificates were to be redeemed out of the profits on payment to the holder of the total amount which he had paid in, with 8 per cent interest thereon, together with his proportion of all fines and lapses. Holders of certificates not called in under the device of the multiple table during one hundred sixty-eight months would pay in \$214, of which \$46 was deducted for expenses leaving \$168 to be invested, and for this \$214 the company absolutely promised to return \$500, necessitating that it should earn 28 per cent profit per annum, and paying the holder 133 per cent or 10 per cent per annum average interest.

The company issued a half million dollars of these certificates, "class B." It had a capital stock of only \$2,500, and no other property except that paid in by the certificate holders, and the funds or property in which the certificate holders' money was invested.

Held: (1) "Class A" certificates constituted

a lottery, and "class B" was not essentially different therefrom, being in the nature of a lottery scheme, prohibited by the act of 1877 (Acts 1877, p. 112), as amended by the act of 1881 (Acts 1880-81, p. 62).

(2) A court of equity should afford relief to a litigant expressly asking aid against such a contract more readily than the postal authorities would volunteer to act on behalf of the public, which was not actively seeking protection.

(3) In a number of instances, where substantially similar schemes have been under review, the courts have held the same to be illegal, contrary to public policy, and void. Among many others, see *Horner v. United States*, 147 U. S. 460, 37 L. ed. 237, 13 Sup. Ct. Rep. 409; *State ex rel. Atty. Gen. v. Interstate Sav. Invest. Co.* 64 Ohio St. 283, 52 L. R. A. 530, 60 N. E. 220 (where the effect of the table of multiples was involved); *Peltz v. Supreme Chamber, O. of F. U. (N. J. Eq.)* 19 Atl. 668 (2); *State v. New Orleans Debenture Redemption Co.* 51 La. Ann. 1827, 28 So. 586. The case of *Union Invest. Asso. v. Lutz*, 50 Ill. App. 176, *contra*, is not a decision by a court of final resort.

(4) Such holding is not solely in the interest of the certificate holder, who desires to discontinue the illegal scheme, but also in pursuance of a sound public policy, and to prevent similar schemes from being launched.

(5) To have selected certificates for cancellation by the usual methods of lot would have involved the element of chance; to have selected them in numerical order would not have involved the element of chance; to select them by the device of the multiple table making older certificates mature after younger, and where even this order was interfered with by lapses, was essentially a selection by lot, and was within the prohibition of the act of 1877. *State ex rel. Atty. Gen. v. Interstate Sav. Invest. Co.* 64 Ohio St. 283, 52 L. R. A. 530, 60 N. E. 220.

(6) The scheme here involved chance on chance, by which an early redemption was a return of the amount paid in with about 10 per cent interest, and amounted to a small prize, if, later on, the scheme failed for want of lapses. To have the certificate redeemed at the end of the one hundred sixty-eight months, secured principal and 133 per cent profit, and was the greater prize, if the number of lapses proved sufficient to enable the plan to work out to the end of one hundred sixty-eight months.

(7) In determining whether the scheme is

cial report of the case, still the records of this court disclose that in the case of *Gilbert v. State* (Ga.) 43 S. E. 47, which was heard by four justices, and the judgment rendered by three, the fourth dissenting, an application for a rehearing upon the ground above referred to was refused.

It is further contended that a rehearing should be granted for the reason that in the opinion of the majority it is recognized that the scheme is dependent, to some extent, upon the doctrine of survivorship, and that, as joint tenancy with its incident of survivorship has been abolished in this state, the ruling is unsound to the extent referred to. It is true that the common-law doctrine of survivorship among joint tenants was abolished by the Constitution of 1777. *Lowe v. Brooks*, 23 Ga. 325; *Carswell v. Schley*, 58

Ga. 101, 108. See also *Bryan v. Averett*, 21 Ga. 402, 68 Am. Dec. 464; *Harrison v. Harrison*, 105 Ga. 520, 31 S. E. 455. The Code declares: "Joint tenancy does not exist in this state, and all such estates, under the English law, will be held to be tenancies in common under this Code." Civil Code 1895, § 3142. It follows, therefore, that wherever an instrument creates an estate which at common law would be held to be a joint tenancy, in this state the instrument would be held to take effect as to all its terms, except so far as it provided by implication for survivorship among the tenants, and such tenants would be held to occupy to each other, so far as this question is concerned, the relation of tenants in common. While the doctrine of survivorship, as applied to joint tenancies, has been distinctly

possible without undue lapses, the courts must exclude from the calculation windfalls, extraordinary and improbable rises in value of investments, and consider the risks of business, current rates of interest, and the fact that, if such a scheme, without aid from undue lapses, were regarded as possible by men of ordinary business prudence, the enormous profits promised would attract millions of capital from the more useful channels of trade and commerce.

(8) The evidence discloses that out of \$240,000 total profits earned 49 per cent of such profits, or \$119,000, was derived from lapses, and that, but for such lapses, the company could not have redeemed the certificates already called in, and on which about 10 per cent interest was paid.

(9) There is an absolute promise to pay \$500 for every \$214 paid in on certificates which mature at the end of one hundred sixty-eight months. This involves the necessity of the company earning enough on each \$168 to pay back the \$46 appropriated for expenses, together with 133 per cent on \$168, equal to an average annual interest of 28 per cent on the \$168 invested, and a dividend of 19 per cent per annum to the certificate holder.

(10) A provision for incidental lapses does not render a scheme illegal. In legal and valid insurance contracts the element of a lapse is incidental, and the policy holder has at all events received value in actual protection by insurance during the premium term. In strict tortines the lapses are not necessary to the success of the scheme, for all can remain in to the end of the period, and get their share of the fund, whatever it may prove to be.

(11) Equity abhors lapses, and will relieve against forfeitures. *South Carolina & G. R. Co. v. Augusta Southern R. Co.* 107 Ga. 182, 33 S. E. 36. A scheme largely depending on lapses for its success is illegal, and contrary to public policy, for the reason that the lapses do not represent earnings of the company so much as losses of those unfortunates who, having started, are unable to hold out to the date of maturity. Equity is unwilling that others should reap that which they did not sow.

(12) The guaranty to pay much for little appeals to that cupidity and desire to "get rich quick," which makes the scheme contrary to public policy, and calls for action by a court of equity to protect those who, tempted by the

guaranty of \$500 for \$214 paid in, are blind to the fact that they may be among the lapsed. Equity will act all the more quickly because those who are financially the weakest are most likely to lapse, to the benefit of the stronger, who can continue to pay until the end of the term.

(13) The right to make contracts is not unlimited. Civil Code 1895, § 3668. The same public policy which forbids lotteries and futures, and which protects the necessitous from usurious contracts, will in like manner protect those who have been induced by the promise of usurious profits to go into a scheme depending for its performance on lapses, in which many must lose in order that few may gain.

(14) The maxim, *In pari delicto*, etc., or that courts will not ordinarily interfere where parties to an illegal contract are equally guilty, does not apply here, because the parties are not on a parity.

(a) Nor does it apply where the contract is executory, and in course of performance, as here.

(b) Nor does it apply for the further reason that the defendant company really has no interest in the appropriation to be made of the fund by the court. It has been paid \$4, together with 25 cents monthly, for investing a fund. It is, in effect, the agent of the certificate holder, and the money in its hands is a trust fund, the real owners being the subscribers. Any holder, on proof of the insolvency of the agent, or the impossibility of the ultimate performance of the scheme without undue lapses, is entitled to have the illegal scheme discontinued, and the trust property placed in the hands of a receiver for distribution among the true owners.

(15) If the scheme continues in operation, each certificate holder must still pay, in order to avoid a lapse, with the forfeiture of all that he has contributed. Equity will not force him to continue the illegal payments, nor to run the risk of a forfeiture by his withdrawal. Before the contract is finally executed, it allows a *locus penitentiae* to those who desire to have the scheme discontinued, and in aid of those seeking the discontinuance of the scheme the court will administer the trust fund for the benefit of the true owners. *McLaughlin v. National Mut. Bond & Invest. Co.* 64 Fed. 908.

abolished and does not exist in this state, there is no law of this state that we are aware of which prevents parties to a contract, or a testator in his will, from expressly providing that an interest in property shall be dependent upon survivorship. Of course, all presumptions are against such an intention, but where the contract or will provides, either in express terms or by necessary implication, that the doctrine of survivorship shall be recognized, we know of no reason why a provision in the contract or will dependent upon such doctrine may not become operative under the laws of this state. While this question seems not to have been distinctly passed upon by this court, there are numerous cases in which the doctrine of survivorship has been recognized as being operative. Among the cases on this subject, see *Riordon v. Holiday*, 8 Ga. 79; *Benton v. Patterson*, 8 Ga. 146; *Dunn v. Bryan*, 38 Ga. 154; *Hooper v. Howell*, 50 Ga. 165, 52 Ga. 316; *Parrott v. Edmondson*, 64 Ga. 332; *Olmstead v. Dunn*, 72 Ga. 850. At common law an estate in joint tenancy, with the incident of survivorship, was created in any case where lands or tenements were granted to two or more persons, to be held in fee simple, fee tail, for life, for years, or at will. The mere creation of the estate in two or more persons, without more, drew to it the incident of survivorship. See 2 Bl. Com. p. 180. In Georgia the mere creation of the estate in two or more persons never draws to it survivorship as an incident, and the presumption is in all cases that survivorship was not intended. But where, by express terms or necessary implication, a survivorship is provided for, the law of Georgia allows it to exist. This exact question has been passed upon in other states having statutes abolishing the doctrine of survivorship as applied to joint tenancies. In *Arnold v. Jack*, 24 Pa. 57, the supreme court of Pennsylvania held that, though survivorship, as an incident to joint tenancies, had been abolished in that state, it might be expressly provided for by will or deed; Knox, J., in the opinion saying: "But, conceding that the right of survivorship, as an incident of a joint tenancy, no matter how created, is gone, it by no means follows

that this right may not be expressly given, either by a devise in a will, or by grant in a deed of conveyance. It may cease to exist as an incident, and yet be legally created as a principal." See also *Jones v. Cable*, 114 Pa. 586, 7 Atl. 791; *Sturm v. Sawyer*, 2 Pa. Super. Ct. 254; *Lentz v. Lentz*, 2 Phila. 117. In the case of *Taylor v. Smith*, 116 N. C. 531, 21 S. E. 202, the supreme court of North Carolina held that the act abolishing survivorship in estates in joint tenancy did not prohibit contracts making the rights of the parties dependent on survivorship. In the opinion, Avery, J., said: "The act of 1784 (Code, § 1326) abolishes survivorship where the joint tenancy would otherwise have been created by the law, but does not operate to prohibit persons from entering into written contracts as to land, or verbal agreements as to personalty; such as to make the future rights of the parties depend upon the fact of survivorship." See also 17 Am. & Eng. Enc. Law, 2d ed. p. 650.

The remaining grounds of the application for a rehearing relate to matters which were fully discussed and carefully considered. Attention is called in the motion for a rehearing to the case of *State v. Hawkins*, 95 Md. 133, 51 Atl. 850. Even if this case can be considered as antagonistic to the conclusion reached in the present case, we find nothing in the reasoning of the court which dissatisfies us with the conclusions we have reached. In addition to the cases cited in the original opinion on the question of what constitutes a lottery, we take this occasion to call attention to the following: *Hall v. Cox* [1898] 1 Q. B. 198; *Reg. v. Dodds*, 4 Ont. Rep. 390; *Reg. v. Jamieson*, 7 Ont. Rep. 149; *Stoddart v. Argus Printing Co.* [1901] 2 K. B. 474; *Dunham v. St. Croix Soap Mfg. Co.* 34 N. B. 243; *United States v. Rosenblum*, 121 Fed. 180.

While the differences of opinion among the justices of this court, as indicated by the opinions filed, still exist, so far as the merits of this controversy are concerned, we are all agreed that no sufficient reason has been given why this case should be reargued.

Application denied.

IOWA SUPREME COURT.

D. H. PARSONS

v.

Philip MANSER, Appt.

(.....Iowa.....)

1. A keeper of bees must exercise ordinary prudence in locating their hives so as to avoid unnecessary danger to those who are likely to make lawful use of the premises or the highway near by.
2. A keeper of bees may be found guilty of negligence in locating their hives within a few feet of a post which he has fixed for fastening horses to, where he knows that they are prone to attack perspiring horses.

3. Whether or not the owner of a horse is negligent in hitching it within a few feet of a hive of bees, which he could have seen had he looked, is for the jury.

4. The rule as to the duty which a property owner owes licensees regarding the safety of the premises is not applicable in a case where horses were left tied in a highway near a hive of bees, which attacked them and caused them to crowd over the fence into such proximity to the hives as to be stung to death.

(January 22, 1903.)

A PPEAL by defendant from a judgment of the District Court for Warren County in favor of plaintiff, in an action brought

NOTE.—*Liability of owners of bees for injuries done by them.*

- I. Introduction, 132.
- II. Actions for injuries inflicted by bees, 133.
- III. Bees as a nuisance, 133.

I. Introduction.

Bees are generally admitted to come within the class denominated as *feræ naturæ* rather than *domitæ naturæ* or *mansuetæ naturæ*; but, as pointed out in *Earl v. Van Alstine*, 8 Barb. 630, the determining point at common law, in the classification of animals, is, not the ferocity of their disposition, but whether an absolute and permanent right of property may be acquired in them, or a qualified right merely, based upon the extent to which they may be domesticated and brought under the control of man; and the court points out that dogs, some of which are extremely savage and fierce, are uniformly classed as *domitæ naturæ*, while hares, rabbits, and doves, although comparatively harmless, are termed *feræ naturæ*. While there seems to be little doubt that the bee is placed within this latter class, "It must" as the court says in the case above, "nevertheless be regarded as coming very near the dividing line," because "its habits and its instincts have been studied, and, through the knowledge thus acquired, it can be controlled and managed with nearly as much certainty as any of the domestic animals." The same idea is expressed by the court in *PARSONS v. MANSER*. There are some expressions in text books, however, to the effect that bees are *domitæ naturæ*, as, in *Barrows, Neg.* § 151, it is said that the term "domestic animals" "is now used to indicate those species of animals useful to man, which, either by nature or successive generations of captivity, have come to be generally regarded as peaceable and harmless, including horses, cattle, bees, dogs, etc.," but the only citation to support the statement in regard to bees is *Earl v. Van Alstine*, 8 Barb. 630, which does not seem to go that far.

Blackstone says (2 Bl. Com. 392): "Bees are also *feræ naturæ*, but, when hived and reclaimed, a man may have a qualified property in them by the law of nature, as well as by the civil law." And they thus remain his property notwithstanding a temporary escape, because instilled with the *animus revertendi*, and their owner is, therefore, not within the rules govern-

ing the owner of animals *feræ naturæ* without this instinct, which absolves him from all liability upon the escape of the animals from his possession. *Boulton's Case*, 5 Coke, 104b; *Hinsley v. Wilkinson*, Cro. Car. 387.

But, as has been seen, determining in which class bees belong,—whether *feræ naturæ* or *domitæ naturæ*,—when the classification is made on the basis above indicated, is not conclusive in an inquiry as to the liability of their owner for injuries committed by them, the real question being whether they are fierce and dangerous, or comparatively harmless, as the liability and degree of care necessary to be exercised by the owner in regard to their keeping are regulated thereby. This is recognized in *Earl v. Van Alstine*, 8 Barb. 630, where the court says that "the liability does not depend upon the classification of the animal doing the injury, but upon its propensity to do mischief;" in regard to which the judge says, speaking of the bee: "I apprehend that such a thing as a serious injury to persons or property from its attacks is very rare, not occurring in a ratio more frequent, certainly, than injuries arising from the kick of a horse, or the bite of a dog." Similar language is used in the opinion in *PARSONS v. MANSER*, and no expressions are discovered to any other effect. Therefore, as bees are undoubtedly not considered sufficiently fierce and dangerous to render their owner liable, at all events, as an insurer, for any injuries inflicted by them, it follows that he is liable only upon a failure to use due care in their keeping. As stated by *Barrows on Negligence*, § 150: "The right of recovery for injuries caused by animals rests on the same basis as that for harm done by any other dangerous instrumentality, and the gist of the action is, in every instance, negligence." And by *Shearman & Redfield on Negligence*, § 629: "But the owner of creatures which, as a species, are harmless and domesticated, and are kept for convenience or use, such as dogs, cattle, horses, and even bees, is not liable for injuries wilfully committed by them, unless he is proved to have had notice of the inclination of the particular animals complained of to commit such injuries. If, having had such notice, he neglects to keep them confined where no one can suffer from them while using ordinary care, he is liable for all injuries committed by them." This statement, however, should be qualified in the language of *Ingham on Animals*, 380: "The owner is bound

to recover the value of plaintiff's horses, which were stung to death by defendant's bees. *Affirmed.*

The facts are stated in the opinion.

Mr. O. C. Brown, for appellant:

The owner of premises is under no legal duty to keep them free from pitfalls, obstructions, etc., for the accommodation of persons who go upon them or over them without invitation, on their own business, or for their own convenience or pleasure, even when done with the owner's permission.

Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028; *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783; *Gibson v. Leonard*, 143 Ill. 182, 17 L. R. A. 588, 36 Am. St. Rep. 376, and note, 32 N. E. 182; *Larmore v. Crown Point Iron Co.* 101 N. Y. 391, 54 Am. Rep. 718, 4 N. E. 752; *Con-*

verse v. Walker, 30 Hun, 596; *Bedell v. Berkey*, 76 Mich. 435, 43 N. W. 308; *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573, 41 S. W. 62.

A landowner is not liable for injuries received by stock trespassing on his premises on account of such premises being in a dangerous condition, and not being kept in proper repair.

St. Louis, I. M. & S. R. Co. v. Ferguson, 57 Ark. 16, 18 L. R. A. 110, 20 S. W. 545; *Hughes v. Hannibal & St. J. R. Co.* 66 Mo. 325; *Clary v. Burlington & M. River R. Co.* 14 Neb. 232, 15 N. W. 220; *Gilman v. Sioux City & P. R. Co.* 62 Iowa, 299, 17 N. W. 520; 1 Thomp. Neg. 298, 303; 3 Lawson, Rights, Rem. & Pr. §§ 1149, 1151.

Mr. J. O. Watson for appellee.

to guard against the general propensities of the class to which the animal belongs, as well as against the special tendencies of the specific animal known to him."

The fact that bees are kept for use and convenience, rather than as curiosities, is recognized in *PARSONS v. MANSEY*, and in *Earl v. Van Alstine*, 8 Barb. 630, *supra*, as modifying somewhat the owner's liability in the case of injuries inflicted by them; the court stating in the latter decision that for that reason there was nothing to call for the application of a very stringent rule in the case. *Barrows on Negligence*, § 150, says in this regard: "If a person lawfully keeps a wild animal for a useful purpose his obligation to so confine it that it cannot injure other people is not greater or otherwise than it is in the case of fire, or any other dangerous instrumentality. And it is, therefore, believed that the gist of the action for injuries caused by a wild beast or any other confessedly dangerous animal, whether the injury is inflicted while the animal is confined or at large, is negligence on the part of its owner or keeper;" citing *Earl v. Van Alstine*, 8 Barb. 630, *supra*.

Cooley also advances this theory, saying: "When wild animals are kept for some purpose recognized as not censurable, all we can demand of the keeper is that he shall take that superior precaution to prevent their doing mischief which their propensities in that direction justly demand of him." *Torts*, p. 412, note.

II. Actions for injuries inflicted by bees.

A case based upon, and recognizing, all the foregoing theories is *Earl v. Van Alstine*, 8 Barb. 630, which was an action for damages inflicted upon plaintiff's horses by stinging, resulting in the death of one of them. A judgment of recovery was reversed upon appeal. From the facts it appeared that the hives had been kept in the owner's yard adjoining the public highway in which plaintiff's horses were traveling for eight or nine years without, so far as appearing, any injuries having been previously inflicted by them. Two questions were considered: "(1) Is anyone who keeps bees liable, at all events, for the injuries they may do? and (2) Did the defendant keep these bees in an improper manner or place, so as to render him liable on that account?" After a review of numerous author-

ities, the court came to the following conclusions generally and in regard to the former question: "(1) That one who owns or keeps an animal of any kind becomes liable for any injury the animal may do, only on the ground of some actual or presumed negligence on his part; (2) that it is essential to the proof of negligence, and sufficient evidence thereof, that the owner be shown to have had notice of the propensity of the animal to do mischief; (3) that proof that the animal is a savage and ferocious nature is equivalent to proof of express notice. In such cases notice is presumed." Bees, not being regarded as falling within the latter class, their owner was declared not liable, at all events, for any injury they might do, but only upon proof that he had had previous notice of their propensity to do the mischief. And also, in view of the fact that the law looks with more favor upon the keeping of animals that are useful to man, than on those that are purely noxious and useless, the court stated that, there being no question as to the utility of bees, there was nothing to call for the application of a very stringent rule in this case. As to the second question, it appearing that the hives had been in the same location for eight or nine years, and no proof being offered as to the slightest injury having been inflicted by the bees within that time, the court declared that this rebutted the idea of any notice to the defendant, either from the nature of the bees, or otherwise, that it was dangerous to keep them in that situation. This decision and *PARSONS v. MANSEY* are perfectly consistent and harmonious, since in the latter case there was evidence of previous notice of the identical inclination in the bees from which the injury afterward resulted.

In *Tellier v. Pelland* (1873) Rev. Leg. (Quebec) 61, the owner of bees by which a horse had been stung so that it died was held liable for the value of the horse. The opinion is almost entirely taken up with an examination of the medical evidence, the chief controversy being whether the horse really died in the manner asserted.

III. Bees as a nuisance.

An ordinance was passed by a city council ordaining the keeping of bees a nuisance, and therefore making it unlawful for anyone to

Ladd, J., delivered the opinion of the court:

The plaintiff is a peddler of medicines. As such he called at the house of defendant to sell goods on the 7th day of July, 1900. He had hitched his team to a post a little west of the gate leading to the house, in the highway south of it, and about 5 feet from the fence. There were two bee gums about 25 feet north of the post in defendant's yard, and three more 10 or 12 feet farther on. Trees stood close together west and north of this yard, and shrubbery and bushes to the east. The only unobstructed passage was to the south and southeast. Shortly after entering the house, he heard a crash, and upon running out found that the horses had pushed through or over the fence, and their heads were within a few feet of the hives. The hind wheels of the wagon were still on the fence, and one horse was lying down. Bees covered them. He immediately unhooked the traces, while defendant's daughter cut the lines, but both were soon compelled to flee for their own safety. Two gums were afterwards overturned by the horses. She went after help, while he did what he could by throwing water on the horses and trying to remove them.

1. The beehives were painted white, and stood about 2 feet above the ground. They were in clear view from the road, so that plaintiff could have seen them had he looked. This he did not do, but hitched his team where injury was likely to occur. Appellant urges that he was guilty of contributory negligence, and that the evidence failed to establish negligence on the part of the defendant. But he was entitled to the free use of the highway, and had the right to assume that those keeping animals of whose mischievous nature everyone is presumed to have knowledge would exercise reasonable care for the protection of others from their

depredations. True, bees may not be confined like the wild beasts. To roam seems to be necessary to their existence. They fly great distances, and, if interfered with, or their course obstructed, are likely to resent by the use of their only available weapon. Everyone harboring creatures *fera natura* is charged with knowledge of their habits and evil propensities. *Moss v. Partridge*, 9 Ill. App. 490; *Com. ex rel. Wilson v. Fourteen Hogs*, 10 Serg. & R. 393; *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123; *Berozzi v. Harris*, 1 Post. & F. 92; *Laverone v. Mangianti*, 41 Cal. 138, 10 Am. Rep. 269. There is no reason for an exception in favor of the bee. Indeed, their disposition to make themselves felt is a matter of common observation or experience from early childhood. But they are very useful, the aviary often furnishing a livelihood, and generally proving a source of profit; and the books seem to look with more favor upon the keeping of animals useful to man than those which are worthless save as curiosities. For this reason the rule of absolute liability for the consequences of injuries received from wild beasts kept in confinement, declared in the earlier decisions, even if regarded as sound, ought not to be extended to creatures so nearly domesticated. See *Congress & E. Spring Co. v. Edgar*, 99 U. S. 651, 25 L. ed. 488; *Decker v. Gammon*, 44 Me. 322, 69 Am. Dec. 99; *Vredenburg v. Behan*, 33 La. Ann. 627; *Filburn v. People's Palace & Aquarium Co.* L. R. 25 Q. B. Div. 258; *Manger Bros. v. Shipman*, 30 Neb. 352, 46 N. W. 527; *May v. Burdett*, 9 Q. B. 111. But that rule seems to have been somewhat relaxed, or, at least so explained as to be better understood. Judge Cooley, in his work on Torts, takes the position that, as the keeping of wild animals for many purposes has become recognized as proper and useful, the liability of the owner or keeper for any injury by them to the person or property of others should rest on the doc-

own, keep, or raise bees within the limits of the city. Upon an appeal by the city from a decision holding the ordinance void, the court held as follows, affirming the decision of the lower court: "Neither the keeping, owning, nor raising of bees is, in itself, a nuisance. Bees may become a nuisance in a city, but whether they are so or not is a question to be judicially determined in each case. The ordinance under consideration undertakes to make each of the acts named a nuisance without regard to the fact whether it is so or not, or whether bees in general have become a nuisance in the city. It is, therefore, too broad, and is invalid." *Archadelphia v. Clark*, 52 Ark. 23, 11 S. W. 957.

A case where bees were, as a matter of fact, declared a nuisance, is *Olmsted v. Rich*, 25 N. Y. S. R. 271, 6 N. Y. Supp. 826, which was an action to enjoin a nuisance, and for \$1,500 damages. From the facts it appeared that upon a village lot adjoining plaintiff defendant had col-

lected a large number of swarms of bees which, during the spring and summer, greatly interfered with plaintiff's enjoyment of his premises, driving him, his servants, and guests from his garden and grounds, stinging them, and otherwise making his dwelling and premises unfit and unsafe for habitation, constituting a nuisance to plaintiff's damage in the sum demanded. A verdict of 6 cents damages, with an award of a permanent injunction, was affirmed on appeal.

It would seem that, in the case of injuries inflicted by bees, an action at law might be brought for damages occasioned by the maintenance of a nuisance, in analogy with the rule in the case of other dangerous instrumentalities, when whether the bees were or were not a nuisance would of course be a question of fact, and the doctrine of negligence and contributory negligence would have no application.

trine of negligence; that, while a high degree of care is demanded, yet if, notwithstanding this, they do mischief, it should be treated as accidental only. Cooley, Torts, 348. In *Earl v. Van Alstyne*, 8 Barb. 630, Selden, J., after a careful review of authorities then existing, reached the conclusion that liability depended, not on the fact that animals occasioning the injury are *feræ naturæ*, but upon the owner's knowledge of their disposition. Thus, domestic animals are by nature harmless, and upon this the owner may rely until he has ascertained to the contrary. If, however, he harbors a domestic animal known to him to be ferocious, he is liable, without proof, of having become aware that the animal has previously been guilty of like acts. See 2 Cyc. Law & Proc. 368. Wild animals are by nature fierce and dangerous, and hence of this everyone is charged with notice. That is their natural state. The conclusions he reached are: "(1) That one who owns or keeps an animal of any kind becomes liable for any injury the animal may do, only on the ground of some actual or presumed negligence on his part; (2) that it is essential to the proof of negligence, and sufficient evidence thereof, that the owner be shown to have had notice of the propensity of the animal to do mischief; (3) that proof that the animal is of a savage and ferocious nature is equivalent to proof of express notice." In *May v. Burdett*, 9 Q. B. 101, the wife had been bitten by a monkey. The declaration alleged the ferocious character of the animal and defendant's knowledge of it. Subsequent to verdict, defendant moved in arrest because of the omission to aver negligence. and Chief Justice Denman said: "But the conclusion to be drawn from an examination of all the authorities appears to us to be this: That a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril, and that if it does mischief, negligence is presumed. . . . The negligence is in keeping such an animal after notice." Liability for safe-keeping depends, not so much on the classification of animals into wild and domestic as upon their natural propensity for mischief. If they are ferocious and savage, like the lion, tiger, etc., the keeper is bound to know the danger incident to their confinement; and the mere charge of not having been so restrained as to avoid injury is tantamount to an allegation of negligence. But bees, while generally classed as *feræ naturæ*, are so useful and common as to be all but domesticated. Keepers of the aviary have carefully studied their habits and instincts, and control them almost as certainly as domestic animals. Serious injuries from them are very rare, 62 L. R. A.

and, unless some want of care in their management is shown, the owner ought not to be held responsible for damages occasioned by them. See *Earl v. Van Alstyne*, 8 Barb. 630. Nothing could be done by the keeper of bees to protect all from their attacks. These might occur miles from the hives, and beyond his reach. But they have fixed habitations. *State v. Repp*, 104 Iowa, 305, 40 L. R. A. 687, 73 N. W. 829. The location for these is always a matter for his determination, and it is not too much to exact of him the exercise of ordinary prudence in so placing the hives as to avoid unnecessary danger to those who are likely to make lawful use of the premises or the highway nearby. In other words, he must, as was held in *Tellier v. Pelland*, 5 Rev. Leg. 61,—a similar case,—so use his own as not to interfere with the rights of others. The defendant naturally expected people to visit his home, and that teams would in all probability be hitched to the post. It was put there and maintained for that purpose, and this in itself was an assurance that it was a safe place to leave horses. But that was the course the bees were likely to fly in going to and from their hives, and there was evidence to the effect that they were prone to attack horses when perspiring, if near them. Moreover, the defendant was advised of this, as his daughter had cautioned a music teacher in his presence of the danger from them in tying her horse to this very post but a few days before. In this respect the case differs from *Earl v. Van Alstyne*, 8 Barb. 630, where the bees had been in the same place eight years without knowledge of their molesting anyone. Because of their situation and the notice of their inclination to interfere with horses when hitched where plaintiff left his team, the question of defendant's negligence was for the jury, as was also that of contributory negligence.

2. Appellant has called attention to several authorities in principle to the effect that plaintiff, in entering defendant's premises, was merely a licensee, and assumed the risks of their condition. *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573, 41 S. W. 62; *Gibson v. Leonard*, 143 Ill. 182, 17 L. R. A. 588, 32 N. E. 182; *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128; *O'Connor v. Illinois C. R. Co.* 44 La. Ann. 339, 10 So. 678; *Hart v. Cole*, 156 Mass. 475, 16 L. R. A. 557, 31 N. E. 644. What bearing this has on the case we are unable to understand. If, because of defendant's negligence, the bees attacked the horses left without fault in the road, and, owing to this, they crowded through or jumped over the fence in the vicinity of the hives, and were so injured as that death re-

sulted, of which the first attacks were the proximate cause, then he is liable, regardless of any duty owing to plaintiff while on the premises.

3. Appellant urges that there was no evidence from which it could be found the bees stung the horses in the road. No direct testimony to that effect was offered, and it could hardly be expected that the bees attacking the horses would be specifically identified as defendant's. It was shown that the team was gentle; that the gums were but about 25 feet distant, facing toward the horses; that the bees went away and returned in the direction of the horses; that,

if the wind blew from the horses in the direction of the gums, they would be likely to attack them. The circumstances were such as to render it reasonably probable that the attack by bees from defendant's hives caused the horses to break loose. A gentle team would not be likely to break away because of biting of flies, and the suggestion that someone else's bees may have done the mischief is not of importance, in view of the situation. We think the question was for the jury. See *Brownfield v. Chicago, R. I. & P. R. Co.* 107 Iowa, 254, 77 N. W. 1038.

Affirmed.

INDIANA SUPREME COURT.

REPUBLIC IRON & STEEL COMPANY,
App't.,
v.
STATE of Indiana.
(.....Ind.....)

1. The legislature is not precluded from incorporating a clause providing for a penalty, in a statute requiring the weekly payment of wages, by the fact that mention of that fact is not made in the title of the act, by the constitutional provision that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title.
2. Requiring employers to make weekly payment of wages, notwithstanding private contracts which they may make with their employees, is not within the police power of the state.
3. A statute requiring the weekly payment of wages, by interfering with the liberty of contract, deprives citizens of their liberty and property without due process of law.

(April 8, 1908.)

APPEAL by defendant from a judgment of the Circuit Court for Delaware County in favor of plaintiff in an action brought to recover wages and the statutory penalty for refusal to pay them as provided by the statute. *Reversed.*

The facts are stated in the opinion.

Messrs. Ryan & Thompson, Robert F. Davidson, and Frank C. Olive, with Messrs. Smiley N. Chambers, Samuel O. Pickens, and Charles W. Moores, for appellant:

This act imposes no valid penalties, because the title of the act mentions none.

Indiana C. R. Co. v. Potts, 7 Ind. 681; *Savannah, F. & W. R. Co. v. Geiger*, 21 Fla. 669, 58 Am. Rep. 697; *Northwestern Mfg. Co. v. Chambers*, 58 Mich. 381, 55 Am. Rep. 693, 25 N. W. 372; *Grosvenor v. Duffy*, 121 Mich. 220, 80 N. W. 19.

The act violates both the Federal Constitution and the Indiana Constitution in that (a) it deprives a large class of our citizens of their liberty and of their property without due process of law, and abridges their privileges and immunities; (b) it withholds from citizens of Indiana and of the United States the equal protection of the laws; and (c) it impairs the obligation of contracts.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 505, 44 L. ed. 560, 564, 20 Sup. Ct. Rep. 385; *Com. v. Isenberg*, 4 Pa. Dist. R. 579; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Re House Bill No. 203*, 21 Colo. 27, 39 Pac. 431; *Bessette v. People*, 193 Ill. 334, 56 L. R. A. 558, 62 N. E. 215; *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 58 Pac. 1071; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781; *Leop v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75; *Low v.*

NOTE.—For other cases in this series as to constitutionality of statute requiring wages to be paid weekly, see *State v. Brown & S. Mfg. Co.* (R. I.) 17 L. R. A. 856; *Braceville Coal Co. v. People* (Ill.) 22 L. R. A. 340; *Re House Bill No. 1230 (Mass.)* 28 L. R. A. 344, and cases in note thereto.

People (Ill.) 22 L. R. A. 340; *Re House Bill No. 1230 (Mass.)* 28 L. R. A. 344, and cases in note thereto.

Rees Printing Co. 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362.

The reasonableness of a legislative interference with the private right of contract undertaken as a police regulation is a judicial question, and not a legislative one.

Eden v. People, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *Ex parte Jentzsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803; *Lawton v. Steele*, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313.

By exempting from its terms "employees engaged by a common carrier in interstate commerce" it grants to certain citizens and classes of citizens "privileges and immunities which, upon the same terms, shall not equally belong to all citizens."

Ind. Const. art. 1, § 23; U. S. Const. 14th Amend.; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *San Antonio & A. P. R. Co. v. Wilson*, 4 Tex. App. Civ. Cas. (Willson) § 323, p. 565, 19 S. W. 910; *Com. v. Isenberg*, 4 Pa. Dist. R. 579; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313; *State v. Gardner*, 58 Ohio St. 599, 41 L. R. A. 689, 51 N. E. 136; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 24 Pac. 737; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *Re Morgan*, 26 Colo. 415, 47 L. R. A. 52, 58 Pac. 1071.

If this act is within the legitimate scope of the police power, then it should include within its provisions persons engaged in interstate commerce, for interstate commerce is not exempt from the police regulations of the several states.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 101, 32 L. ed. 352, 354, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Plumley v. Massachusetts*, 155 U. S. 461, 472, 39 L. ed. 223, 227, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Pittsburg & S. Coal Co. v. Louisiana*, 156 U. S. 590, 598, 39 L. ed. 544, 548, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459; *Western U. Teleg. Co. v. James*, 162 U. S. 650, 656, 40 L. ed. 1105, 1106, 16 Sup. Ct. Rep. 934; *Hennington v. Georgia*, 163 U. S. 299, 315, 40 L. ed. 166, 173, 16 Sup. Ct. Rep. 1086; *State v. Southern R. Co.* 119 N. C. 820, 25 S. E. 862; 62 L. R. A.

State v. Fulker, 43 Kan. 237, 7 L. R. A. 183, 22 Pac. 1020; *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 631, 41 L. ed. 863, 864, 17 Sup. Ct. Rep. 418; *Gladson v. Minnesota*, 166 U. S. 427, 430, 41 L. ed. 1064, 1066, 17 Sup. Ct. Rep. 627; *State v. Indiana & I. S. R. Co.* 133 Ind. 69, 18 L. R. A. 502, 32 N. E. 817; *Burrows v. Delta Transp. Co.* 106 Mich. 582, 29 L. R. A. 468, 64 N. W. 501.

It violates §§ 25 and 26 of the Bill of Rights in that it suffers its taking effect to depend on the will and pleasure of the department of inspection, an authority not provided by the Constitution of the state.

Ind. Const. art. 1, §§ 25, 26; *Maize v. State*, 4 Ind. 342; *Lammert v. Lidwell*, 82 Mo. 188, 21 Am. Rep. 411; *State v. Field*, 17 Mo. 529, 59 Am. Dec. 275.

It violates § 1 of article 3 of the Indiana Constitution by conferring judicial functions upon a board of officers charged with official duties under the executive department of the state.

Underwood v. McDuffee, 15 Mich. 361, 93 Am. Dec. 194; *State ex rel. Reynolds v. Tippecanoe County*, 45 Ind. 501; *Arkle v. Ohio County Ct.* 41 W. Va. 471, 23 S. E. 804; *People ex rel. Kern v. Chase*, 165 Ill. 527, 36 L. R. A. 105, 46 N. E. 454; *Thorp v. Woolman*, 1 Mont. 168.

To be within the police power an act must be responsive to public necessity, and it must be reasonable in its operation upon persons whom it affects. Whether it is or is not is a question which the courts may not leave to the legislature to determine. The question is a judicial one.

Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Ex parte Whitwell*, 98 Cal. 73, 19 L. R. A. 727, 32 Pac. 870; *Ex parte Jentzsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *Ruhstrat v. People*, 185 Ill. 133, 49 L. R. A. 181, 57 N. E. 41; *Askam v. King County*, 9 Wash. 1, 36 Pac. 1097.

The weekly wage law is not responsive to a public necessity, and therefore is not police legislation.

Russell, Pol. Power, chap. 4; Tiedeman, State & Federal Control of Persons & Property, chap. 9; *Chaddock v. Day*, 75 Mich. 527, 4 L. R. A. 809, 42 N. W. 977; *New York Fire Department v. Gilmour*, 149 N. Y. 453, 44 N. E. 177; *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006; *Mugler v. Kansas*, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; *Ruhstrat v. People*, 185 Ill. 133, 49 L. R. A. 181, 57 N. E. 41;

Greensboro v. Ehrenreich, 80 Ala. 579, 60 Am. Rep. 130, 2 So. 725.

It is not reasonable.

Ruhrstrat v. People, 185 Ill. 133, 49 L. R. A. 181, 57 N. E. 41.

The appellant, although a corporation, may raise this question, first, because it is "a citizen for all the purposes of suing and being sued."

Shaw v. Quincy Min. Co. 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; *St. Louis v. Wiggins Ferry Co.* 11 Wall. 423, 429, 20 L. ed. 192, 194.

And, second, because the denial of the right of its employees to contract with it, besides being a direct abridgment of their privileges, is also an indirect abridgment of its own.

Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 189, 31 L. ed. 650, 654, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Smyth v. Ames*, 169 U. S. 466, 522, 42 L. ed. 819, 840, 18 Sup. Ct. Rep. 418; *Blake v. McClung*, 172 U. S. 239, 259, 43 L. ed. 432, 439, 19 Sup. Ct. Rep. 165.

The weekly wage act amounts to an abdication of legislative functions.

Noel v. People, 187 Ill. 587, 52 L. R. A. 287, 58 N. E. 616.

Messrs. **Winter & Winter** also for appellant.

Messrs. **Merrill Moores, Cassius C. Hadley, and Elias D. Salisbury**, with **Mr. William L. Taylor**, Attorney General, for appellee:

The title is sufficient. The fact that a statute imposes a penalty for a violation of its provisions need not be stated in the title.

Indianapolis v. Huegele, 115 Ind. 581, 18 N. E. 172; *Benson v. Christian*, 129 Ind. 539, 29 N. E. 26; *Lewis v. State*, 148 Ind. 346, 47 N. E. 675; *Ex parte Yung Jon*, 28 Fed. 308; *State v. Koshland*, 25 Or. 178, 35 Pac. 32; *State v. Bernheim*, 19 Mont. 512, 49 Pac. 441; *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 485, 38 N. W. 474; *People v. Miller*, 88 Mich. 383, 50 N. W. 296; *State v. Brachvogel*, 38 Minn. 265, 36 N. W. 641; *State v. Stripling*, 113 Ala. 120, 36 L. R. A. 81, 21 So. 409; *Plumb v. Christie*, 103 Ga. 686, 42 L. R. A. 181, 30 S. E. 759; *Burns v. State*, 104 Ga. 544, 30 S. E. 815; *Brown v. State*, 73 Ga. 38; *State v. Stunkle*, 41 Kan. 459, 21 Pac. 675; *State v. Karstendiek*, 49 La. Ann. 1021, 39 L. R. A. 520, 22 So. 845; *Thompson v. Akin*, 81 Ill. App. 65; *Larned v. Tiernan*, 110 Ill. 173; *Cohn v. People*, 149 Ill. 491, 23 L. R. A. 821, 37 N. E. 60; *Sukes v. People*, 127 Ill. 117, 2 L. R. A. 461, 19 N. E. 705; *People use of State Bd. of Health v. Blue Mountain Jos*, 129 Ill. 370, 21 N. E. 923; *Johnson v. Martin*, 75 Tex. 40, 12 S. W. 321; *Albrecht v. State*, 8 Tex. App. 216, 34 Am. Rep. 737; *Holton v. State*, 62 L. R. A.

28 Fla. 308, 9 So. 716; *State v. Kingsley*, 108 Mo. 135, 18 S. W. 994; *State v. Whitaker*, 160 Mo. 59, 60 S. W. 1068.

The act does not violate the Federal or state Constitution:

a. By depriving citizens of liberty and property without due process of law, or abridging privileges or immunities.

1. The 5th Amendment to the Federal Constitution restricts only Federal power.

Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; *Twitohell v. Pennsylvania*, 7 Wall. 321, 326, 19 L. ed. 223, 224; *Hurtado v. California*, 110 U. S. 516, 535, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292; *Thorington v. Montgomery*, 147 U. S. 490, 37 L. ed. 252, 13 Sup. Ct. Rep. 394; *Holden v. Hardy*, 169 U. S. 366, 382, 42 L. ed. 780, 787, 18 Sup. Ct. Rep. 383; *Butler v. State*, 97 Ind. 378; *State v. Boswell*, 104 Ind. 541, 4 N. E. 675; *State ex rel. Curtis v. Brown & S. Mfg. Co.* 18 R. I. 16, 17 L. R. A. 856, 25 Atl. 246.

2. The appellant is a person, but not a citizen, within the meaning of the 14th Amendment.

Orient Ins. Co. v. Daggs, 172 U. S. 557, 561, 43 L. ed. 552, 554, 19 Sup. Ct. Rep. 281, 136 Mo. 396, 35 L. R. A. 227, 38 S. W. 85.

3. A corporation cannot complain that an act is unconstitutional which affects only natural persons.

Wagner v. Garrett, 118 Ind. 114, 20 N. E. 706; *Pittsburgh, O. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582; *Gustavel v. State*, 153 Ind. 613, 54 N. E. 123.

b. By withholding from citizens of Indiana and of the United States the equal protection of the laws.

Opinion of the Justices, 163 Mass. 592, sub nom. *Re House Bill No. 1230*, 28 L. R. A. 344, 40 N. E. 713; *Com. v. Hamilton Mfg. Co.* 120 Mass. 383; *Com. v. Dunn*, 170 Mass. 140, 49 N. E. 110; *State ex rel. Curtis v. Brown & S. Mfg. Co.* 18 R. I. 16, 17 L. R. A. 856, 25 Atl. 246; *Skinner v. Garnett Gold-Min. Co.* 96 Fed. 735; *Archer v. James*, 2 Best & S. 67; *Hancock v. Yaden*, 121 Ind. 366, 6 L. R. A. 576, 23 N. E. 253; *Shaffer v. Union Min. Co.* 55 Md. 74; *State v. Peel Splint Coal Co.* 36 W. Va. 802, 17 L. R. A. 385, 15 S. E. 1000; *Avent Beattyville Coal Co. v. Com.* 96 Ky. 218, 28 L. R. A. 273, 28 S. W. 502; *Re Scrip Bill*, 23 Colo. 504, 48 Pac. 512; *Harbison v. Knoxville Iron Co.* 103 Tenn. 421, 56 L. R. A. 316, 53 S. W. 955, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; *Woodson v. State*, 69 Ark. 521, 65 S. W. 465; *State v. Wilson*, 61 Kan. 32, 47 L. R. A. 71, 58 Pac. 981; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 204, 25 S. W. 75; *State v. Holden*, 14 Utah, 71, sub nom. *Holden v. Hardy*, 37 L. R. A. 103, 46 Pac. 756, 14 Utah, 96, 37 L. R. A. 108, 46 Pac. 1105, 169 U. S. 366,

42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Short v. Bullion-Beck & C. Min. Co.* 20 Utah, 20, 45 L. R. A. 603, 57 Pac. 720.

c. By impairing the obligation of contracts.

Churchman v. Martin, 54 Ind. 383; *Fry v. State*, 63 Ind. 559, 30 Am. Rep. 238; *Small v. Hammes*, 156 Ind. 561, 60 N. E. 342; *Barrett v. Millikan*, 156 Ind. 510, 60 N. E. 310; *Smith v. Parsons*, 1 Ohio, 239, 13 Am. Dec. 608; *Weil v. State*, 46 Ohio St. 452, 21 N. E. 643; *Jones v. Great Southern Fireproof Hotel Co.* 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; *Daggs v. Orient Ins. Co.* 136 Mo. 396, 35 L. R. A. 227, 38 S. W. 85.

It is not class legislation.

Hancock v. Yaden, 121 Ind. 366, 6 L. R. A. 576, 23 N. E. 253; *State v. Indiana & I. S. R. Co.* 133 Ind. 69, 18 L. R. A. 502, 32 N. E. 817; *Pennsylvania Co. v. State*, 142 Ind. 428, 41 N. E. 937; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 513, 18 L. R. A. 729, 33 N. E. 421; *Indianapolis v. Navin*, 151 Ind. 139, 41 L. R. A. 337, 47 N. E. 525, 51 N. E. 80; *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Barrett v. Millikan*, 156 Ind. 510, 60 N. E. 310; *Skinner v. Garnett Gold-Min. Co.* 96 Fed. 735; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Missouri P. R. Co. v. Mackey*, 127 U. S. 209, 32 L. ed. 109, 8 Sup. Ct. Rep. 1161; *McDunich v. Mississippi & M. R. Co.* 20 Iowa, 338; *State v. Smith*, 58 Minn. 35, 25 L. R. A. 759, 59 N. W. 545; *State v. Nelson*, 52 Ohio St. 88, 26 L. R. A. 317, 39 N. E. 22; *Woodson v. State*, 69 Ark. 521, 65 S. W. 465; *Com. v. Hillside Coal Co.* 109 Ky. 47, 58 S. W. 441; *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147.

1. If the defendant is an Indiana corporation it is subject to reasonable regulation.

State ex rel. Curtis v. Brown & S. Mfg. Co. 18 R. I. 16, 17 L. R. A. 856, 25 Atl. 246; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75; *Eagle Ins. Co. v. Ohio*, 153 U. S. 446, 38 L. ed. 778, 14 Sup. Ct. Rep. 868; *Com. v. Certain Intoxicating Liquors*, 115 Mass. 153; *Rodemacher v. Milwaukee & St. P. R. Co.* 41 Iowa, 297; *Ohio & M. R. Co. v. McClelland*, 25 Ill. 140; *Indianapolis v. Navin*, 151 Ind. 143, 41 L. R. A. 337, 47 N. E. 525, 51 N. E. 80.

2. If a foreign corporation, it must submit or leave the state.

Fire Assn. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; *Norfolk & W. R. Co. v. Pennsylvania*, 62 L. R. A.

136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *Farmers' & M. Ins. Co. v. Harrah*, 47 Ind. 236; *Ducat v. Chicago*, 48 Ill. 172, 95 Am. Dec. 529.

The authority granted to the department of inspection to exempt certain employers under certain conditions was not objectionable.

Lafayette, M. & B. R. Co. v. Geiger, 34 Ind. 185; *State ex rel. Harrison v. Menaugh*, 151 Ind. 266, 43 L. R. A. 408, 418, 51 N. E. 117, 357; *State ex rel. Clark v. Haworth*, 122 Ind. 462, 7 L. R. A. 240, 23 N. E. 946; *Leeper v. State*, 103 Tenn. 500, 48 L. R. A. 167, 53 S. W. 962; *State v. Messenger*, 63 Ohio St. 398, 59 N. E. 105; *Arms v. Ayer*, 192 Ill. 601, 58 L. R. A. 277, 61 N. E. 851; *Isenhour v. State*, 157 Ind. 521, 62 N. E. 40; *Blue v. Beach*, 155 Ind. 130, 50 L. R. A. 64, 56 N. E. 89; *State v. Broadbelt*, 89 Md. 565, 45 L. R. A. 433, 43 Atl. 771; *Hurst v. Warner*, 102 Mich. 238, 26 L. R. A. 484, 60 N. W. 440; *State ex rel. Burroughs v. Webster*, 150 Ind. 607, 41 L. R. A. 212, 50 N. E. 750; *Parks v. State*, 159 Ind. 211, 59 L. R. A. 190, 64 N. E. 862; *Overshiner v. State*, 156 Ind. 187, 51 L. R. A. 748, 59 N. E. 468; *State ex rel. Rhodes v. Indiana Bd. of Pharmacy*, 155 Ind. 414, 58 N. E. 531; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 693, 36 L. ed. 294, 310, 12 Sup. Ct. Rep. 495; *United States v. Ormsbee*, 74 Fed. 207; *Boyd v. Bryant*, 35 Ark. 69, 37 Am. Rep. 6; *Home Ins. Co. v. Swigert*, 104 Ill. 653; *Groesch v. State*, 42 Ind. 547; *Alcorn v. Hamer*, 38 Miss. 652; *Cincinnati, W. & Z. R. Co. v. Clinton County*, 1 Ohio St. 77; *Gordon v. State*, 46 Ohio St. 607, 6 L. R. A. 749, 23 N. E. 63; *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716; *Re Oliver*, 17 Wis. 681; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 31 L. R. A. 112, 65 N. W. 738.

The taking effect of the law does not depend on the department of inspection.

Isenhour v. State, 157 Ind. 521, 62 N. E. 40; *Thompson v. Peru*, 29 Ind. 305; *Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185; *Groesch v. State*, 42 Ind. 547; *Cincinnati, W. & Z. R. Co. v. Clinton County*, 1 Ohio St. 77; *Stuebenville & I. R. Co. v. North Twp.* 1 Ohio St. 105; *Loomis v. Spencer*, 1 Ohio St. 153; *Cass v. Dillon*, 2 Ohio St. 647; *State ex rel. Huston v. Perry County*, 5 Ohio St. 497; *Noble v. Baker*, 5 Ohio St. 524; *Newton v. Mahoning County*, 26 Ohio St. 619; *State ex rel. Baldwin v. Williams County*, 3 Ohio C. C. 403; *Salem Turnp. & C. Bridge Corp. v. Essex County*, 100 Mass. 282; *For v. Fox*, 24 Ohio St. 335; *Ratcliff v. Teters*, 27 Ohio St. 66.

It does not confer judicial functions, or powers.

Owners of Lands v. People, 113 Ill. 296; *Arms v. Ayer*, 192 Ill. 601, 58 L. R. A. 277,

61 N. E. 851; *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192; *Cleveland, C. C. & St. L. R. Co. v. Baokus*, 133 Ind. 513, 18 L. R. A. 729, 33 N. E. 421; *Huntington County v. Heaston*, 144 Ind. 583, 41 N. E. 457, 43 N. E. 651; *Miller v. State*, 149 Ind. 607, 40 L. R. A. 109, 49 N. E. 894; *State ex rel. Burroughs v. Webster*, 150 Ind. 607, 41 L. R. A. 212, 50 N. E. 750; *Ferner v. State*, 151 Ind. 247, 51 N. E. 360; *Carnahan v. State*, 155 Ind. 156, 57 N. E. 717; *Huntington County v. Beaver*, 156 Ind. 450, 60 N. E. 150; *George v. People*, 167 Ill. 447, 47 N. E. 741; *State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 629, 4 N. E. 81.

Hadley, Ch. J., delivered the opinion of the court:

Action in the name of the state to recover wages and a penalty under the provisions of §§ 1 and 2 of the act approved February 28, 1899, commonly known as the "weekly wage law" (Laws 1899, p. 193, chap. 124). It is averred in the complaint that the defendant, the Republic Iron & Steel Company, is a corporation engaged in operating a manufacturing plant at Muncie, Indiana, and employs therein a large number of persons to labor for hire; that the defendant is not a common carrier engaged in interstate commerce; that on the 1st day of February, 1900, and prior thereto, William Haverstick was engaged by the defendant to work in said plant; that on the 10th day of February, 1900, the defendant paid Haverstick for his services rendered up to and including the 31st day of January, 1900, but reserved and held back wages due him for services rendered during the first ten days of February, 1900; that on the 17th day of February, 1900, the defendant was indebted to Haverstick for labor performed in the sum of \$96.95, which service is set forth in a bill of particulars filed as a part of the complaint; that subsequent to the last day of February, 1900, Haverstick was never absent from his regular place of labor in said plant at any time of stated payment of wages fixed by the defendant; that Haverstick was present at his regular place of labor on the 17th day of February, ready and willing to receive the wages due him, and there was due him on said day said amount of \$96.95, and which remains unpaid; that although the laws of the state of Indiana require the defendant to pay its employees each week all that is due, save only the right to withhold from an employee compensation for services for six days, said defendant wrongfully and unlawfully failed, neglected, and refused to comply with said laws, and to pay Haverstick each week what was due him. Prayer for judgment for Haverstick for amount due, 62 L. R. A.

with 6 per cent thereon, and for the state a judgment equal to 50 per cent of the unpaid wages. Appellant's demurrer to the complaint was overruled, and a proper exception reserved. Upon issues joined, there was a trial by the court, and a finding and judgment for the plaintiff for \$48.45 for the use of the common schools, assessed against the defendant as a penalty on the amount due and unpaid Haverstick when the suit was commenced, and for all costs.

Appellant's assault upon the complaint questions the constitutional validity of the statute upon which the action is founded. It is conceded that the evidence supports the essential averments of the complaint, and is sufficient to entitle appellee to a recovery if the statute in question is valid.

The preamble and three material sections of the act follow:

"An Act Providing for the Weekly Payment of Wages Due Employees, Making It Unlawful for an Employer to Assess a Fine against the Wages of an Employee, and Regulating Changes in Rate of Wages, Prohibiting the Assignment of Future Wages; Providing for Its Enforcement and Repealing All Laws in Conflict Therewith. [Approved February 28, 1899.]

"Sec. 1. Be it enacted by the general assembly of the state of Indiana, that every person, company, corporation, or association employing any person to labor, or in any other service for hire, shall make weekly payments for the full amount due for such labor or service, in lawful money of the United States to within six days or less of the time of such payment; but if, at any time of stated payment, any employee as aforesaid shall be absent from his regular place of labor or service, he shall be paid in like manner thereafter on demand: Provided, that this act shall not apply to any employee engaged by a common carrier in interstate commerce: and, Provided, that the labor commissioners of the state, after notice and hearing, may exempt any of the aforesaid parties whose employees prefer a less frequent payment, from paying any of its employees weekly, if, in the opinion of the said commissioners, the interests of the public and of such employees will not suffer thereby.

"Sec. 2. The chief inspector of the department of inspection of this state, or any person interested, may bring suit in the name of the state in any court of competent jurisdiction, and the prosecuting attorney of any county where such suit is brought shall prosecute the same against any person, company, corporation, or association that neglects or refuses to comply with § 1 of this act, within ten days after such payment is due and left unpaid; and in case judgment

is rendered in favor of said employee and against said defendant for the sum alleged to be due or any part thereof, 6 per cent of such sum shall be added to such payment from the time when payment was due; and a penalty of 50 per cent of the amount of such judgment shall be assessed and collected from said defendant by said court and paid into the school fund of the state."

"Sec. 6. It is hereby made the duty of the chief inspector and of the department of inspection to enforce the provisions of this act by the processes of the courts, and in the name of the state; and, upon their failure so to do, any citizen of the state is hereby authorized to do the same in the name of the state."

Laws 1899, pp. 193, 194, chap. 124.

The amount of wages due Haverstick at the commencement of this suit, to wit, \$96.95, having been subsequently, and before trial, fully paid, the judgment rendered was limited to an imposition of the 50 per cent penalty provided for by § 2 of the act. Hence, from the state of the record, no other question is properly presented by the appeal than the validity of said sections.

1. It is first submitted that, because the title of the act makes no mention of penalties for the violation of its provisions, the penalty clause of § 2 is void, under article 4, § 19, of the Indiana Constitution, which provides that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." The evident purpose in requiring a title to a legislative proposition was thereby to convey notice of the general subject to be affected to those who are called on to act upon it, and thus to prevent deception by the blending of incongruous subjects in the same act. It is only necessary that the general subject of the act be expressed—that is, be indicated—by the title. It is not essential that the means and methods provided in the act for the securing of intended results and ends shall be set forth in the title. The Constitution is satisfied if the constituent means embraced in the body of the act have a proper relation to each other and to the subject expressed in the title, and are consistent, in tending to carry forward and to accomplish the general purpose indicated by the title and intended by the legislation. *Isenhour v. State*, 157 Ind. 517, 523, 62 N. E. 40; *Lewis v. State*, 148 Ind. 346, 47 N. E. 675; *Benson v. Christian*, 129 Ind. 535, 29 N. E. 26; *Indianapolis v. Huegele*, 115 Ind. 581, 18 N. E. 172. No act of the legislature can be made effective without some reasonable provision for its enforcement, and the assessment of a penalty for noncompliance has long and many times been recognized by

the general assembly and the courts of this state as an efficient and reasonable means of securing obedience. The subject of the act in question is "to Provide for the Weekly Payment of Wages Due," and, to secure performance of the duty thus imposed upon employers, a penalty is provided for nonperformance. The penalty provision of § 2 is, therefore, not only connected with and germane to the subject of the act, but calculated to be an effective means in accomplishing the purpose indicated by the title. Hence, the provision is not within the evil intended by the Constitution to be excluded.

2. It is not necessary to a disposition of the case that we determine whether appellant, being arraigned on a state statute, can demand protection of its liberty and property under the 5th Amendment of Federal Constitution (see *Thorington v. Montgomery*, 147 U. S. 490, 37 L. ed. 252, 13 Sup. Ct. Rep. 394; *Holden v. Hardy*, 169 U. S. 366-382, 42 L. ed. 780-788, 18 Sup. Ct. Rep. 383; *State v. Boswell*, 104 Ind. 541, 4 N. E. 675; *Butler v. State*, 97 Ind. 378, 382), or whether, being a corporation, the right to sue and be sued so invests it with citizenship as to entitle it to invoke the 14th Amendment to the Federal Constitution against an abridgment of its privileges and immunities. See *Orient Ins. Co. v. Dagge*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281, 136 Mo. 395, 35 L. R. A. 227, 38 S. W. 85. It is not denied that appellant, though a corporation, is a person, within the rulings of the Supreme Court of the United States, and as such may demand that its liberty and property be safeguarded under the last two clauses of § 1 of the 14th Amendment to the Federal Constitution, which declares: "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is furthermore conceded that appellant may invoke, as it does, the guarantees of the Federal and state Constitutions against the impairment of contracts (U. S. Const. art. 1, § 10; State Const. art. 1, § 24); and, putting aside all subsidiary questions not properly involved in the appeal, we come directly to a consideration of the judgment rendered, which stands wholly upon the statute, and which must fall if the supporting provisions of the statute are found to be unconstitutional.

Appellant is authorized to contract and be contracted with as a natural person, and we must, therefore, assume at the beginning that in its legislation the state is bound to recognize, even in the exercise of its police power, the right of all persons to the equal protection of the laws, and to the security afforded by due process of law. The right to

a sustenance, and to acquire property, and to make treaties in relation thereto, is liberty, in the constitutional sense. Labor is property. It is exchangeable for food and raiment and comforts, and may be bought and sold, and contracts made in relation thereto, the same as concerning any other property.

The question therefore arises, Is the arbitrary denial of the right to exchange money for labor—one class of property for another—in matters which affect no public interest, an unwarrantable interference with the right of contract, and a depriving of the person of liberty and property without due process of law? The only rational grounds upon which it is claimed there may be legislative interference with freedom of contract for lawful purposes is in the exercise of that undefined, reserved force of the people known as the "police power." There is a divergence of view as to the proper scope and application of this power, but all authorities seem to agree that it may be exerted only on behalf of some general, public interest, as distinguished from individuals or classes; that is to say, to protect the public health, safety, morals, prevent fraud and oppression, and promote the general welfare. It is not to be invoked to protect one class of citizens against another class unless such interference is for the real protection of society in general. As far-reaching and flexible as the power has often been held to be, it is nowhere claimed for it that it may override the Constitution, and strike down a right that has been solemnly and expressly guaranteed by the fundamental law. The legislature has exclusive authority to make laws setting it in motion and regulating its exercise. This body, therefore, very properly has a wide discretion in determining what interest of the public requires it, and what measures are necessary for the protection of such interest. But when the power is used for the purpose of regulating a business, occupation, or employment which in itself is lawful and useful to the community, it becomes the duty of the court, when called on, to decide whether the particular regulation is just and reasonable and in harmony with the constitutional guaranties, or whether it is an unwarrantable invasion of the protected rights of the citizen to pursue such business or employment upon terms of his own choosing. *Street v. Varney Electrical Supply Co.* (Ind.) 61 L. R. A. 154, 66 N. E. 895; *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716; *Colon v. Lisk*, 153 N. Y. 188, 196, 47 N. E. 302; *Ruhstrat v. People*, 185 Ill. 133, 49 L. R. A. 181, 57 N. E. 41; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 62 L. R. A.

375, 48 L. R. A. 265, 55 S. W. 627; *Mugler v. Kansas*, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; *Lawton v. Steele*, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Ex parte Whitwell*, 98 Cal. 73, 19 L. R. A. 727, 32 Pac. 870; *Askam v. King County*, 9 Wash. 1, 36 Pac. 1097; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 664, 43 N. E. 1108; *Tiedeman, State & Federal Control of Persons & Property*, § 1; *Tiedeman, Pol. Power*, § 95; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

We quote the words of Brown, J., in *Lawton v. Steele*, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499: "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." It follows that a statute, to be within the power, must be responsive to some public necessity, suitable to subserve it, and reasonable in its operation upon the persons whom it affects. It is not claimed that the weekly payment of wages involves any question of public health, public safety, or public morals.

The attorney general endeavors to justify the law upon two grounds: (1) The wage earners are not upon an equal footing with employers, and opportunities for oppression and consequent public suffering ensue; and (2) thrift being beneficial to the community, it should be encouraged by enabling workmen to pay cash for current demands, which can only be done by requiring frequent payment of wages. Assuming all these things to be true, they do not of themselves justify the arbitrary invasion of the personal rights and liberty of the citizen. Liberty to contract on one's own terms, to decide for himself his own employment, to buy and sell, to exchange one belonging for another, are among his most valuable and cherished rights. As was said in *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L. R. A. 265, 55 S. W. 627: "In order to sustain legislation of the character of the act in question as a police measure, the courts must be able to see that its object, to some degree, tends towards the prevention of some offense or

manifest evil, or has for its aim the preservation of the public health, morals, safety, or welfare. . . . Mere legislative assumption of the right to direct and indicate the channel and course into which the private energies of the citizen shall flow, or attempt to abridge or hamper his right to pursue any lawful calling or avocation which he may choose, without unreasonable regulation or molestation, have ever been condemned in all free government." "If there is one thing which more than another," says Justice Shiras, in *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 505, 44 L. ed. 564, 20 Sup. Ct. Rep. 385, "public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice."

Is the statute in question a reasonable regulation, and reasonable in its operation upon the persons whom it affects? The contract prohibited affects employer and employee alike. If the master can employ only upon terms of weekly payment, the workman can find employment on no other terms. It will be observed that the statute gives the parties no choice,—no right to waive the provisions of the law. The language is: "Every person, company, or corporation, employing any person to labor, shall make weekly payments for the full amount due for such labor, and the chief inspector, or any person interested, may bring suit in the name of the state, against any person, company, or corporation that neglects or refuses to comply within ten days after such payment is due and left unpaid." The obvious intention of the legislature was to make contracts for persons that they would not in all cases make for themselves, and to forbid the making of contracts that they would make. The laborer may be the chief sufferer. His labor may be the only means of supplying himself and family, but by this law he is denied the right to work, and another the right to employ him, unless he can be paid once a week. Any law or policy that disables the citizen from making a contract whereby he may find lawful, needed, and satisfactory employment is unreasonable. It may be that the workman will desire and request his employer, as conducive to economy and saving, to keep back all wages not needed for current necessities. Whether he leaves his surplus earnings with his employer, or deposits them with the building and loan association or with the savings bank, involves no public interest, and affects no public concern. Yet, according to this statute, if, in a fair and open agreement, the employer "neglects or refuses" to pay the

full amount earned for a period of ten days after due, the chief inspector may, if he disapproves the arrangement (and upon his failure to act any citizen of the state may) sue, without the consent, and even over the protest, of the workman, in the name of the state, and not only compel payment, but mulct the employer in a 50 per cent penalty for making an honest effort to favor his employee. The statute places the wage earners of the state under quasi guardianship. It classes them with minors and other persons under legal disability, by making their contracts void at the pleasure of a public officer. It tends to degrade them as citizens, by impeaching their ability to take care of themselves. It is paternalism, pure and simple, and in violent conflict with the liberty and equality theory of our institutions. It is no argument to say that our assumption is unreasonable, and that the inspector is not likely to interfere in such cases. Whether he will or not is unimportant. In discussing the constitutionality of the act in question, it is to be determined, not by what has been done or is likely to be done under it, but what may be done under and by virtue of its authority. We do not assert that the legislature is powerless to regulate the payment of wages when the same are paid at unreasonable periods, or that a community composed largely of workmen may not be injuriously affected by unduly delayed payments, for these questions are not before us; but what we do hold is that this statute, which takes away from both the employer and employee, whether in the shop, in the store, or on the farm, all power to contract for labor, except upon terms of weekly payment of wages in cash, is an unreasonable, and therefore an unconstitutional, restriction.

It is also contended that appellant, being an employer, and not an employee, can only raise such questions as involve the rights of employers, and that the constitutional right of a laborer to contract to do lawful work upon terms satisfactory to him cannot be questioned or appropriated by an employer as a defense; thus applying to contracting parties the rule affirmed in *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 13, 49 N. E. 582, and many other cases. We are unwilling to admit that this is a proper case for the application of the rule, since we are unable to see how the result may be different, whether the laborer is disqualified from entering into a contract of employment, or the employer disqualified from making it. In either view, the contract which the parties desire to make is prevented, and both parties mutually and equally affected by the interdiction.

We would not be understood as holding

that the freedom of contract is wholly beyond legislative control. There are many instances in which restraint may be properly imposed, but in each and every one the relation to some public benefit must be clearly discernible. Certain contracts are required to be in writing, manifestly to promote public morals by removing the temptation to perpetrate frauds by perjury. A householder is disqualified from withdrawing in advance from those dependent upon him the benefits of the exemption laws, and thus prevented from imposing upon the public the burden of their sustenance. Statutes limiting the rate of interest are valid, as preventing unconscionable extortion; and so on through a long list that might be given, each showing a logical and an appropriate relation to the promotion or protection of some interest of society.

The cases of the *Opinion of the Justices*, 163 Mass. 592, *sub nom. Re House Bill No. 1230*, 28 L. R. A. 344, 40 N. E. 713; *State ex rel. Curtis v. Brown & S. Mfg. Co.* 18 R. I. 16, 17 L. R. A. 858, 25 Atl. 246; and *Skinner v. Garnett Gold-Min. Co.* 96 Fed. 735, cited by the attorney general as sustaining his contention, cannot be accepted as controlling precedents. The Massachusetts case is not an adjudication at all, but the uncontested answer of the justices of the supreme court to a question propounded to them by the house of representatives, which we quote: "Is it within the constitutional power of the legislature to extend the application of the present law, relative to the weekly payment of wages by corporations, to private individuals and partnerships?" The premise upon which the answer of the justices is constructed is indicated in the opening lines as follows: "Your question implies that in your opinion the present law relating to the weekly payment of wages by certain corporations to their employees is constitutional, and your inquiry is whether it is within the constitutional power of the legislature to extend the law to private individuals and to partnerships." The question before the justices was not the constitutionality of the law as it existed, but, as-

suming that the statute was valid as it applied to corporations, was it constitutional to extend its provisions to individuals and partnerships? Moreover, it is expressly noted by the justices that the power granted the legislature by the Constitution of that state is more comprehensive than that found in the Constitutions of some of the other states, and the provision pointed out and relied upon as supporting the view expressed is radically different and broader than the provisions of the Indiana Constitution. The Rhode Island case is even less a precedent, because it rests upon the theory that the statute was but an amendment to the charter of a corporation, under the reserved power of the legislature to amend. The *Skinner Case* is of little value, (1) because it involves the payment of wages monthly; and (2) because the decision of Judge Morrow turns on substantially the same grounds as the Rhode Island case. Similar statutes are held to be unconstitutional in the following cases: *Braceville Coal Co. v. People* (weekly payment) 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Oom. v. Isenberg* (biweekly payment) 4 Pa. Dist. R. 579; *San Antonio & A. P. R. Co. v. Wilson* (biweekly payment) 4 Tex. App. Civ. Cas. (Willson) § 323, p. 565, 19 S. W. 910. The following cases are also instructive upon the general subject: *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288; *Godoharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350.

The foregoing conclusions lead us to conclude that the act in controversy, so far as it relates to the question herein involved, is in violation of § 1, art. 1, of the state Constitution, commonly known as the "Bill of Rights," and of the 14th Amendment to the Federal Constitution, denying a state the power to deprive a person of life, liberty, or property without due process of law, and the demurrer to the complaint should have been sustained.

Judgment reversed and cause remanded, with instructions to sustain appellant's demurrer to the complaint.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Joshua M. SEARS

v.

BOARD OF STREET COMMISSIONERS
OF THE CITY OF BOSTON,
And Eleven Other Cases.

(180 Mass. 274.)

1. The cost and benefit of the whole

improvement should be considered in assessing the property on either street, and not merely that on the street where the property is situated, under a statute providing for the building of a union passenger station, and the extension of two streets, and the widening of one of them, and directing the assessment, upon any real estate which receives any peculiar benefit from the construc-

NOTE.—As to necessity of benefits as basis of local assessments generally, see, in this series, 62 L. R. A.

Re Madera Irrig. Dist. Bonds (Cal.) 14 L. R. A. 755, and note; *Raleigh v. Peace* (N. C.) 17 L.

tion of the station, and the streets, of a proportional part of the expense incurred by the city therefor.

2. In determining the cost of an improvement consisting of a union passenger station and the improvement of two streets connecting therewith, which shall be assessed on property abutting on either street, the legislature may lump the cost of the improvement on both streets, and is not required to confine the amount to be assessed against the property on either to the cost of the improvement upon it.
3. The benefit to property located on one street by reason of the location of a union passenger station and the extension and improvement of that street and another one may be determined for the purpose of assessing upon it its proportional cost of the improvement, without considering the benefit to other property by reason of the station in connection with changes in other streets beside the two named, and property upon which is made a separate assessment district.
4. The time of finishing the passenger station may be taken as the moment for estimating the benefit in the assessment of the cost upon property benefited by the location of the station and the improvement of streets leading to it, and the public is not limited to the time when its work upon the improvement is finished.
5. In assessing upon abutting property the cost of the improvement of streets leading to a newly located passenger station, the benefit to the property, arising from the station, may be considered, as well as that from the improvement of the street, where the location of the station and the street improvement are all parts of the same improvement, and the benefit to the property assessed results entirely from the city's expenditures.
6. The purpose for which a union passenger station is located is sufficiently public to authorize special assessments upon property thereby benefited for the cost of the improvements in streets, made necessary by such location.
7. The benefit to property in the vicinity of a newly located passenger station may be so different from the general benefit to all the property in the city as to justify an assessment of a portion of the cost of improving streets leading to the station, made necessary by it.
8. The court cannot, on certiorari to review an assessment upon property benefited for the cost of a street improvement, go behind a finding that the property assessed was all that was benefited beyond the general advantage to the real estate in the city.

(January 3, 1902.)

R. A. 330, and *note*; *Davis v. Litchfield* (Ill.) 21 L. R. A. 563, and *note*; *Ashberry v. Roanoke* (Va.) 42 L. R. A. 638; *Weed v. Boston* (Mass.) 42 L. R. A. 642; *Rolph v. Fargo* (N. D.) 42 L. R. A. 646; *Sears v. Boston* (Mass.) 43 L. R. A. 834; *Hutcheson v. Storrie* (Tex.) 45 L. R. A. 289; *Schroder v. Overman* (Ohio) 47 L. R. A. 156; *Kersten v. Milwaukee* (Wis.) 48 L. R. A. 851; *Adams v. Shelbyville* (Ind.) 49 L. R. A. 62 L. R. A.

APPPLICATION for a writ of certiorari to quash assessments which had been made to meet the expense of a street improvement. *Dismissed.*

The facts are stated in the opinion.

Messrs. Louis D. Brandeis, William H. Dunbar, and John G. Palfrey, amici curiae:

The levy of a betterment assessment is an exercise of the taxing power. Such assessments are special burdens imposed upon a particular class for a particular purpose; the authority, and the only authority, for imposing such special burdens is the power to tax.

Dorgan v. Boston, 12 Allen, 223; *Harvard College v. Boston*, 104 Mass. 470; *Mt. Auburn Cemetery v. Cambridge*, 150 Mass. 12, 4 L. R. A. 336, 22 N. E. 66; *Spencer v. Merchant*, 125 U. S. 345, 355, 31 L. ed. 763, 767, 8 Sup. Ct. Rep. 921; *Norwood v. Baker*, 172 U. S. 269, 280, 43 L. ed. 443, 447, 19 Sup. Ct. Rep. 187.

The general power of taxation is limited to the right to raise money to meet public expenses for public purposes.

Minot v. West Roxbury, 112 Mass. 1, 17 Am. Rep. 52; *Coolidge v. Brookline*, 114 Mass. 592; *Mead v. Acton*, 139 Mass. 341, 1 N. E. 413; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455.

As the power to tax is confined to raising money required for the performance of some public duty cast upon the taxing body, so the power to levy a special assessment is necessarily limited in like manner; but the latter power is further limited as to the class of public duties for the performance of which assessments may be levied.

If the special assessment is levied to provide for the performance of a public duty which has as its purpose conferring such a special benefit, it is rightly held that a tax is not disproportional or unreasonable which to the extent of this special benefit imposes a special burden on the class benefited.

Dorgan v. Boston, 12 Allen, 223; *Sears v. Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

The assessment still remains, however, a tax. The benefit derived is not a subject-matter of taxation, an additional source of

797; *Shank v. Smith* (Ind.) 55 L. R. A. 564; *Ramsey County v. Robert P. Lewis Co.* (Minn.) 53 L. R. A. 421; *Barber Asphalt Paving Co. v. French* (Mo.) 54 L. R. A. 492, Affirmed in 45 L. ed. U. S. 879; *King v. Portland* (Or.) 55 L. R. A. 812; *Webster v. Fargo* (N. D.) 56 L. R. A. 156; *People ex rel. Scott v. Pitt* (N. Y.) 58 L. R. A. 372; *Smith v. Worcester* (Mass.) 59 L. R. A. 728.

public revenue. It justifies the imposition, on the persons or property specially benefited, of the public burden by which the benefit was secured, to the extent of the special benefit; but it does not justify the imposition of any other burden. It only fixes a limit beyond which the assessment cannot go.

Weed v. Boston, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204; *Dexter v. Boston*, 176 Mass. 247, 57 N. E. 379; *Jones v. Boston*, 104 Mass. 461.

The assessment is a tax levied to meet the cost to the public of the improvement; it can be levied for no other purpose; and, like taxes for other purposes, must not substantially exceed the amount of the cost.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *McCormack v. Patchin*, 53 Mo. 33, 14 Am. Rep. 440.

A statute purporting to authorize an assessment where there is no special benefit, or in substantial excess of such benefit, is void as imposing a disproportional tax.

Weed v. Boston, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204; *Sears v. Boston Street Comrs.* 173 Mass. 350, 53 N. E. 876; *Dexter v. Boston*, 176 Mass. 247, 57 N. E. 379; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

The station caused no special benefit to property for which an assessment could be laid.

Illinois C. R. Co. v. Decatur, 147 U. S. 190, 197, 37 L. ed. 132, 134, 13 Sup. Ct. Rep. 293; *Boston Seamen's Friend Soc. v. Boston*, 116 Mass. 181, 17 Am. Rep. 153; *Sears v. Boston*, 173 Mass. 71, 43 L. R. A. 834, 53 N. E. 138.

The construction of the station and of the streets did not constitute a single improvement.

Lincoln v. Boston Street Comrs. 176 Mass. 210, 57 N. E. 356.

Assuming that the act provided for a single improvement, the assessment authorized was not a proportional tax.

Butler v. Worcester, 112 Mass. 541; *Kelso v. Boston*, 120 Mass. 297.

Messrs. Hutchins & Wheeler, Gaston, Snow, & Saltonstall, and Henry Endicott, Jr., also for petitioners.

Mr. Thomas M. Babson for respondents.

Holmes, Ch. J., delivered the opinion of the court:

These are petitions for writs of certiorari to quash assessments made by the defendants under Stat. 1896, chap. 516, § 14. The act created a corporation with power to build the Southern Union Passenger Station in Boston. The stock was to belong to the

five railroads that were to use the station, and the corporation was to purchase or take the specified land and to build the station. By § 11, in order to render the station and passenger facilities accessible and convenient for public use, the defendants were ordered to make certain changes in the streets of Boston, the chief of which were the widening and extension of Summer street and the extension of Summer street, and then by § 14 they were directed to assess upon any real estate in Boston which in their opinion "receives any benefit and advantage from the location and construction of said union station, Summer street and Cove street, beyond the general advantage to all real estate in said city, a proportionate part of one half of the expense incurred by said city therefor, but in no case exceeding such benefit and advantage." The defendants have made their assessment, reciting that "the union station, Summer street and Cove street, provided for by" the act, "have been located, constructed, and completed," adjudicating that each of the estates in a schedule "received benefit and advantage from such location and construction beyond the general advantage to all real estate in said city, and that said estates are all the estates receiving such benefit and advantage," determining the amount of "one half of the expense incurred by the city for such location and construction," and thereupon assessing upon each estate a certain sum "as the part of said one half of said expense, proportionate to, and not exceeding, said benefit and advantage so received by the estate."

Against the assessment it is argued that by a true construction of the words quoted from the statute the cost and benefit ought to have been severed, so that half the cost of the extension of Summer street, for instance, should have been assessed to those benefited by that extension, and to no others, instead of lumping the cost of both streets and the benefit of the whole improvement, as was done. It is argued further that, at least when construed as the defendants have construed it, the statute is unconstitutional, because it makes the petitioners pay for changes which did not benefit them, and further, because it does not limit the sum with which they may be charged by the benefit accruing from the outlay of the city, but only by the benefit of the whole establishment of the union station. It is said that, even if it had been a public building, an assessment of cost to the extent of the benefit from the station to the petitioners' land would not have been warranted, both because the benefit was merely the general public benefit, and also was too remote and uncertain, and because, whatever its kind,

it was an accidental result of a change made, not for the purpose of improving the petitioners' land, but with a different intent. But the station was not a public building, and a further objection still is based upon the fact that it was built with the money of a private corporation and belonged to that corporation when built. Some minor matters were mentioned, but these are the main points.

We shall spend no time upon the construction of the statute, because we hardly could make it plainer than it is made by the literal meaning of the words of the act that the improvement was treated by the legislature as a unit, the station being impossible without a change in the streets, the extension of the streets being unnecessary apart from the building of the station, two means of continuous public travel being thus brought together according to a single plan. The unity of the plan is emphasized by taking the completion of the station as the time from which the two years allowed for making the assessment shall begin to run.

The more serious question, and that to which the greater part of the argument was directed, is whether the statute is constitutional. The first subdivision of this question concerns the power of the legislature to lump the cost of the streets, treating it all as the contribution of the city to a single object. As to this we have no doubt. It is easy to put cases of absurd attempts to unite by legislative fiat things which have nothing to do with each other. But such illustrations do not carry the argument far. There is no doubt that the legislature within the limits of reason can group as one the distinguishable elements of a public improvement. *Lincoln v. Boston Street Comrs.* 176 Mass. 210, 212, 57 N. E. 356. To a greater or less extent it is necessary and habitual to group them in this way. *Alden v. Springfield*, 121 Mass. 27, 28. The only thing to be considered is whether the attempt to do so is unjustifiable in the particular case. We are of opinion that in this case the action of the legislature was fully justified. We are of opinion that if, for instance, the whole enterprise had been carried out by the city, supposing other objections out of the way, and considering the power of the legislature only with reference to treating the cost as one whole for the purpose of assessment, it would have been warranted in so doing by the organic relation of part to part, upon the plain principles of common sense. It was argued that, if the legislature treated the scheme as one, then it would have provided for the assessment of estates benefited by the station in 62 L. R. A.

connection with other changes besides those made in Summer street and Cove street. But it will be remembered that the assessment is for a part of the cost of Summer street and Cove street alone, and that the benefit from the location and construction of the station and streets is only a limit. Reasons of detail for the decision of the legislature were offered by the city solicitor. We deem it a sufficient answer that we cannot say that the legislature was wrong. If we are right in our general view, of course it was proper to take the time of finishing the station as the moment for estimating the benefit, although the work of the city should be finished at an earlier moment.

But supposing that the legislature could lump the cost to the city, it is said, it was bound to limit the assessment to the benefit to the petitioners' land from the city's expenditure, and could not include that from any other source. With regard to this, it is to be remembered, that, in the language of Chief Justice Gray, "the estates are assessed, not for the benefit conferred, but for the cost of the public improvement." *Chase v. Springfield*, 119 Mass. 556, 563. The petitioners are called on to repay a part of what the city of Boston has spent, they are not specially taxed for the gain to their lands. The benefit is referred to only as a justification and a limit. If an outlay by the city has made it possible for the petitioners to enjoy special benefits otherwise justifying an assessment, we are at a loss to see why it should be any more necessary that the city should have created the benefit *in toto* than that it should have created the matter out of which the station was built. The foundation on which the statute puts the petitioners' liability plainly is that although the city did not pay for the whole thing, no part of it would have been called into being without the city's payment, and the city's payment was in fact so far the cause of the advantage to the petitioners that it was entitled to assess on the footing that its expenditures brought the improvement about. Certainly we cannot say that the legislature was wrong.

Assuming all that we have decided thus far in favor of the defendants, still, it is said, this particular scheme, considered as a whole, was not a public improvement, and on that account payments toward it as a whole and special benefits from it as a whole would not warrant an assessment. So far as this objection is based on the general nature of the dominant purpose of the union station, it is settled that that purpose is sufficiently public to authorize the exercise of the power of eminent domain (*Eastern R. Co. v. Boston & M. R. Co.* 111 Mass. 125,

15 Am. Rep. 13) or of general taxation (*Kittredge v. North Brookfield*, 138 Mass. 286), even for purposes of a pure gift. *Chicago, B. & Q. R. Co. v. Otoe County*, 16 Wall. 667, 673, 675, 21 L. ed. 375, 380, 381. See *Portage County v. Wisconsin C. R. Co.* 121 Mass. 460, 470, 471; *Prince v. Crocker*, 166 Mass. 347, 361, 32 L. R. A. 610, 44 N. E. 446; *Browne v. Turner*, 176 Mass. 9, 56 N. E. 969. And we see no reason why it is not sufficiently public for special assessment also. It is implied that it might be in *Brown v. Providence, W. & B. R. Co.* 5 Gray, 35, 39. We are not now dealing with the objection that the purpose is public in such a sense that a local tax or assessment cannot be levied for it,—that it is too public, so to speak (*Dyar v. Farmington*, 70 Me. 515); that comes later. We are considering the opposite objection, urged however in the same breath, that it is not public at all. The cases cited are sufficient perhaps to answer the argument based on the fact that the ownership of the station was private, that the city did not get back a title for what it gave (see also *Gleason v. Waukesha County*, 103 Wis. 225, 234, 79 N. W. 249), and that the present use might be transitory. But further, as was observed by the city solicitor, in the care of streets it very well may happen that neither the city nor the persons assessed get any title, and that the service is far more transitory than here, and yet that an assessment will be valid. *Sears v. Boston*, 173 Mass. 71, 43 L. R. A. 834, 53 N. E. 138. See *New York, N. H. & H. R. Co. v. Blacker*, 178 Mass. 386, 390, 59 N. E. 1020.

We come now to the question whether there is anything in the nature of the benefit that enables us to say that the legislature could not do what it attempted to do. It would be a matter for regret if the law as worked out by the courts with regard to the constitutional powers of the legislature should be found to have taken so scholastic a form that an actual effect upon a well defined and limited part of a city which might be so distinct as to change the character of its use and to double its market value could not be recognized as a benefit when it came to the imposition of a tax. The truth is that the supposed objections are of so shadowy a form, and consist so largely of rhetorical expressions, that it is hard to grapple with them, and yet that they derive a kind of life from the atmosphere of the cases.

Upon a question of set-off against the payment for property taken for public uses, the line might be drawn strictly in order to give full effect to the constitutional requirement that what is taken shall be paid for. See *Up-*

ton v. South Reading Branch R. Co. 8 Cush. 600; *Dickinson v. Fitchburg*, 13 Gray, 546; *Old Colony & F. River R. Co. v. Plymouth*, 14 Gray, 155, 163; *Whitman v. Boston & M. R. Co.* 7 Allen, 313, 327; *Parks v. Hampden County*, 120 Mass. 395; *Roberts v. Brown County*, 21 Kan. 247, 252. But it has been recognized that benefits which could not be set off might justify an assessment. *Upham v. Worcester*, 113 Mass. 97, 98. And even by way of set-off in a proceeding for damages caused by the taking of land for a railroad it has been held that any peculiar increase of value in the market could be allowed. *Meacham v. Fitchburg R. Co.* 4 Cush. 291, 294, 298.

It is plain that the fact that the rise in value is common to all or many of the estates upon a street would not prevent the benefit being sufficiently peculiar for a betterment tax. *Upham v. Worcester*, 113 Mass. 97, 99. See *Abbott v. Cottage City*, 143 Mass. 521, 526, 58 Am. Rep. 143, 10 N. E. 325; *Cross v. Plymouth County*, 125 Mass. 557; *Allen v. Charlestown*, 109 Mass. 243, 246; *Wesson v. Washburn Iron Co.* 13 Allen, 95, 90 Am. Dec. 181. No doubt it might be hard to draw the line between some cases where the benefit might be held special and a general advance of real estate in the vicinity which often has been said not to be sufficient for set-off (*Meacham v. Fitchburg R. Co.* 4 Cush. 291; *Parks v. Hampden County*, 120 Mass. 395); although it is to be noticed that Mr. Chief Justice Gray, in speaking of benefits that cannot be assessed for, describes them as those which extend to all estates in the same town or city (*Upham v. Worcester*, 113 Mass. 97, 99; *Atkinson v. Newton*, 169 Mass. 240, 243, 47 N. E. 1029), and that the same limit is adopted by § 14. But this difficulty does not arise where the source of the benefit is the direction given to public travel along a special channel. There the benefit is accurately localized.

Again the fact that the improvement is for a public purpose of course is no objection to the tax. *Harvard College v. Boston*, 104 Mass. 470, 486; *Lincoln v. Boston Street Comrs.* 176 Mass. 210, 213, 214, 57 N. E. 356. To invalidate the betterment assessment the general public benefit must be the only result of the improvement. Such a change may have a double aspect, of general public benefit, and also of peculiar local advantage. *Gleason v. Waukesha County*, 103 Wis. 225, 237, 79 N. W. 249. It is suggested, to be sure, that the special benefits cannot be made the basis of a tax when they are only incidental, and not the object to which the improvement was directed. See *Morgan Park v. Wiswall*, 155 Ill. 262, 274,

40 N. E. 611. But we see nothing in the Constitution to prevent it, or to make the power of the legislature depend upon which of two resultant advantages is especially before its mind when it makes a change in the streets. In this case, plainly it contemplated improving the petitioners' land as it provided for making them pay their share of the cost of the improvement.

As to the remoteness or speculative character of the advantage, we do not see what trouble there is on the former ground if the legislature says that the advantage is near enough. It certainly does not affect the power of the legislature that a loss of value caused by diversion of travel is not allowed for under some general provisions for the payment of damages, or, by decisions not without their difficulties, in case of the discontinuance of a way. *Stanwood v. Malden*, 157 Mass. 17, 16 L. R. A. 501, 31 N. E. 702. We are aware that the phrases "remote" and "speculative" have been used in that connection. But, as often has been pointed out, anticipations of the future are the main element in all values. *Johnston v. Faxon*, 172 Mass. 466, 467, 52 N. E. 539. With regard to speculativeness, the possible changes in the future use of the station and all the elements of doubt are discounted by the public and allowed for in market value.

A minor objection taken to the assessment is that, although it is provided by § 14 that the city of Boston shall assume all assessments upon land of the terminal company, such an assessment should have been made in the first place, as thereby the share of

the petitioners would be diminished. If it is not absurd, as the city solicitor contends, to assess for a public improvement land taken by eminent domain for that very improvement, it is enough to say that the defendants in their order adjudicated that the estates assessed were all the estates receiving benefit beyond the general advantage to all real estate in the city. We cannot go behind the adjudication on certiorari.

Finally it is objected that the terminal company had not conveyed certain lands to the city as required in a proviso of § 14, and that the conveyance was a condition precedent to the right to assess. The land had been laid out as a public street although the form of taking a deed was not gone through with until later. We are of opinion that the proviso was intended merely to attach some subsidiary requirements favorable in part to the city and in part to the terminal company, in the mode in which provisos often do, but not to attach a condition precedent to the right to assess. See *Considine v. Metropolitan L. Ins. Co.* 165 Mass. 462, 465, 43 N. E. 201.

We have considered all the numerous briefs submitted to us, in all their detail, and have dealt with such points of the combined argument as seemed to us most important. We are of opinion that none of the objections to the statute are valid, and that the assessment must stand.

Petition dismissed.

Writ of error dismissed by Supreme Court of United States April 6, 1903.

MICHIGAN SUPREME COURT.

DETROIT, FORT WAYNE, & BELLE ISLE RAILWAY

v.

Charles S. OSBORN, Railroad Commissioner.

(127 Mich. 219.)

After a railroad company has acquired and exercised the right to cross the tracks of a street car company, the latter, equally with the former, becomes subject to the power of the state as to the imposition of the expense of the additional safeguards necessary to avoid accidents, although

the necessity for them was caused solely by the railroad company.

(Grant, J., dissents.)

(July 2, 1901.)

APPPLICATION for a writ of mandamus to compel the vacation of an order imposing upon relator a portion of the cost of safety devices at an intersection of its road with a steam railroad. *Denied.*

The facts are stated in the opinion.

Messrs. Brennan, Donnelly, & Van De Mark and Henry E. Bodman for relator.

NOTE.—As to right of railroad company to compensation for the crossing of its tracks by a street railroad, see *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* (Ill.) 29 L. R. A. 485, and *note*.

As to which company must pay for necessary frogs and crossing apparatus where one railroad wishes to cross the tracks of another, see *Seat* 62 L. R. A.

tie & M. R. Co. v. State (Wash.) 22 L. R. A. 218.

For a case holding that a railroad company wishing to cross the tracks of another should be required to pay the necessary switchmen at such crossing, see *Butte, A. & P. R. Co. v. Montana Union R. Co.* (Mont.) 31 L. R. A. 298.

Mr. Horace M. Oren, Attorney General, for respondent:

The mere fact that the Union Terminal Association Railway Company acquired a right to cross relator's tracks does not impose upon it the duty, for all time, to bear the expense of constructing and maintaining the safety contrivances and appliances mentioned in the commissioner's order.

Grand Rapids v. Bennett, 106 Mich. 528, 64 N. W. 585; *Grand Rapids v. Grand Rapids & I. R. Co.* 58 Mich. 641, 26 N. W. 159; *Detroit Parks & Boulevards v. Chicago, D. & C. G. T. Junction R. Co.* 91 Mich. 291, 51 N. W. 934; *Detroit Parks & Boulevards v. Michigan C. R. Co.* 90 Mich. 385, 51 N. W. 447.

The act, by authority of which the order was made, is simply an act to provide for the public safety. The rights, privileges, and property of all such corporations at all times are subject to such reasonable and valid police regulations as are necessary to the common good and the general welfare of the public.

Flint & P. M. R. Co. v. Detroit & B. C. R. Co. 64 Mich. 370, 31 N. W. 281; *People v. Detroit, U. H. & M. R. Co.* 79 Mich. 474, 7 L. R. A. 717, 44 N. W. 934; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 150, 62 Am. Dec. 625; *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 317, 29 N. E. 1109; *Maine C. R. Co. v. Waterville & F. R. & Light Co.* 89 Me. 328, 36 Atl. 453.

Moore, J., delivered the opinion of the court:

The following statement of facts is taken from the brief of counsel for relator:

"The petition and answer filed in this cause set out as briefly as practicable the facts in the case. In substance, they are that petitioner owns a line of street railway in Detroit, authority to construct and operate which was granted in 1865. In the following year the railway was built, forming a continuous line west on Fort street to Clark avenue, south on Clark to the River road, and then west again on the River road. At the time the track was constructed on Clark avenue there was no railroad, or highway, street, lane, or alley, or crossing, of any kind, over Clark avenue between Fort street and the River road. In 1882 or 1883 the Wabash Railroad constructed a single track across Clark avenue and across petitioner's tracks. Up to that time there had been no crossing over Clark avenue between Fort street and the River road of any kind, either that of a railroad or a public highway, a private way, road, street, or alley. In the year 1893 or thereabouts the Union

station was opened at the corner of Third and Fort streets, in Detroit, and since that time said station has been used jointly by the Wabash, the Detroit, Lansing, & Northern, the Flint & Pere Marquette, the Detroit & Lima Northern, and the Canadian Pacific railroads as a terminal point, the tracks over Clark avenue at this point having been increased from one to three to accommodate the increased traffic. These tracks are used as approaches to the Union station, and incoming and outgoing trains and cars of all the foregoing roads, except the Canadian Pacific Railroad, pass over said tracks. There are 38 regular daily passenger trains crossing Clark avenue upon these tracks. Besides this, the Canadian Pacific uses the station as an eastern terminus, connecting with the other roads for purposes of through east and west traffic. In 1893 the legislature passed an act (No. 171) which provides (§ 5) that the 'commissioner of railroads shall . . . examine the crossings of the tracks of railroads and street railroads then existing, and order such changes made in the manner of such crossings, or such safeguards for protection against accidents to be provided thereat as in his judgment ought to be so made or provided; and shall apportion any expenses incident thereto between the companies affected as he may deem just and reasonable.' Claiming authority under this act, the respondent has ordered the construction of certain safety devices, and apportioned the expense between the Terminal Association and the Ft. Wayne & Belle Isle Railway Company. Petitioner must bear whatever expenses can properly be imposed upon the Ft. Wayne & Belle Isle Railway Company."

The petition in this case is filed for the purpose of having the order set aside. The answer alleges that, if the street-railway tracks were not constructed in said street, "and did not cross the tracks of said steam railroad, the said safety appliances so ordered as aforesaid would not be required or necessary in the manner in which the order provides they shall be constructed and maintained; and, though the safety gates provided for in such order are designed specially for the protection of the general public traveling on said highway from danger resulting from said steam railroad, still the derailling and signaling appliances are intended to protect the traveling public on both electric and steam roads from collision at the crossing of the two roads, and that the necessity for the said safety devices results equally as much from the existence and presence of the petitioner's tracks as from the presence of the tracks of the Union Terminal Association."

Counsel for the relator in their brief say:

"There are a number of important questions involved in this controversy, one being the extent of the authority of the railroad commissioner over street railway companies. We feel it necessary, however, to suggest only one of these questions, because the adjudication thereof in the manner we anticipate will render a consideration of the others unnecessary. We call attention to the fact, fully set out in the petition, that the necessity for the order of the railroad commissioner, if any there be, is due to the construction of the Terminal Association's tracks after petitioner's tracks were laid. The danger is not caused by petitioner, nor due to its presence in the street. Under the well-settled rule of this court, the cost of making the crossing safe must be borne by the company making the crossing and responsible for the danger. In *People v. Lake Shore & M. S. R. Co.* 52 Mich. 277, 17 N. W. 841, it was decided that a statute requiring a railroad company to bear the expense of constructing and maintaining a crossing for a highway which was laid out after the railroad was built was unconstitutional and void. The court said that, 'as far as the same can be reasonably accomplished, it [the crossing road] shall reduce the inconvenience occasioned to the public by its own peculiar mode of enjoyment to a minimum. But when the reason ceases the right of interference must cease.' And it was held that the railroad could not be made to bear the expense of crossing, because it was 'not a contrivance which the existence of the railroad renders necessary, and which otherwise would be needless.' In *Chicago & G. T. R. Co. v. Hough*, 61 Mich. 507, 28 N. W. 532, it was said: 'If a railroad interferes with an existing highway, it must bear all the expense of crossing and restoring the highway, as far as practicable, to safe condition. . . . But, as pointed out in *People v. Lake Shore & M. S. R. Co.* 52 Mich. 277, 17 N. W. 841, when a new highway is created, then it belongs to those who create it to bear the expense of making the crossing in the condition necessary to meet all the expense and danger which it occasions.' The danger which the commissioner wishes to guard against not being in existence before the railroad crossing was constructed, it belongs to the Union Terminal Association, which created it, to 'bear the expense of making the crossing in the condition necessary to meet all the expense and danger which it occasions.' The same principle is recognized and enforced in the following cases: *Grand Rapids v. Grand Rapids & I. R. Co.* 58 Mich. 647, 26 N. W. 159; *Detroit Parks & Boulevards v. Michigan C. R. Co.* 90 Mich. 385, 51 N. W. 447; *Detroit Parks & Boulevards v. Chicago, D. & C. G. T. Junction R. Co.* 91 62 L. R. A.

Mich. 291, 51 N. W. 934; *Detroit Parks & Boulevards v. Detroit, G. H. & M. R. Co.* 93 Mich. 58, 52 N. W. 1083; *Grand Rapids v. Bennett*, 106 Mich. 528, 64 N. W. 585; *Gage v. Pittsfield Twp.* 120 Mich. 436, 79 N. W. 687; *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.* 64 Mich. 350, 31 N. W. 281."

An examination of these cases will show they were all cases where it was sought to obtain a right of way either for a railroad across a highway, or for a highway across a railroad, or a crossing for one railroad over the right of way of another; and none of the cases relates to the question involved here, as to who shall bear the expense of additional safeguards ordered upon roads which have crossed each other for a long period of time. An examination of the cases will also disclose that, in proceedings by one road for a right of way over another, there are some inconveniences and burdens which must be borne by the senior road for which it is not entitled to compensation from the junior road. In the case of *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.* 64 Mich. 350, 31 N. W. 281, the former company sought to obtain a right of way over the railroad track of the defendant company. The commissioners allowed only \$100 for the land taken and the consequential damages. The defendant company gave evidence tending to show that it would suffer a yearly expense, as the result of establishing the crossing, of \$50 cost for maintaining signals, \$25 cost of watchman, and \$300 cost of stopping trains, and claimed the allowance made by the commissioners was grossly inadequate, but the court declined to disturb it. In discussing the question, Justice Champlin used the following language: "The question as to what elements of damages should enter into and form a basis of an award, when one railroad crosses another, has been before the courts of some of our sister states; and, while the decisions have not been entirely uniform, the principles underlying them all point to an allowance which shall secure a just compensation, within the recognized rules of evidence relating to damages, as including all loss or injury which is the direct result of the appropriation of the land to the new use. They also recognized that there are elements of damage which, aside from being uncertain, remote, or conjectural, are the consequence of regulations by the legislature designed to secure the safety of the public, which are imposed upon all railroad companies alike, and which, in so far as they do not involve any structural change in the property itself in order to make it conform to the new condition, do not afford a basis for compensation."

The result of the decision in *Massachu-*

setts was announced by Mr. Chief Justice Gray in *Massachusetts C. R. Co. v. Boston, C. & P. R. Co.* 121 Mass. 124, tersely, as follows: "A railroad corporation across whose road another railroad or a highway is laid out has the like right as all individuals or bodies politic and corporate, owning lands or easements, to recover damages for the injury occasioned to its title or right in the land occupied by its road, taking into consideration any fences or structures upon the land, or changes in its surface absolutely required by law, or in fact necessary to be made by the corporation injured, in order to accommodate its own land to the new condition. *Com. v. Boston & M. R. Co.* 3 Cush. 25, 53; *Old Colony & F. River R. Co. v. Plymouth County*, 14 Gray, 155; *Grand Junction R. & Depot Co. v. Middlesex County*, 14 Gray, 553. But it is not entitled to damages for the interruption and inconvenience occasioned to its business; nor for the increased liability to damages from accidents; nor for increased expense for ringing the bell; nor for the risk of being ordered by the county commissioners, when in their judgment the safety and convenience of the public may require it, to provide additional safeguards for travelers crossing its railroad. *Locks & Canals v. Nashua & L. R. Corp.* 10 Cush. 385, 392; *Boston & W. R. Corp. v. Old Colony R. Corp.* 12 Cush. 605, 611, 3 Allen, 142, 146; *Old Colony & F. River R. Co. v. Plymouth County*, 14 Gray, 155."

In Illinois the principle was laid down in the case of *Chicago & W. T. R. Co. v. Englewood Connecting R. Co.* 115 Ill. 375, 56 Am. Rep. 173, 4 N. E. 246, founded upon the manifest fact that the value of a railroad property, outside of the advantages of location and amount of business it controls, consists in the strength, permanency, and durability of its structures, and its adaptability to and capacity for doing railroad business, "that, whenever the proposed condemnation and subsequent user will injuriously affect such a property in either of these respects, the injury thus occasioned will form a proper basis for the assessment of damages in a proceeding of this kind." "In this case the court on the trial excluded all evidence from the jury tending to show that either the value of the respondent's road, or its capacity to do the business of the company, would be impaired by the proposed crossing, and the court, upon a review of the authorities in that state, held that the court below erred. It had previously been held by that court that the law requiring trains to stop before reaching and crossing another road was a police regulation, and might be maintained or repealed, at the pleasure of the legislature; that it would therefore be mere

conjecture as to what, if any, damages would be sustained for the delay, inconvenience, and trouble produced by complying with the requirements of the statute; and that, independent of the statute, the same duty would be imposed, and that it was too vague and uncertain to be an element of damages. *Peoria & P. U. R. Co. v. Peoria & F. R. Co.* 105 Ill. 110." "The point was more fully considered in an opinion filed at the same time with that above cited, and reported in the same volume, at page 388 (44 Am. Rep. 799), in which a rehearing was denied at the March term, 1883, in which the majority of the court held that damages occasioned by the stopping of trains could not be considered in awarding compensation (*Chicago & A. R. Co. v. Joliet, L. & A. R. Co.*). These decisions have not been overruled in that state. Such is also the conclusion reached by the supreme court in Ohio. *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.* 30 Ohio St. 604." "I think that the stopping of trains, whether required by the law as a police regulation, or by the duty of the company in order to secure the safety of persons transported, is not an element which can be considered by the jury in estimating the damages and compensation to be made." "The general railroad law requires trains to come to a full stop before crossing the track of another railroad, not nearer than 200 nor more than 800 feet from the crossing. It regulates the precedence which trains shall have in crossing, and prescribes penalties for disobedience of the regulations. These are police regulations enacted by the legislature designed to promote the public safety, and are as binding upon an existing road as one newly organized. They stand upon an equality before the law, and neither can levy tribute upon the other as a compensation for obedience to its requirements. It is subject to amendment or repeal at any time the legislature may see fit; and for this reason, as well as for the absolute impossibility of determining in advance the number of trains which in the future operation of the road would be required to stop at such crossing, the damage arising therefrom is uncertain and conjectural. But, aside from this, any inconvenience or annoyance or loss suffered in obeying the police regulations of the sovereign authority is *damnum absque injuria*. . . . In the absence of the statute, the duty imposed by the circumstances upon the corporation to adopt and observe proper precautions to protect the lives of persons committing themselves to its care takes the force of law, and has its foundation in the same principles which underlie police regulations, namely, the protection and welfare of the public. In other words, the police regulation requiring trains to stop does not cre-

ste a new duty, but compels the observance of an existing duty by the corporation. The statute or duty merely regulates the mode in which the corporation shall exercise its franchise. This incident to crossing takes no land, requires no structural change in the property, and deprives the corporation of no right granted by its charter. It does not lie within the scope of injuries for which compensation should be made." "The cost of maintaining signals or a crossing system would be a proper matter for the consideration of the commissioners, as well as cost of watchman. These expenses, however, are subject to contingencies which may cause the damages to fluctuate and possibly be reduced to a nominal sum."

The other cases cited are in harmony with the views expressed by Justice Champlin. These cases undoubtedly establish the doctrine that, within the limits of the rule as described by Justice Champlin, the junior highway or railroad seeking a crossing must bear all the expense of making the crossing, and restoring the highway or railroad crossing, as far as practicable, to safe conditions. This, however, relates to the conditions as they exist at the time the crossing is made, and not to conditions which may or may not arise thereafter. The damages must be real, tangible, and proximate. Allowances may not be made for possible or probable contingencies. *Grand Rapids v. Bennett*, 106 Mich. 528, 64 N. W. 585, and cases there cited.

We then come to the question of what the status of the two roads is after the compensation is made and the right of user by the junior road is obtained. While this question has never been, so far as we know, before this court, it has been before other courts. In *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.* 30 Ohio St. 604, there is a full discussion of this aspect of the case: "The franchise to be a corporation, entitled as such to own a right of way and to operate a railroad thereon, is granted by the state for the public benefit, in consideration of the supposed benefits accruing to the state and its people from the improvement and its use. The tangible property held for corporate purposes is a means of carrying out the purposes of the corporation. Each corporation has granted to it so much of the right of eminent domain as is necessary to obtain its right of way and to construct its road. The charters of these corporations are obtained under a general law, to authorize the creation and regulation of incorporated companies. 1 Swan & C. Rev. Stat. p. 271. The fact that one charter is older than another does not give it exclusive privileges or superior powers in prosecuting its business as public carrier of per- 62 L. R. A.

sons and property. If the elder company has exercised its power to condemn property for its right of way, and has constructed and is operating its road, that does not withdraw its property from the equal power of condemnation of its right of way for a crossing, to be enjoyed in common by a junior company. Such appropriation, to be used on equal and common terms, does not operate as a subversion or destruction of the former public use. It is only an increased burden upon its use, imposed for public purposes. . . . The right of the one to cross the track of the other is as clear and undoubted as was the right of the other in the first instance, to cross the land of the original owner. They each derive this right by grant from the state, and not by purchase of the other. In each case the Constitution protects the private property by requiring compensation to be paid. The right of transit across a railroad rests upon the same grounds as that of the right of railroads to cross the canals, rivers, and common highways of the state, and it is as important a public use as the right of transit along them. New channels of trade and commerce and new highways for public travel are essential to the growth and development of the state, and the convenience and comfort of its people, and the power of the state to provide them is one of those sovereign powers held in trust for the public welfare, which it has no right to grant away or surrender. This grant to railroad corporations is for the public accommodation. To assume that the road first located and constructed has the exclusive franchise of operating a road over the point of crossing, and that this right, as well as the property, must be paid for by the second road, does violence to the well-settled public policy of the state. These corporations owe their existence, and the right to exercise their franchises and privileges, to the principle that the state may employ such agencies as it may deem proper to promote the public welfare. These roads are great public highways, and as such are amenable to such reasonable regulations, not inconsistent with vested rights of private property, as will promote that object.

. . . When both roads are constructed, they are operated under charters granting equal franchises and privileges, and both are alike subject to the obligations that may be lawfully imposed. When the younger corporation has acquired its right of property in common with the older in a crossing, they become joint and equal owners, bound by mutual obligations to each other and to the public, to so use this common right as to do no unnecessary harm to the other or to the public. To each corporation the maxim, *Sic utere tuo ut alienum non laedas*, applies

with special force. To enforce the principles of that maxim, and in the legitimate exercise of the police power of the state, the act of March 24, 1860 (1 Swan & C. Rev. Stat. p. 372a), was passed. . . . When the appropriation is made, paid for, and put to the new use, both companies stand on a perfect equality as to rights and privileges in the use of the crossing."

We can see no fault in the logic of this opinion. When the right to use the crossing is once acquired, the right of the several corporations to this use is reciprocal, so far as is consistent with the kind of use made of the crossing by them. Of course, in the case of a highway crossing over a railroad, from the very nature of the use the foot passengers and persons traveling in vehicles would be required to stop, instead of requiring the trains of cars to stop, because this would be the only practicable method of running the trains and insuring the safety of the public. When the joint use of a crossing is obtained, is the position tenable that, because one road is older than another, the junior road must not only compensate the senior road for its present damage before it can cross, but for all time it must bear any additional future cost which may be made necessary by the erection and maintenance of appliances for the safety of the public, resulting from the increased use of the crossing? We think it logically follows from what has already been said this question must be answered in the negative.

It is said: "It cannot be pretended that without the existence of the steam-railroad crossing the railroad commissioner would have any jurisdiction, or that there would be any danger arising from the operation of the street railway which would call for an interference of the railroad commissioner. His jurisdiction only attaches because of the danger arising from the construction and operation of the steam railroad crossing the highway at the point in question." It is a complete reply to this suggestion to say that if there was no highway at this point traveled by a line of electric railway cars and by the public there would be no occasion for the interference of the railroad commissioner. It is because both of these conditions exist that human life is endangered at this crossing, and, under the exercise of the police power in the interest of public safety, the state is authorized to interfere through its agent the railroad commissioner. *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Dent v. West Virginia*, 129 U. S. 114, 62 L. R. A.

32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Minneapolis & St. L. R. Co. v. Emmons*, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. Rep. 870; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 150, 62 Am. Dec. 625; *Woodruff v. Ccclin*, 54 Conn. 277, 6 Atl. 853.

It is insisted by counsel for relator that the action of the railroad commissioner cannot be sustained for another reason. We quote from the brief of counsel: "We contend that a street railway which has been granted a franchise to occupy a public street acquires a right to use the same in common with other members of the traveling public, and is not an additional burden upon the street, but is merely an adaptation of the highway to a particular means of travel, and does not constitute an additional servitude. A railroad is, on the other hand, an additional servitude, and, if it is built across a highway, it must do all things necessary to render the highway, for all its legitimate uses, as safe as it was before the railroad was built across it, or would be if such railroad were not built across it at all. The authority for this view is found in the following cases, and, although the facts to which the principles involved were applied differed from those of the case at bar, the principles themselves are involved here, and must, in our opinion, control,"—citing *Chicago & O. Terminal R. Co. v. Whiting, H. & E. C. Street R. Co.* 139 Ind. 297, 26 L. R. A. 337, 38 N. E. 604; *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* 156 Ill. 255, 29 L. R. A. 485, 40 N. E. 1008; 2 Dill. Mun. Corp. 4th ed. § 722; *Chicago, B. & Q. R. Co. v. Steel*, 47 Neb. 741, 66 N. W. 830; *Du Bois Traction Pass. R. Co. v. Buffalo, R. & P. R. Co.* 149 Pa. 1, 24 Atl. 179; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306; *Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007; *Nichols v. Ann Arbor & Y. Street R. Co.* 87 Mich. 369, 16 L. R. A. 371, 49 N. W. 538. None of these authorities touch the question involved here. Nearly all of them, except the Michigan cases, are referred to in *Chicago, B. & Q. R. Co. v. Steel*, 47 Neb. 741, 66 N. W. 830. The question involved was whether a railroad company was entitled to damages from a street-railway line seeking a crossing. In disposing of the case the court said: "The doctrine of the cases cited, and which to us appears altogether reasonable and sound, is that a railroad company acquires no exclusive use of streets crossed by its tracks with the consent of the city or other municipal body, but must enjoy the rights so conferred in common with the general public; that it

is presumed to have contemplated the adoption of such improved means of travel as the exigencies of the case require in order to best subserve the public interests and necessities; and that any mere inconvenience suffered by it on account of the crossing of its lines by the tracks of street railways by permission of the proper authorities is *damnum absque injuria*." In the Michigan cases the question involved was whether the adjacent owners were entitled to compensation where the street in front of their land was used by a street-railway company. In *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306, Justice Cooley used the following language: "If the railroad were only a city railway, constituting a mere local convenience, and calculated to relieve the pressure of traffic and travel upon the street, the question, of course, would be different. There are cases which hold it to be competent, under proper legislative authority, to permit a street-railway track to be laid, regardless of the consent or of the wishes of abutting proprietors who may own the soil of the street. A street railway for local purposes, so far from constituting a new burden, is supposed to be permitted because it constitutes a relief to the street. It is in furtherance of the purpose for which the street is established, and relieves the pressure of local business and local travel, instead of constituting an embarrassment. It is for this reason that the owners of lands over which a city street is laid are denied compensation if a street railway is subsequently authorized within it." The same question was involved in the other Michigan cases where electricity was used as motive power. It was held the adjacent owner was not entitled to compensation, under the facts disclosed by those cases, though two of the five judges thought the building of the street railway did impose an additional burden, for which compensation should be given to the adjacent owner.

Though the decisions are not uniform, it may be considered as now settled by the great weight of authority that the use of a street by a street railway company, under proper regulations, even though it use electricity as a motive power, is not an improper use of the street, and is not such an additional burden as to entitle the adjacent proprietor to additional compensation. It does not follow, however, from these decisions, that the electric car and the horseless carriage do not increase the danger to those who have a right to travel the streets. If it be asserted that the propulsion of a modern suburban car, 45 or 50 feet long, which may be propelled, at the will of the motorman, at a speed from simply moving to 40 or 50 miles an hour, through the public streets of

a city, is not a different use of the street, and a source of greater danger to the public, than obtained when the streets were used only by pedestrians and carriages drawn by horses, such an assertion would not commend itself to the common sense of those having cognizance of the facts. The long list of frightful injuries and fatal casualties which occur yearly because of the new methods of travel in all our large cities would be a complete answer to the assertion. Does it not follow, then, that, though the modern methods of travel are required by the conditions of modern life, inasmuch as they may and do increase the danger to human life, it is entirely competent for the state, in its efforts to protect its citizens in the exercise of its police power, to provide such regulations, at the expense of the persons or corporations employing the new methods, as in its wisdom it deems necessary to accomplish that purpose? Upon what other theory does it regulate the speed of the vehicles traveling the streets? Why does it require, at the expense of the corporation owning street cars, their frequent inspection, or require them to be equipped with powerful brakes and with safety fenders? Can there be any question but what it would be legal to require steam boilers used to propel horseless carriages to be so constructed as not to be liable to explosion, or to require the person operating such a carriage to be so familiar with its operation before taking it upon a crowded street that its appearance there should not be a source of danger? It seems to us there can be but one answer to these questions. New dangers upon the public streets require new safeguards in the interest of the safety of the public. It is a matter of common knowledge that where electric cars run at frequent intervals across a railroad over which trains are frequently run, it is a place of unusual danger, not only to the passengers in the steam cars, but also to the passengers in the electric cars. This danger is occasioned, not by the steam road alone, nor by the electric road alone, but by both of them. We have no doubt that under such circumstances the state, in the exercise of its police power, can take such steps as will minimize the danger, and can impose the expense of doing so upon the corporations causing the danger.

In Maine a statute similar to the statute of this state was passed in 1895, authorizing the railroad commissioners in such a case as this one to apportion the expense between the electric road and the steam road, though it did not require them to do so. Under this statute, the case of *Maine C. R. Co. v. Waterville & F. R. & Light Co.* 89 Me. 328, 36 Atl. 453, arose. In that case it was claimed, as it is claimed here, that the use of the cross-

ing' of the steam road by the electric road was simply a use of the highway. We quote from the decision of the commissioners: "But the counsel for the electric railway company goes further, and in argument claims that by its charter his company has the right for its electric cars to pass and repass across the rails of the Maine Central Railroad Company, and over the highway, the same as any other vehicle on said highway, and that the Maine Central Railroad Company is obliged, under the law, to make proper provisions for the passage of electric cars across its railroad tracks. He argues that the car of the electric railway is nothing more than the team or vehicle of any other person or corporation which has a right to pass and repass within the highway. He argues that the building of an electric railway along the highway in this state is not a new servitude upon the street, and is not a new use of the way, but is only a new and later mode of using the way." Under the circumstances of that case, the commissioners put the expense of putting in the new crossing frogs entirely upon the electric road. The case was removed to the supreme court, which declined to disturb the decision of the commissioners, the court using the following language: "Act 1895, chap. 72, undoubtedly authorizes the railroad commissioners to apportion the expense, but it does not require them to do so. It leaves the question to their sound judgment and discretion; and, on appeal, the only rule prescribed for the presiding justice is that he shall make such order or decree as law and justice shall require. The statute declares that 'exception may be taken to such order or decree,' but it prescribes no rules by which the law court shall be governed in passing upon the exceptions. It seems to us that the evident intention of the legislature was to leave the whole question of how railroad crossings should be constructed and maintained, and how the expense of such crossings should be borne, in the first instance to the sound judgment and discretion of the railroad commissioners, and we think that their decision should not be altered or reversed unless manifestly illegal or unjust." See *Detroit Parks & Boulevards v. Chicago*, D. & C. G. T. Junction R. Co. 91 Mich. 291, 51 N. W. 934; *Woodruff v. Cutlin*, 54 Conn. 277, 6 Atl. 849; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437.

We have no doubt of the right of the legislature to authorize the railroad commissioner to do what he has sought to do here.

The petition of the relator is denied.
62 L. R. A.

Montgomery, Ch. J., and Long, J., concurred with **Moore, J.**

Grant, J., dissenting:

The main question in this case may be thus stated: When a steam railroad company has condemned a right of way, and extended its tracks across a public street or highway, on which is an existing street-car line, and at the time the public travel upon the street or highway was not such as to require the erection of gates, etc., for the protection of the public, but subsequently, owing to the increase of population, the increase of tracks and trains by the railroad company, and the increase of travel upon the street or the highway, the erection and maintenance of such safeguards becomes essential for the protection of the public, can the street railway company be required to pay a portion of the expense? It is now the settled law of this state that a street railway does not create an additional servitude. *People ex rel. Kunze v. Fort Wayne & E. R. Co.* 92 Mich. 522, 16 L. R. A. 752, 52 N. W. 1010. In addition to the authorities cited in *Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007, and *Nichols v. Ann Arbor & Y. Street R. Co.* 87 Mich. 361, 16 L. R. A. 371, 49 N. W. 538, see also the following: *Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. Street R. Co.* 139 Ind. 297, 26 L. R. A. 337, 38 N. E. 604; *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* 156 Ill. 255, 29 L. R. A. 485, 40 N. E. 1008. Another well-settled principle is of importance in this discussion, viz.: A steam railroad, in constructing its tracks across an existing highway, must pay all the expense of putting the highway in safe condition, and erecting and maintaining such safeguards as are required for the protection of travelers upon the street or highway, as well as those who are traveling upon the steam cars. The correlative proposition is also well established, viz.: When a public highway is laid out across an existing railroad, the public must compensate the railroad company, not only for the value of the land taken, but also for the construction of requisite safeguards, including gates, flagmen, fences, cattle guards, etc., for the protection of the public. *Chicago & G. T. R. Co. v. Hough*, 61 Mich. 507, 28 N. W. 532; *Grand Rapids v. Grand Rapids & I. R. Co.* 58 Mich. 641, 648, 26 N. W. 159; *Detroit Parks & Boulevards v. Michigan C. R. Co.* 90 Mich. 385, 51 N. W. 447; *Detroit Parks & Boulevards v. Chicago, D. & C. G. T. Junction R. Co.* 91 Mich. 291, 51 N. W. 934; *Grand Rapids v. Bennett*, 106 Mich. 528, 64 N. W. 585; 8 Am. & Eng. Enc. Law, 2d ed. p. 351; *Du Bois Traction Pass. R. Co. v. Buffalo, R. & P. R. Co.* 10 Pa. Co.

Ct. 401. The elements of damages in such cases are ably discussed by Chief Justice Champlin, in *Flint & P. M. R. Co. v. Detroit & B. O. R. Co.* 64 Mich. 350, 31 N. W. 281, and many authorities there cited.

Another well-established principle important to be here noted is this: He who creates and maintains a nuisance must pay the cost of abating it; and that business which in its management endangers the persons and property of others must pay the expense of taking the necessary precaution to avoid the danger, and it matters not whether that danger existed at the time of the establishment of the business or arose afterwards. It follows that in 1882 the Wabash Railroad Company, when it constructed its single track across the highway, and in 1893, when the Union Terminal Association placed its tracks across, they were required by law to pay the expense of all appliances at that time necessary for the protection of the public. So, too, if these companies were now making application to cross the highway, they would be compelled to pay the expense of all the appliances which, in this proceeding, the commissioner has divided equally between the relator and the Union Terminal Association, and would be obliged to do so so long as they did business.

The argument of the learned attorney general seems to be that because, under the circumstances as they existed when the Wabash Railroad Company and the Union Terminal Association constructed their roads, damages for the cost of the appliances now required would then have been uncertain and speculative, and could not have been considered, therefore these companies cannot now be required to bear the entire expense. He states his position as follows: "In behalf of respondent, I claim that said cases, while establishing the doctrine that a railroad company whose track is crossed is entitled to just compensation for all damages which it may have sustained by reason of such crossing, do not sustain the claim made by counsel for petitioner, namely, that the Union Terminal Association Railway Company must for all time bear the expense for constructing and maintaining the safety contrivances and appliances mentioned in the commissioner's order, for the simple reason that, under the facts and circumstances of this case, the expense of constructing and maintaining said safety contrivances is not an element which can be considered in making up the just compensation to which petitioner is entitled under the Constitution and laws of this state. . . . This court has never decided that where the necessity of safety appliances is created some fifteen or twenty years after the crossing is made, solely in consequence of changed circumstan-

ces and conditions, resulting from the growth of the surrounding territory, that the road whose tracks were first laid shall be forever exempt from the burden of assisting in constructing and maintaining safety appliances made necessary by such changed conditions."

The injustice to the railroads is not apparent, because by holding them to bear the expense they are doing no more than the law would clearly require of them if they were now seeking to cross the highway. What is it that causes the danger to travelers upon the highway? Clearly, it is not the street cars. It is the trains of the railroad companies. The street car companies, by relieving travel, may fairly be held to lessen the danger to otherwise overcrowded streets. Why should the street car company, any more than an omnibus line or a stage company, using the same streets, be required to pay for the expense of protecting the public? If it be said that there is danger to travelers upon the steam railway from the street cars, the answer is ready that they are no more dangerous than heavy trucks, van wagons, stages drawn by four or six horses, or other vehicles. The street cars differ only from other methods of travel in that their carriages run upon rails. They have no more rights in going over the streets than other travelers have, except that other travelers are required reasonably to give the cars the right of way. Under the police power, these street-car companies are subject to all reasonable rules in running their cars. They may be, and now are, required by law to stop their cars a certain distance from the railroad crossing, and not to cross until some employee has gone to the railroad track, and signaled that the track is clear. The same rule might be required of stage-coaches and any other conveyances with heavy loads.

In *Du Bois Traction Pass. R. Co. v. Buffalo, R. & P. R. Co.* 10 Pa. Co. Ct. 401, the complainant, the street railway company, filed its bill in equity to restrain the defendant steam railway company, from interfering with the construction of its tracks in the public highway across the railway tracks. The defendant used force to prevent the construction. In the suit the defendant claimed that the street railway company should pay damages to the defendant for injury to its business. It was there said: "The respondent holds this right [the use of the street] subject to all the consequences flowing from the ever-increasing travel upon Booth street, and the use of all methods discovered or discoverable for the accommodation of the travel upon the surface of the street; and, if the respondent suffers any damages arising from the cross-

ing of its tracks by the public, it is of a kind which it must be held to have assumed to itself, when it entered upon Franklin street.

. . . The crossing of its track by the passenger railway company gives no greater right to damages, in the view we take of the case, than it could have if the claim was made against an omnibus line." This case was approved in 149 Pa. 1, 24 Atl. 179. That case is quoted with approval in *Chicago, B. & Q. R. Co. v. Steel*, 47 Neb. 741, 66 N. W. 830, where the authorities are reviewed, and the court holds "that it [the steam railroad company] is presumed to have contemplated the adoption of such improved means of travel as the exigencies of the case require, in order to best subserve the public interests and necessities."

In *Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. Street R. Co.* 139 Ind. 297, 26 L. R. A. 337, 38 N. E. 604, it was held that the street railway company was in the enjoyment of the public easement and use of the street, and that the right of the street railway to cross the tracks of the steam railway was subject to no conditions other than those to which the general public is subject in traveling over such streets. The court said: "It [the steam railway] never owned its right of way over and across the streets named, free from the burden of the public easement, a part of which belongs to the appellee, the street railway." The true rule seems to be that when a railroad company crosses a public street or highway, in the absence of any limitations in its charter, it obtains its right subject to all lawful uses to which the street may be put. It obtains its right subject to the well-known fact that conditions change with the growth of population, and that it itself must meet the expense which these conditions have made necessary for the protection of travelers upon the highway or street.

The learned attorney general seems to concede, that, were it not for this street railway, the commissioner, under the law and the police power, could place upon these railroads the entire cost of erecting and maintaining these appliances. As we have shown and held, the street car company is a lawful user of the highway, and, as such user, it cannot be selected to pay the whole or any part of the expense required for the protection of all who travel upon the highway or upon the railroad. This disposal of the case renders it unnecessary to determine the other questions raised.

Since writing the above I have received the opinion of my brother Moore. The question involved is of such great importance that I feel justified in making a brief reply. It is well to keep in mind the precise question for our determination. The question is 62 L. R. A.

not between two steam railroads crossing each other on private grounds or on the public highway. Neither is it between steam railroads and the entire public using the highway. It is between steam railroads and one user of the public highway, and the question is, Who shall pay for the protection of the entire public? or, in other words, Can one user of the public highway be required to pay part or all the expense of protecting all users of the highway and as well those traveling upon the steam road? It must also be borne in mind that no one is seeking to abridge, lessen, or destroy the police power of the state to adopt any and all regulations which are necessary to protect the persons and property of those using the highway or the steam road. This power remains the same. The state, either directly or through the municipality, can regulate the speed of street cars within 100, 500, or 1,000 feet of the crossing. It can compel them to stop at any distance from the crossing. It can regulate the speed of the steam car when approaching. It can, as it now does, compel an employee on the street car to advance to the tracks before crossing, and see whether the crossing is safe. It may compel the steam road to erect gates, etc. I quote again from *Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. Street R. Co.*: "So long, therefore, as it is the settled law of this state that a street railway is not an additional burden to that of the easement which the general public has in the street, and that the street railway company's right to use the street is founded on that easement, that long it must be held that the right of such street railway to cross over the tracks of a steam railway laid on such street is subject to no conditions other than those to which the general public is subject in traveling over such streets. When the steam railway company obtains its right of way over and along a public street, it does so subject to the right of the general public to use such street, and the street crossings over its tracks, and it is generally incumbent on such steam railway company to make such crossings as passable for the general public as they were before the construction of their tracks thereon." The logic of this case and others cited by me upon the same point is that the street railway is a proper, legitimate, and necessary use of the public highway, and that it cannot be made subject to conditions "other than those to which the general public is subject in traveling over the streets." Wherein is the logic of compelling one user of the public highway to pay the whole or part of the expense in protecting all users of the highway against the dangers incident to the passage of long, swift, and ponderous trains of

steam cars? It is not the street car which causes the congestion of travel at this point; on the other hand, it relieves the congestion. The congestion is caused by the increase of population,—by vehicles of all sorts, engaged in the transportation of goods and passengers, and as well travelers on foot. My brother refers to the horseless carriage as probably increasing the danger to those who have the right to travel in the streets. Will it be contended that the owners of horseless carriages could be selected from the owners of other vehicles using the highway, and compelled to, in part or entirely, pay for the expense of gates, etc., at a railroad crossing? If a cartage company, a corporation, were engaged in the transportation of goods with its heavy trucks and enormous loads over this highway every fifteen minutes or half hour in the day, could it be compelled to pay part or all of the expense to avoid the danger caused by the trains of the steam roads? Many vehicles, with their loads, are as heavy, and sometimes nearly or quite as large, as ordinary street cars. The tallyhos, with four or six horses, are certainly as dangerous at these crossings as are the street cars. But for the street cars there would be more conveyances of other character, and more congestion of travel, at these crossings, and consequently more danger than results from the use of the street cars.

It is urged that the facts in the cases I have cited are not those of this case, and that the precise question now before us was not involved in them. This is true. The same may be said of the cases cited in my brother's opinion, unless it be the Maine case, to which I will refer hereafter. The question is a new one, and calls for the application of principles to be deduced, so far as possible, from the decided cases, and by the application of sound legal principles. My brother says: "If there was no highway at this point traveled by a line of electric railway cars and by the public, there would be no occasion for the interference of the railroad commissioner. It is because both of these conditions exist that human life is endangered at this crossing, and, under the exercise of the police power in the interest of public safety, the state is authorized to interfere through its agent, the railroad commissioner,"—citing several cases. Will it be said that if there were no electric cars there would be no necessity of interference by the commissioner or some other authorized body to protect the public and prevent danger? Is the electric car the sole cause of the danger, so far as it is caused by the using of the highway? Might not the danger be as great, or even greater, without the street car? The cases cited by my brother

relate to fences, cattle guards, farm crossings, and the like, and do not touch this case. The statement of my brother that, "under the exercise of the police power in the interest of public safety, the state is authorized to interfere," is the conceded law. But does that effect the question, Who shall pay for these safeguards? The authorities cited, apportioning the expense where one steam road crosses another, are not, in my judgment, applicable. He quotes extensively from *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.* 30 Ohio St. 604. I understand the rule laid down in that case is the general rule approved by this court, and is applicable only to steam railroads, whether they cross one another on private grounds or the public highway. It has never been applied to street railways.

I am not aware, as my brother suggests, that street cars in cities are allowed a speed of from 40 to 50 miles per hour. No ordinance so providing has ever been called to my attention. I doubt whether there are as many accidents at street-car crossings from collisions with street cars as with other vehicles. The fact that there are frightful injuries and fatal casualties in the streets of the city, in consequence of collision with street cars, does not affect this question. Those accidents may result from the negligence of travelers, or from the employees of the street car companies, or both, or from too great a speed allowed by the city, or in violation of the city ordinance. The question we are dealing with is one entirely foreign to these.

Maine C. R. Co. v. Waterville & F. R. & Light Co. 89 Me. 328, 36 Atl. 453, is cited as a case in point. The language quoted by my brother from that case must be read and understood in connection with its facts. The steam-railroad tracks were first laid. The street railway company recognized its duty, when it crossed, to place the necessary crossing frogs at its own expense. That this would be the legal duty of the street railway company would hardly be questioned. These frogs were a part of the track of the street railway, and were necessary in its construction. They had become so worn as to be dangerous. The street railway company claimed that it was the duty of the steam railroad company to replace them, and to make proper provisions for the passage of the electric cars across the tracks of the steam road,—a proposition which could not commend itself to anyone's judgment. The railroad commissioners very properly held that the street railway company should bear the expense essential to enable it to cross the defendant's track, and to keep it in repair. No other conclusion, in the exercise of good sense, could have been reached.

The syllabus of the opinion reads as follows: "Whenever an alteration is made in an existing railroad track for the sole convenience and accommodation of another railroad, the expense shall be borne by the latter." No question of the exercise of the police power was discussed or apparently involved. I am unable to see that that case controls this. The question before us is not whether the legislature may enact that the expense of crossings similar to this shall be borne, in whole or in part, by the entire public, nor whether the street car company, in putting its tracks across a steam road, can be compelled to make an overhead crossing at its own expense. We are dealing with a case where the natural growth of public travel, through the increase of trade and population, has made the proposed safeguards necessary for the protection of all, and where the attempt is made to make one user of the public highway bear half the expense to the exclusion of all others. The writ should issue.

Hooker, J., did not sit.

Affirmed by Supreme Court of United States, April 6, 1903.

John P. JONES *et al.*, *Plffs. in Err.*,
v.

Frederick CODY.

(.....Mich.....)

1. A tradesman has no right of action against the principal of a public school for enforcing a lawful order of the

NOTE.—Right of school authorities to control pupils when going to and from school.

The few authorities on this question fully sustain the decision in *Jones v. Cody*, and the rule as expressed by Mechem, Pub. Off. § 730, that "the authority of the teacher is not confined to the school room or grounds, but he may prohibit and punish all acts of his pupils which are detrimental to the good order and best interests of the school, whether such acts are committed in school hours, or while the pupil is on his way to or from school, or after he has returned home."

A head master of a boarding school was convicted of an assault, in *Cleary v. Booth* [1893] 1 Q. B. 465, 62 L. J. M. C. N. S. 87, 5 Reports, 263, 68 L. T. N. S. 349, 41 Week. Rep. 391, 17 Cox C. C. 611, 57 J. P. 375, on account of a caning which he gave one of his pupils for an assault committed by the latter on a co-student while on the way to school in the morning. The question for decision, which was whether the head master was justified in inflicting corporal punishment upon one of his scholars for acts done outside the limits of his school, one of the judges said was one of first impression, and not an easy one, but he came to the conclusion that a teacher's authority ex- 62 L. R. A.

board of education requiring pupils to go directly home when dismissed from school, although the effect of such enforcement is to injure his trade with the pupils.

2. The board of education may require pupils to go directly home when dismissed from school, under statutory authority to pass rules relative to anything whatever that may advance the interests of education, the good government and prosperity of the free schools, and the welfare of the public concerning the same.

(December 16, 1902.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action brought to recover damages for interference with plaintiffs' business. *Affirmed.*

Statement by Grant, J.:

Counsel for appellants has made no statement of the case as provided by rule 40, which reads as follows: "The brief of a party bringing a cause into this court shall contain a clear and concise statement of the facts of the case, distinct from argument, and of the errors upon which he relies, the questions involved, and the manner in which they are raised. The court will consider such statement sufficient and accurate unless the opposite party shall point out in his brief wherein the statement is insufficient or inaccurate." We might affirm the judgment for this reason, but, as the case is one of considerable importance, we will dispose of it on the merits. Defendant's counsel has made a clear statement, which we have verified and find correct. The plaintiffs are the owners of a small

tends, not only to acts done in school, but also to cases where a complaint of acts done by his scholars out of school,—at least while going to and from school,—reaches him. Another Judge was also of the same opinion, stating that it could not be that the teacher's duty or power ceased the moment the pupil left school for home, for "there is not much opportunity for a boy to exhibit his moral conduct while in school under the eye of the master,—the opportunity is while he is at play or outside the school; and, if the school master has no control over the boys in their relation to each other except when they are within the school walls, this object of the Code would be defeated;" referring to § 101, Code, Education Dept., authorizing a grant for discipline and organization, with orders that special regard be paid to the moral training and conduct of children. However, it was admitted to be a question of fact in each case whether the conduct of the master in inflicting corporal punishment is right. Some weight was placed, in the case at bar, upon the fact that the act for which the boy was punished, was done to another pupil of the same school. The conviction was reversed, and the cause remanded with directions to the magistrate to inquire only whether the punishment inflicted was excessive.

confectionery store situated opposite the Webster school,—one of the public schools of the city of Detroit. Mrs. Jones had full charge of the business. The defendant was principal of the school. The schools are under the control of the board of education, which derives its powers from a special act of the legislature. Section 8 of the act gives the board "authority to make by-laws and ordinances . . . relative to the employment and examination of teachers, their powers and duties; relative to the regulation of schools and the books to be used therein; . . . relative to anything whatever that may advance the interests of education, the good government and prosperity of the free schools in said city, and the welfare of the public concerning the same." Laws 1869, No. 233. This controversy arises over the enforcement of rule 87, subdivision "c," which provides that "pupils are required to go directly to their homes at the close of school at noon and at night, unless required or specially permitted by their teachers to remain." This has been a rule of the board for many years. In the fall and winter of 1899 the defendant had not required a strict compliance with this rule. It was his habit, after the various rooms had been dismissed at noon and night, to go around, straightening up his affairs inside the school building. He then went to the principal's room, got his coat and hat, and started for home. This occupied about ten minutes after the pupils had been dismissed. In passing out of the school block, if he noticed any of the boys loitering in the streets, he told them to go home; and if they were in the stores he

stepped to the door, or inside, and said: "Come, boys, your time is up. You must go on home." Plaintiffs found no fault with the rule or method of enforcement until January 10, 1900. On that date the principal, seeing some of the boys in plaintiffs' store, stepped inside, as had been his custom, to send them on their way home. He was then informed by Mrs. Jones that she did not wish him to come into her place of business to order the boys out, and he at once informed her that, if not allowed to enforce the rule in the manner he was enforcing it, he would be obliged to enforce it strictly, and require the pupils to go directly to their home at the close of school sessions. In the interval between January 10 and February 14, 1900, the trouble was brought to the notice of the superintendent of schools, and also the committee of the board on teachers and schools. Mrs. Jones made a complaint in person to the superintendent, and wrote a letter and called upon Mr. Love, the chairman of the committee. Mr. Cody went to the superintendent for instructions, and later appeared before the committee. From both the superintendent and the committee he received instructions to enforce the rule, and accordingly on February 14, 1900, he had the teachers read the rule to the pupils in the various rooms of the school. It is this action in enforcing the rule strictly in accordance with its terms, of which plaintiff makes complaint. She says her trade, which amounts to \$5 or \$6 per day, "fell off right away;" and because, as she claims, the enforcement of this rule of the board lessened her trade, with the scholars, she brings this action

DeSkins v. Gose, 85 Mo. 485, 55 Am. Rep. 387, was an action for damages for a punishment inflicted on account of the violation of a rule prohibiting the use of profane language, quarrelling, or fighting among the scholars, either at the schoolhouse or on the way home. The violation of the rule occurred one half or three fourths of a mile from the schoolhouse, after school had been adjourned for the day, and the scholars were on their way to their respective homes, but before they had reached them, and the punishment was inflicted the next day thereafter, after the pupil had returned to school. Judgment for plaintiff was reversed. The case turned on whether the rule above referred to was reasonable. The court said that, without question, it was both reasonable and necessary, in so far as it forbade such acts on the part of scholars while at school, and as to its authority over them on their way home. "If the effect of acts done out of the school room while the pupils are returning to their homes, and before parental control is resumed, reach within the school room, and are detrimental to good order, and the best interests of the school, no good reason is perceived why such acts may not be forbidden and punishment inflicted on those who commit them. . . . The effect of the scholars using to and with each other ob-

scene and profane language, quarrelling and fighting among themselves on the way to their homes, would necessarily be felt in the school room, . . . arraying one against the other, as well as the parents of each, and destroying that harmony and good will which should always exist among the scholars who are daily brought in contact with each other in the school room."

Disrespectful language in regard to a teacher, for which a pupil was punished, in *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 150, was used after he had returned to his home, and was, with another school mate, passing the teacher's house, and therefore the facts are not strictly within the class of cases herein collated; but the judge uses the following relevant language in the opinion: "It is conceded that his [the teacher's] right to punish extends to school hours, and there seems to be no reasonable doubt that the supervision and control of the master over the scholar extends from the time he leaves home to go to school till he returns home from school. Most parents would expect and desire that teachers should take care that their children, in going to and returning from school, should not loiter, or seek evil company, or frequent vicious places of resort." Even in this instance, on account of the direct effect which

against the defendant, who was carrying out the instructions of his superiors. The court directed a verdict for the defendant.

Mr. James Pound, for plaintiffs in error:

Any rule or regulation which has for its object anything outside of the instruction of the pupil, the order requisite for instruction, is beyond the province of the board of education to adopt.

Holman v. School Dist. No. 5 Trustees, 77 Mich. 605, 6 L. R. A. 534, 43 N. W. 996; *State v. Fond du Lac Bd. of Edu.* 63 Wis. 234, 53 Am. Rep. 282, 23 N. W. 102.

A rule requiring pupils of a public school to pay for school property which they may wantonly and carelessly break or destroy is not a reasonable rule, and its enforcement by chastisement of the pupil is unjustifiable.

State v. Vanderbilt, 116 Ind. 11, 18 N. E. 266.

Defendant's malice can be inferred from his acts, which were absolutely unjustifiable.

Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156.

the language used would have in subverting the master's authority and begetting disorder and insubordination, he was held justified in inflicting punishment.

And, *arguendo*, it is said, in *Burdick v. Babcock*, 31 Iowa, 562: "If the effects of acts done out of school hours reach within the school room during school hours, and are detrimental to good order and the best interest of the pupils, it is evident that such acts may be forbidden."

... A pupil may engage in sports beyond school that will render him unfit to study during school hours. Cannot these sports be forbidden? The view that acts, to be within the authority of the school board and teachers for discipline and correction, must be done within school hours, is narrow, and without regard to the spirit of the law and the best interest of our common schools."

But, unless the act complained of thus reaches within, and affects the conduct and discipline of, the school, a teacher's authority is not ordinarily allowed to control a child after he reaches home, as will be seen by reference to cases in subd. VIII. of a note on the *Right to exclude, suspend, or expel pupils from school for misconduct of pupil or parent*, in *Cartersville Bd. of Edu. v. Purse* (Ga.) 41 L. R. A. 593.

A conviction for an aggravated assault and battery was reversed on appeal in *Hutton v. State*, 23 Tex. App. 386, 59 Am. Rep. 776, 5 S. W. 122, where the facts showed that the assault complained of was a punishment inflicted upon a pupil for a violation of a rule prohibiting students from fighting. The fighting was away from the school and not during school hours, but the court said that that did not deprive the teacher of the legal right to punish the pupil for an infraction of the rule.

In discussing the jurisdiction of the school board to make needful rules for the conduct of the pupils, and of the teacher to enforce such rules, it is said, *obiter*, in *State ex rel. Beatty* 62 L. R. A.

This question is one of fact.

Sheehan v. Sturges, 53 Conn. 481, 2 Atl. 841; *Murphy v. Independent Dist.* 30 Iowa, 429; *Rulison v. Post*, 79 Ill. 587.

For some adjudicated senseless rules, see:

State v. Fond du Lac Bd. of Edu. 63 Wis. 234, 53 Am. Rep. 282, 23 N. W. 102; *Perkins v. Independent School Dist.* 56 Iowa, 476, 9 N. W. 356; *Holman v. School Dist. No. 5 Trustees*, 77 Mich. 605, 6 L. R. A. 534, 43 N. W. 996; *State ex rel. Clark v. Osborne*, 24 Mo. App. 309; *Dritt v. Snodgrass*, 66 Mo. 286, 27 Am. Rep. 343; *Hughes v. Goodell*, 3 Pittsb. 264; *Murphy v. Independent Dist.* 30 Iowa, 429.

Mr. Arthur Webster, for defendant in error:

The supervision and control of the master over the scholar extend from the time he leaves home to go to school until he arrives home from school.

Lander v. Seaver, 32 Vt. 120, 76 Am. Dec. 156; *Mechem*, Pub. Off. § 730; *Bolding v. State*, 23 Tex. App. 172, 4 S. W. 579; *Deskins v. Gose*, 85 Mo. 485, 55 Am. Rep.

v. Randall, 79 Mo. App. 226, that it is not confined to the school room and school premises, but extends over the pupil on his road from his home to school and return.

Although coming only indirectly under the general subject discussed, *Guethler v. Altman*, 26 Ind. App. 587, 60 N. E. 355, is included because of its similarity in some respects to *Jones v. Cody*. This was also an action brought by a tradesman against a school board, superintendent, and a teacher for damages resulting from maliciously preventing, by means of advice, persuasion, threats, and intimidation, the pupils of a high school from trading at plaintiff's place of business. The question presented, which was as to the sufficiency of the complaint as against demurrers, was decided in the negative, on the ground that it was not an unlawful act to advise or persuade the pupils not to visit the complainant's store, there being no contract relations; and the court stated that, although the teacher acted maliciously, that fact would not change the rule, since the act was lawful in itself, and violated no right, and, therefore, could not be made actionable because of the motive which induced it. But, whether any control beyond mere persuasion, etc., was attempted to be exercised in this case, or whether any rule as to the conduct of the children after school existed, does not appear, although the complaint alleges that, in doing the things complained of, the teacher was following instructions given him by the school board and superintendent; and the judge makes the following statement in the opinion: "It was proper for the school authorities to make such reasonable rules and regulations as were necessary for the discipline, government, and management of the school;" but the decision is in no way based upon any right of the school authorities to make rules controlling the children, but merely upon the ground above stated.

M. M. M.

387; *Hutton v. State*, 23 Tex. App. 386, 59 Am. Rep. 776, 5 S. W. 122; *Sherman v. Charleston*, 8 Cush. 160.

A rule requiring pupils "to go directly to their homes at the close of school at noon and night, unless required or specially permitted by their teachers to remain," is reasonable.

Fertick v. Michener, 111 Ind. 472, 60 Am. Rep. 709, 11 N. E. 605; *Mechem*, Pub. Off. § 728.

A principal or other school officer cannot be made liable in damages for errors of judgment in attempting to enforce discipline in and about the school, unless he acts from wanton, wilful, or malicious motives.

Fertick v. Michener, 111 Ind. 485, 60 Am. Rep. 709, 11 N. E. 605.

If defendant used his power as principal to control the patronage of the scholars, and put in force a boycott and an alleged restraint upon trade, and had singled out for his attack the plaintiff's store alone,—still it is doubtful whether an action would lie against him.

Guethler v. Altman, 26 Ind. App. 587, 60 N. E. 355.

Grant, J., delivered the opinion of the court:

No malice is alleged in the declaration, and none shown by the proofs. The assertion of plaintiffs' counsel that defendant acted *malo animo* has not even a shadow for a basis. No fault is or can be found with the manner in which the defendant enforced the rule. Plaintiffs made no objection to defendant's method until Mrs. Jones requested him not to enter her store to notify the pupils to go home. He then ceased doing this, and, by the direction of the committee, caused the rule to be read to the pupils in all the school rooms. This action was commendable, and obedience on the part of the pupils was equally commendable. The rule and the method of enforcing it are reasonable, unless it be the law that those in control of our public schools have no jurisdiction over pupils outside the

schoolhouse yard. It is not only the legal right, but the moral duty, of the school authorities, to require children to go directly from school to their homes. All parents who have a proper regard for the welfare of their children desire it. The state makes it compulsory upon parents to send their children to school, and punishes them for failure to do so. The least that the state can in reason do is to throw every safeguard possible around the children who, in obedience to the law, are attending school. The dangers to which children are exposed upon the streets of cities are matters of common knowledge. Humanity and the welfare of the country demand that a most watchful safeguard should, so far as possible, accompany children, when required or allowed to be on the streets. Parents have a right to understand that their children will be promptly sent home after school, and to believe that something untoward has happened when they do not return in time. In no other way can parents and teachers act in harmony to protect children from bad influences, bad companionship, and bad morals. No trader or merchant has the constitutional right to have children remain in his place of business, in order that they may spend money there, while they are on their way to and from school. The liberty of neither the children nor parent nor trader is at all unlawfully restrained by this rule and its reasonable enforcement. The rule does not interfere with the right of the parent to send his child upon an errand, to a store or other reputable place, or to the home of a relative or friend to visit. Neither does it restrict the authority of parents over their children. This action on the part of the school board of the city of Detroit and its teachers is fully sustained by the authorities. *Lander v. Seaver*, 32 Vt. 120, 76 Am. Dec. 156; *Deskins v. Gose*, 85 Mo. 485, 55 Am. Rep. 387; *Sherman v. Charleston*, 8 Cush. 160; *Mechem*, Pub. Off. § 730.

Judgment is affirmed.

The other Justices concur.

MISSOURI SUPREME COURT.

STATE of Missouri, *Respt.*,

v.

Whitney LAYTON, *Appt.*

(160 Mo. 474.)

The statutory prohibition of the manu-

facture or sale of baking powder containing alum is not unconstitutional in view of the dispute as to the fact of its wholesomeness, which prevents the court from taking judicial notice that it is wholesome and innocuous.

(February 26, 1901.)

NOTE.—As to constitutionality of statute requiring manufacturers of baking powder to affix a label to every box stating the ingredients of 62 L. R. A.

which the powder is composed, see *State v. Sherod* (Minn.) 50 L. R. A. 660. For other cases on the question of the con-

APPEAL by defendant from a judgment of the St. Louis Court of Criminal Correction convicting him of selling food products containing alum, contrary to the provisions of the statute. *Affirmed.*

The facts are stated in the opinion.

Messrs. Seddon & Blair and Stanley Stoner, for appellant:

Defendant has the equal right that every other citizen has of assuming his ordinary calling or trade in any wholesome and well-established article of commerce, and, as the law under which he is convicted forbids him to pursue such a calling, it is unconstitutional and void.

2 Hare, Am. Const. Law, p. 772; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Mugler v. Kansas*, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; *Taylor v. Porter*, 4 Hill, 144, 40 Am. Dec. 274; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277; *State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317.

That the trade in which the defendant was engaged was a lawful business was a matter of common notoriety, of which the court should have taken judicial cognizance.

Tiedeman, Pol. Power, p. 289.

The law under which the defendant was convicted conflicts with the 14th Amendment of the Constitution of the United States, which guarantees to every man the equal protection of the law.

State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L. R. A. 265, 55 S. W. 627.

Messrs. Winston & Meagher also for appellant.

Messrs. Edward C. Crow, Attorney General, **Sam B. Jeffries**, and **Stewart, Cunningham, & Elliot**, for respondent:

The Constitution does not guarantee or give to defendant the right to manufacture or sell for food alum, or any chemical or substance which the legislature has declared to be unhealthy and forbidden.

State v. Addington, 77 Mo. 110; *State v.*

Bockstruck, 136 Mo. 335, 38 S. W. 317; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Powell v. Com.* 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Com. v. Alger*, 7 Cush. 53; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 667, 24 L. ed. 1036, 1038; *Boyd v. Alabama*, 94 U. S. 645, 24 L. ed. 302.

The trial court did not err in refusing to take judicial cognizance of the alleged fact that the trade of making and selling alum baking powders in which defendant was engaged was a lawful business.

Cooley, Const. Lim. 5th ed. pp. 222, 223; *State v. Rich*, 20 Mo. 393; *State v. Wiley*, 109 Mo. 439, 19 S. W. 197; *Ex parte Renfrow*, 112 Mo. 591, 20 S. W. 682; *State v. Daniels*, 66 Mo. 192; *State ex rel. Henderson v. Boone County Ct.* 50 Mo. 317, 11 Am. Rep. 415; *State v. Addington*, 77 Mo. 110, 12 Mo. App. 214; *State v. Campbell*, 64 N. H. 402, 13 Atl. 585; *United States v. Des Moines Nav. & R. Co.* 142 U. S. 510, 545, 35 L. ed. 1099, 1109, 12 Sup. Ct. Rep. 308; *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107, 37 Hun. 319.

The statute in question does not conflict with the 14th Amendment of the Constitution of the United States. It does not deny to any person the equal protection of the laws; nor does it conflict with any other provision of the Constitution of the United States or of the Constitution of Missouri.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 16, 43 L. ed. 49, 55, 18 Sup. Ct. Rep. 757; *Barnett v. Atlantic & P. R. Co.* 68 Mo. 56, 30 Am. Rep. 773; *State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317; *Butchers' Union S. H. & J. S. L. Co. v. Crescent City L. S.*

stitutionality of statutes regulating articles of food, see also *Dorsey v. State* (Tex. Crim. App.) 40 L. R. A. 201; *New Orleans v. Faber* (La.) 53 L. R. A. 165; *Chicago v. Netcher* (Ill.) 48 L. R. A. 261; (as to oleomargarine) *State v. Marshall* (N. H.) 1 L. R. A. 51, and note; *Com. use of Allegheny County v. Miller* (Pa.) 6 L. R. A. 633, and note; *Com. use of Allegheny County v. Weiss* (Pa.) 11 L. R. A. 530, and note; *Re Goeck* (C. C. D. Minn.) 10 L. R. A. 830; *Com. v. Huntley* (Mass.) 15 L. R. A. 839; *Com. v. Paul* (Pa.) 30 L. R. A. 396; *Com. use of Philadelphia County v. Schollenberger* (Pa.) 22 L. R. A. 155; *State v. Myers* (W. Va.) 35 L. R. A. 844; *State ex rel. Monnett v. Capital City Dairy Co.* (Ohio) 57 L. R. A. 181; (as to imitation lard) *State v. Snow* (Iowa) 11 L. R. A. 355; 62 L. R. A.

State v. Hanson (Minn.) 54 L. R. A. 468; (as to dairy products generally) *State v. Dupaquier* (La.) 26 L. R. A. 162; *Deems v. Baltimore* (Md.) 26 L. R. A. 544; *State v. Nelson* (Minn.) 34 L. R. A. 318; *State v. Broadbelt* (Md.) 45 L. R. A. 433; *State v. Schlenker* (Iowa) 51 L. R. A. 348; *State v. Crescent Creamery Co.* (Minn.) 54 L. R. A. 467; *People v. Blessecker* (N. Y.) 57 L. R. A. 178; *Littlefield v. State* (Neb.) 28 L. R. A. 588; (as to meat) *Newson v. Galveston* (Tex.) 7 L. R. A. 797; *Jacksonville v. Ledwith* (Fla.) 9 L. R. A. 69; (as to bread) *State v. Schlemmer* (La.) 10 L. R. A. 135; *Helena v. Dwyer* (Ark.) 39 L. R. A. 266; *People v. Wagner* (Mich.) 13 L. R. A. 286; (as to fruit) *Frost v. Chicago* (Ill.) 49 L. R. A. 657.

L. & S. H. Co. 111 U. S. 746, 750-753, 28 L. ed. 585, 586-588, 4 Sup. Ct. Rep. 652.

The subject of this legislation—the public health, and the prevention of the adulteration of food—is peculiarly within the power and protection of the legislature.

18 Am. & Eng. Enc. Law, p. 748; 1 Am. & Eng. Enc. Law, 2d ed. p. 739; *Com. v. Huntley*, 156 Mass. 236, 15 L. R. A. 839, 30 N. E. 1127; *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344; *State v. Campbell*, 64 N. H. 402, 13 Atl. 585; *Com. v. Waite*, 11 Allen, 264, 87 Am. Dec. 711; *Cooley*, Const. Lim. 5th ed. pp. 206, 207; *Edwards v. Lesueur*, 132 Mo. 410, 31 L. R. A. 815, 33 S. W. 1130; *State ex rel. Maggard v. Pond*, 93 Mo. 606, 6 S. W. 469; *Porell v. Pennsylvania*, 127 U. S. 678, 684, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; *Porell v. Com.* 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *State v. Addington*, 77 Mo. 110, 12 Mo. App. 214; *Com. v. Alger*, 7 Cush. 53.

Gantt, J., delivered the opinion of the court:

On the 30th day of August, 1899, the assistant prosecuting attorney of the St. Louis court of criminal correction lodged in that court the following information against Whitney Layton, of said city: "Richard Johnson, assistant prosecuting attorney of the St. Louis court of criminal correction, now here in court, on behalf of the state of Missouri information makes as follows: That Whitney Layton, in the city of St. Louis, on the 28th day of August, 1899, then and there doing business in this state, did unlawfully manufacture, sell, and offer to sell a certain compound and preparation, to wit, Layton's Health-Food Baking Powder, which said compound and preparation was so manufactured and sold for the purpose of being used, and was intended by said Layton to be used, in the preparation of food, in which said compound and preparation so manufactured and sold there was alum. Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state, etc."

The defendant was arrested, and entered his plea of not guilty. A jury was waived, and the cause tried to the court. At the trial the state's representative filed and read in evidence the following stipulation: "For the purpose only of the trial of this cause, and at said trial, the defendant, Whitney Layton, for a stipulation covering a part of the facts in the above-entitled case, admits that in the city of St. Louis, Missouri, on the 28th day of August, 1899, he, the defendant, then and there doing business in the state of Missouri, did manufacture,

sell, and offer to sell to J. M. Houston Grocer Company, then doing business at said city, a certain compound and preparation, to wit, one case containing two dozen one-pound cans of baking powder, known and designated as 'Layton's Health-Food Baking Powder,' which said compound and preparation, so manufactured, sold, and offered for sale by him for the purpose of its being used, was intended by defendant and by said J. M. Houston Grocer Company to be used, in the preparation of food. Defendant further admits that in said compound and preparation so manufactured, sold, and offered to be sold by him there was alum, and that the fact that the same contained alum was then well known to defendant. And it is further agreed and stipulated that at the trial of this case either party may offer any other evidence not inconsistent with the above facts which he may deem material, relevant, and competent in the case, subject to objection by the other party to its materiality, relevancy, or competency." The prosecution then rested.

The defendant then offered evidence tending to establish the following facts: Baking powders have been in use for more than fifty years. They are intended to furnish to the people a simple, cheap, efficient, and wholesome leavening agent in the cooking of food, as a substitute for yeast, which is a very slow and more expensive leavening agent, and one which requires considerable intelligence in the cook to use successfully. All baking powders furnish this leavening agent in the form of carbon dioxide (carbonic acid gas), which is given off from the baking powder in preparing and cooking food. This gas, being liberated in the dough, forms bubbles, which take permanent form in the baked bread, thus making it light and porous. All baking powders, in their essential features, are the same. They all supply this leavening agent (dioxide of carbon) by freeing it from bicarbonate of soda. They differ in the nonessential manner in which this carbon dioxide is released from the bicarbonate of soda. There are three classes of baking powders known to commerce, viz., the cream of tartar baking powders, the phosphate baking powders, and the alum baking powders. The cream of tartar powders are composed of bicarbonate of soda and cream of tartar (bicarbonate of potassium), mixed with starch as a filler. The soda and cream of tartar are combined in such proportions that when they are united together in the presence of water, in the process of cooking, they react upon each other, and free the carbon dioxide, which leavens the bread. The resulting product left in the bread after cooking is Rochelle salts, a

purgative agent. In the phosphate powders the active agent is the phosphate of calcium, which unites with the bicarbonate of soda and liberates the dioxide of carbon, the leavening agent. The alum powders, as they do not differ from the cream of tartar powders in the main essential features of a baking powder, to wit, the liberation of the carbon dioxide from bicarbonate of sodium, but merely in the nonessential mode of liberating the gas, do not differ from each other essentially. In the phosphate alum powders, phosphate of calcium is used to aid in liberating from the bicarbonate of soda the gas, the leavening agent, the essential thing. The straight alum baking powders are composed of bicarbonate of soda and a double sulphate salt of sodium and aluminum, which technically is not alum at all, but is popularly called "soda alum," with starch as a filler or carrier. The alum and the bicarbonate of soda are mixed in such proportions that in the cooking process the carbon dioxide is released as a leavening agent, as in the case of the cream of tartar baking powders. The resulting products are sulphate of sodium and hydroxide (hydrate) of aluminum. The evidence of defendant tended to show that none of the products left in the food cooked with alum baking powders are at all injurious to the human system. The evidence shows that the trade in alum baking powders, as a trade, has given entire satisfaction to the people. Alum baking powders are nearly as standard an article as flour or sugar. They are to be found upon the shelves of every grocery store, not only in Missouri, but in the United States. They were first introduced about 1870. In spite of the fiercest competition and most hostile rivalry upon the part of manufacturers of cream of tartar powders, who, the evidence shows, have used every effort to prejudice the mind of the public by every manner of advertisements and representations, the trade rapidly expanded, until it has now reached vast proportions. The evidence tended to show that alum baking powder sold in the United States last year amounted to not fewer than 120,000,000 pounds, and involved an enormous expenditure in its manufacture and distribution. The defendant's evidence also tended to show that not only was the particular case of baking powder, known as "Layton's Health Food," for the sale of which he was prosecuted, but also all alum baking powders in general, are, and always have been, healthful and wholesome adjuncts in the preparation of human food. The evidence tends to show that no one had ever either heard of or had known

of a single case where the health of a single human being had been injured, or had been supposed to have been injured, by the use of alum baking powder in the preparation of food, and that the trade in alum baking powders, as a trade, prior to the passage of this law, was an honest and lawful business in a generally harmless and useful preparation, used as an adjunct in the cooking of food. The manufacturers and sellers of both such powders—cream of tartar and alum—have been engaged in competition with each other in furnishing to the people, from bicarbonate of soda, a leavening agent for cooking bread, cake, etc. They differ only in the nonessential manner of freeing the gas. That the trade in cream of tartar powders has been practically monopolized by the Royal Baking-Powder Company, which controls the cream of tartar market. To all of this evidence counsel for the state objected when it was offered, on the ground that, in view of the stipulation made between the parties, which was read by the state in making its case, all evidence which might be offered by the defendant in his defense would be irrelevant and immaterial. The court at the time of the objection announced that it would not then rule upon the objection, but would hear the evidence, subject to such objection, and would at the end of the case announce its ruling, and, if it concluded the objection was well taken, would rule out all of such evidence. On the other hand, the state, in rebuttal, offered much evidence by distinguished chemists and physicians that alum, in the quantities usually used in the preparation of baking powders, was and is injurious to health; that while it assists in liberating the carbonic acid gas, and thus makes the bread light, there is a residuum of alumina left in the bread, which is soluble, and enters into the system, and acts as an astringent, and is deleterious; that there was a general prejudice in the minds of the public against alum powders; that, while the sale of alum powders was very enormous, people generally were not advised that they were purchasing alum powders. After all the evidence was in, the court sustained the objection of the state, and excluded all defendant's evidence, as irrelevant and immaterial to the issue in the case, to which the defendant duly excepted at the time. Every item of the evidence offered by defendant was avowedly introduced for the purpose of showing that the statute under which defendant was prosecuted was unconstitutional and void, which contention the court overruled, and found defendant guilty.

The statute which defendant is charged to

have violated is the act of May 11, 1899, and is as follows:

An Act to Prevent the Use of Unhealthy Chemicals or Substances in the Preparation or Manufacture of Any Article Used, or to be Used, in the Preparation of Food.

Be it enacted by the general assembly of the state of Missouri, as follows:

Sec. 1. That it shall be unlawful for any person or corporation doing business in this state to manufacture, sell, or offer to sell, any article, compound, or preparation, for the purpose of being used, or which is intended to be used, in the preparation of food, in which article, compound, or preparation, there is any arsenic, calomel, bismuth, ammonia, or alum.

Sec. 2. Any person or corporation violating the provisions of this act shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined not less than \$100, which shall be paid into and become a part of the road fund of the county in which such fine is collected.

Approved May 11th, 1899. Takes effect August 22d, 1899. [Acts 1899, p. 170.]

The defendant asked various declarations of law to the effect that the legislature could not arbitrarily declare his business unlawful, which were refused, and he saved his exceptions, and in due time filed his motions for new trial and in arrest, which were likewise overruled.

As already indicated in the statement of the case, the one great question upon this record is the constitutionality of the act of May 11, 1899, making it a misdemeanor in this state "for any person or corporation doing business in this state to manufacture, sell, or offer to sell, any article, compound, or preparation, for the purpose of being used, or which is intended to be used, in the preparation of food, in which article, compound, or preparation there is any . . . alum." The act was obviously aimed at what are known as "alum baking powders." While the act also condemns the use of arsenic, calomel, bismuth, and ammonia in baking powders, there is not the slightest evidence that either of these poisons or substances is ever used in the preparation of baking powders in the ordinary trade by reputable dealers and merchants, whereas the evidence which the court heard, but finally excluded in making up its verdict and judgment, disclosed that alum is, and has been for more than a quarter of a century, an ingredient in the preparation of baking powders; that baking powders containing alum in some degree are used to an enormous extent; that not less than 120,000,000 pounds of such powders have been sold in 62 L. R. A.

the United States in the year next preceding the filing of the information in this case. The defendant is a manufacturer of baking powder known as "Layton's Health-Food Baking Powder," and after the act of May 11, 1899, if valid, went into effect, sold a case of said baking powder in the city of St. Louis. The constitutionality of the act is assailed on two grounds: First, that it violates § 28, art. 4, of the Constitution of Missouri; second, that it conflicts with §§ 4 and 30 of art. 2 of the Constitution of Missouri.

It is a trite saying that, when the courts are called upon to decide that an act of the legislature violates the organic law, they start with every presumption in favor of the validity of the statute. This much we owe to a co-ordinate branch of the government, upon which the people, in the Constitution, have conferred the lawmaking power. The right and power of the courts, under our peculiar form of government, to declare a solemn and formal act of the legislature invalid, arise, not out of any supposed or assumed superiority of the judicial department over that of the legislative branch of the government, but are founded upon the fact that the Constitution is the organic law which defines the limitations of all branches of the government, and is the supreme law, by which the acts of all branches of the government must be tested, and in the very nature of things the judiciary must, in performing its functions, determine whether the legislative enactment is in harmony with the supreme law. Proceeding a step further, it must be conceded that the validity of the act in question must be referable to what we denominate the "police power of the state," and that the legislature is clearly the department of the government which is authorized to exercise the police power. Under forms of government where limitations upon executive and legislative powers do not exist, there is no restriction upon this necessary function of government, but under our Federal and state governments limitations are to be found in our written constitutions. Said the Supreme Court of the United States in *Mugler v. Kansas*, 123 U. S. loc. cit. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 297: "It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute (*Sinking-Fund Cases*, 99 U. S. 700-718, 25 L. ed. 496-501), the courts must obey the Constitution, rather than the lawmaking department of

government, and must, upon their own responsibility, determine whether in any particular case these limits have been passed. 'To what purpose,' it was said in *Marbury v. Madison*, 1 Cranch, 137-176, 2 L. ed. 60-73, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty,—indeed, are under a solemn duty,—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." Accepting this statement of the rights and duties of the respective departments, we are brought to the contention of the parties to this record.

The defendant insists that the compound prepared by himself and other manufacturers as and for a baking powder is a perfectly healthful article, that had been in general, indeed universal, use in this state and throughout the United States for thirty years; that these so-called alum baking powders have proven acceptable as a common household article, as a most useful adjunct to the cooking process; that during all that time not a single instance had occurred in which a single person had been rendered sick or suffered in health from their use; that they had become so acceptable to the bakers and housewives of the land that their production and sale amounted to 120,000,000 pounds in a single year; that no more objection could be urged against their use as being deleterious than can be and has been urged by vegetarians against the use of meat, or by certain persons against the common table salt or the use of wheat bread, and that it is no more liable to adulteration than flour or sugar. He urges that to strike down this great industry, in view of its recognized harmlessness, is an arbitrary and unwarranted attempt to exercise the police power of the legislature. On the other hand, the state insists that § 4 of our Bill of Rights, which provides "that all constitutional government is intended to promote

the general welfare of the people; that all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government, and that when government does not confer this security it fails of its chief design;" and § 30 of the Bill of Rights, which ordains "that no person shall be deprived of life, liberty, or property, without due process of law,"—are not infringed by this act; that "the Constitution does not guarantee or give to any person the right to manufacture or sell any chemical or substance which the legislature has declared to be unhealthy and has forbidden." The state's counsel further insist that the judgment of the criminal court is in conformity with the decision of this court in *State v. Addington*, 77 Mo. 110, which case, they insist, involved every essential feature of the case at bar.

In *State v. Addington*, 77 Mo. 110, the defendant was prosecuted under the statute of this state of March 24, 1881, entitled "An Act to Prevent the Manufacture and Sale of Oleaginous Substances or Compounds of the Same in Imitation of the Pure Dairy Products." Acts 1881, p. 120. In sustaining that statute this court stated concisely the ground upon which it rests, as follows: "The central idea of the statute before us seems very manifest. It was, in our opinion, the prevention of facilities for selling or manufacturing a spurious article of butter, resembling the genuine article so closely in its external appearance as to render it easy to deceive purchasers into buying that which they would not buy but for the deception. The history of legislation on this subject, as well as the phraseology of the act itself, very strongly tend to confirm this view. If this was the purpose of the enactment now under discussion, we discover nothing in its provisions which enables us . . . to say that the legislature, when passing the act, exceeded the power confided to that department of the government; and, unless we can say this, we cannot hold the act as being anything less than valid." Commenting upon this decision, Tiedeman, in his work on Limitations of Police Power (p. 296), says: "But the only valid objection to its sale is the close resemblance to genuine butter, and the consequent opportunity for the perpetration of fraud. And this was the sole ground upon which the constitutionality of the law was sustained by the supreme court of Missouri." In *State v. Bockstruck*, 136 Mo. 356, 38 S. W. 317, *State v. Addington*, 77 Mo. 110, was reviewed by the same judge who wrote the opinion in that case, and as confirming the view taken of that case by Tiedeman. We quote: "We con-

sider that the state has the same right to forbid and punish the manufacture of counterfeit butter that it has to forbid and punish the manufacture of counterfeit coin. The like view was taken by us of the validity of the act of 1881 in relation to the manufacture or sale of imitation butter (*State v. Addington*, 77 Mo. 110), though the latter act contained no such provisions as are contained in § 8 of the present act [Acts 1895, p. 27]. It will be observed that the court dwells in both cases upon the fact that in both acts "the evident object and dominating idea was to prevent the manufacture or sale of a spurious article of butter," and upon this ground we still have no hesitancy in holding that such legislation is clearly valid.

Such, also, was the ruling in *People v. Arensburg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277, in which the act was entitled "An Act to Prevent Deception in the Sale of Dairy Products," and it was forbidden to sell any article "in imitation or semblance or designed to take the place of natural butter." In *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29, the court of appeals held an act of the legislature invalid which made the manufacture out of any oleaginous substance or compound, other than that produced from unadulterated milk and cream, any article designed to take the place of butter, etc. Judge Rapallo, in the course of the opinion, after stating that the evidence disclosed that oleomargarine was a perfectly healthful and pure article of food, says: "One of the learned judges who delivered opinions at the general term endeavored to sustain the act on the ground that it was intended to prohibit the sale of any artificial compound as genuine butter or cheese made from unadulterated milk or cream; that it was that design to deceive which the law rendered criminal. If that were a correct interpretation of the act, we should concur with the learned judge in his conclusion as to its validity, but we could not concur in his further view that such an offense was charged in the indictment or proved upon the trial. . . . The prohibition is not of the manufacture or sale of an article designed as an imitation of dairy butter or cheese, or intended to be passed off as such, but of an article designed to take the place of dairy butter or cheese. . . . Simulation of butter is not the act prohibited." Again the court says: "It appears to us quite clear that the object and effect of the enactment . . . were not to supplement the existing provisions against fraud and deception by means of imitations of dairy butter, but to take a further and bolder step, and, by absolutely prohibiting the manufac-

ture or sale of any article which could be used as a substitute for it, however openly and fairly the character of the substitute might be avowed and published, to drive the substituted article from the market, and protect those engaged in the manufacture of dairy products against the competition of cheaper substances capable of being applied to the same uses as articles of food." The court then asks the question: "Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race?" The court held that statute unconstitutional. Judge Dillon, in his admirable work on Municipal Corporations (4th ed. § 141, p. 211), in a note to the text, says: "We cannot refrain from expressing our full concurrence in the views and conclusions of the court of appeals of New York in *People v. Marx*. . . . The Pennsylvania act of 1885, under which Powell was convicted (*Powell v. Com.* 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913, and Affirmed in 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257), makes the manufacture and sale of oleomargarine, though open and un concealed, a crime. We cannot but express our regret that the Constitution of any of the states or that of the United States admits of a construction that it is competent for a state legislature to suppress (instead of regulating), under fine and imprisonment, the business of manufacturing and selling a harmless and even wholesome article, if the legislature chooses to affirm, contrary to the fact, that the public health or public policy requires such suppression. The record of the conviction of Powell for selling without any deception a healthful and nutritious article of food makes one's blood tingle." At first blush the decisions in the *Marx* and *Addington Cases* may appear to collide, but upon a closer view it will be seen that the court of appeals distinctly assents to the doctrine upon which Judge Sherwood announces the *Addington Case* rests; for, speaking of the effort to sustain the New York statute on the ground "that it was intended to prohibit the sale of any artificial compound as genuine butter or cheese made from unadulterated milk or cream; that it was that design to deceive which the law rendered criminal,"—Judge Rapallo says: "If that were a correct interpretation of the act, we should concur as to its validity." As the oleomargarine act considered in the *Addington Case* prohibited imitation butter, and as this court held it was valid because it shut the door against the design to

perpetrate fraud, the great underlying principle of both cases was the same, though the two courts might differ as to the meaning of the words of the two acts.

Does the act of May 11th, making it penal to use alum in the preparation of baking powders, bring it within the reason of *State v. Addington*? In the *Addington Case* there was a recognized standard for the article which the legislature intended to protect against fraudulent imitation, to wit, natural butter made from pure dairy products or unadulterated milk; and, in accordance with our decision in that case, we held that statutes enacted to prevent the imposition of a deception upon others are clearly valid. *Cook v. State*, 110 Ala. 40, 20 So. 360; *Stolz v. Thompson*, 44 Minn. 271, 46 N. W. 410; *State v. Marshall*, 64 N. H. 549, 1 L. R. A. 51, 15 Atl. 210; *State, Waterbury, Prosecutor, v. Newton*, 50 N. J. L. 534, 2 Inters. Com. Rep. 63, 14 Atl. 604; *Com. v. Huntley*, 150 Mass. 236, 15 L. R. A. 839, 30 N. E. 1127; *State ex rel. Weideman v. Horgan*, 55 Minn. 183, 56 N. W. 688. But the question raised on this record, while a kindred one, is, we conceive, different. It seems to us that, in the nature of things, there is a wide difference between legislation prohibiting or regulating the manufacture and sale of an article which is manufactured with a design to imitate a standard or superior article, and pass it off on the public, which cannot readily detect the imposition, for something different from what it is, and the manufacture and sale of an article which in truth and fact is admitted to be innocuous and healthful and in general use, and about which there is neither secrecy, nor imitation of another article of conceded purity and wholesomeness. The *Addington Case*, that case does not reach the difficulty here. The statute upon which this prosecution is based is not based upon the idea of limitation of one article by another. No baking powder is recognized as the standard, as is butter from unadulterated milk in the oleomargarine statute. Here the statute must be upheld, if at all, upon the right of the legislature to make all needful laws to preserve the public health. The right of the state to protect the health, morals, and safety of its people by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the Constitution of the United States, is now recognized by all courts in this country. It is peculiarly a legislative function. While it is true that

there are limits, under our system, to this power, we must start with the presumption in favor of the act. While we do not accede to the proposition that the legislature can arbitrarily declare any article of food in general use, and concededly wholesome and innocuous, to be unhealthy, and its production and sale a crime, and would have no hesitancy in declaring such an act void when the act, on its face, disclosed its arbitrary and unreasonable character, or where, as in the *Marx Case*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29, when such an act is challenged on such ground, it is admitted by the state that the prohibited article is innocuous and beneficial in itself, and is not made in imitation of another, or with a view to deceive the public, but is made and vended without secrecy and without imitation of any other, and the only purpose of the law is to prevent competition, still we find ourselves confronted in this case with a state of facts essentially different from that presented to the court in the *Marx Case*. While defendant offered much evidence to show that alum baking powders were a useful and harmless preparation, there is no gainsaying the fact that the state offered much pertinent testimony to the contrary. That there has long existed a strong prejudice against the use of alum in the making of bread, must be conceded. Whether or not the prejudice is well founded is another matter. As early as the thirty-seventh year of the reign of George the Third the British Parliament absolutely prohibited the use of alum in the making of bread. Stat. 37 Geo. III. chap. 98, § 21. And, irrespective of the statute, it was held indictable to use it in large quantities. *Rea v. Dixon*, 4 Campb. 12. Such seems still to be the statute law of England. Bread Act 1836; 1 Chitty Eng. Stat. titles, *Bread* and *Adulteration of Foods*. Several states of our Union, while not going to the extreme of our general assembly, have statutes passed with a view to the protection of the public against these alum powders, by requiring that the cans in which they are sold shall give notice that they contain alum; and these acts have been sustained as fairly within the police power of the state. This court, in view of this sharp conflict of testimony as to the noxious or innocuous character of alum baking powders, cannot take judicial notice that these powders are a perfectly innocuous preparation. Under these circumstances, then, are we to hold that the court of criminal correction erred in not passing upon the question of fact tendered to him, and, having found the fact, in not deciding the law constitutional or unconstitutional, accordingly as it appeared to him to be harmful and deleterious, or

harmless and innoxious? "If so," as was said in dissenting opinion in *People v. Ciperly*, 37 Hun, 324, which was adopted by the court of appeals of New York (the same court which decided *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29) in reversing the judgment in that case (101 N. Y. 634, 4 N. E. 107) "the court must charge a jury in each case that, if they find milk below that standard to be unwholesome, then the statute is constitutional; if they find it to be wholesome, then the statute is unconstitutional. Evidently a constitutional question cannot be settled, or, rather, unsettled, in that way. The constitutionality would vary with the varying judgments of juries." Substitute alum baking powders for milk, and we have the rule applicable to this case. Long before the decision of the court of appeals in that case, however, Judge Leonard, of this court, in *State v. Rich*, 20 Mo. 396, had said: "If, whenever any act done under the authority of the law came in question collaterally, the constitutionality of the law could be contested, then the trial of the main issue must necessarily be delayed until the preliminary fact upon which the validity of the contested legislative act depended should be first tried and determined, upon testimony which, being different in different cases, might involve the absurdity of deciding the law constitutional one day and unconstitutional the next." And he held the evidence inadmissible. What, then, is the test when the constitutionality of an act of the legislature is assailed as invading the right of the citizen to use his faculties in the production of an article for sale for food or drink? We answer that, if it be an article so universally conceded to be wholesome and innoxious that the court may take judicial notice of it, the legislature, under the Constitution, has no right to absolutely prohibit it; but, if there is a dispute as to the fact of its wholesomeness for food or drink, then the legislature can either regulate or prohibit it. The constitutionality of the law is not to be determined upon the question of fact in each case, but the courts determine for themselves upon the fundamental principles of our Constitution, which vests the legislative power in the general assembly, and the rule of construction, adopted by our courts, "that an act of the legislature is not to be declared void unless the violation of the Constitution is so manifest

as to leave no room for reasonable doubt." *Com. ex rel. O'Hara v. Smith*, 4 Binn. 117; *Cooley*, Const. Lim. 6th ed. 216; *State v. Nelson*, 52 Ohio St. 88, 26 L. R. A. 317, 39 N. E. 22. The cases abound in the greatest courts, state and Federal, in which this limitation has been set upon their own authority by the greatest judges who have illumined our jurisprudence. *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Sinking-Fund Cases*, 99 U. S. 700, 25 L. ed. 496; *Re Wellington*, 16 Pick. 87, 26 Am. Dec. 631; *Perry v. Keene*, 56 N. H. 514. In this last case Ladd, J., said: "Certainly it is not for the court to shrink from the discharge of a constitutional duty; but, at the same time, it is not for this branch of the government to set an example of encroachment upon the province of the others. It is only the enunciation of a rule that is now elementary in the American states to say that, before we can declare this law unconstitutional, we must be fully satisfied—satisfied beyond a reasonable doubt—that the purpose for which the tax is authorized is private, and not public." Keeping in view this cardinal principle for our guidance, how can we say, in view of the contradictory evidence as to the effect on the health of bread made with alum baking powders, that the legislature, beyond a reasonable doubt, transcended its constitutional right in prohibiting the use of alum in bread? We are not authorized to do so. It may be argued with great force that a statute similar to the Minnesota statute would be sufficient for the protection of purchasers who have a prejudice against these powders. It may be that, in the small quantities now used in these alum powders generally, it cannot be shown that any particular person has ever lost his health from their use. But that the legislature deemed their use deleterious cannot be denied, and there is no such conclusive evidence to the contrary as to justify this court in holding that this act, intended for the benefit of the public health, is void. The mere wisdom or unwisdom of the act is not for us to decide.

The judgment must be, and is, affirmed.

Sherwood, P. J., and Burgess, J., concur.

Writ of error dismissed by Supreme Court of United States, December 22, 1902.

SOUTH DAKOTA SUPREME COURT.

STATE of South Dakota
v.

Willis H. BURT, *Plff. in Err.*

(.....S. D.)

The commission of incest by a man is not a crime against his wife, within the meaning of a statute forbidding the latter to be a witness against him without his consent, except when he is prosecuted for the commission of a crime against her.

(April 7, 1903.)

ERROR to the Circuit Court for Brown County to review a judgment convicting defendant of incest. *Reversed.*

The facts are stated in the opinion.

Messrs. E. T. Taubman and L. W. Crofoot, for plaintiff in error:

At common law neither husband nor wife was admissible as a witness in a cause, either civil or criminal, in which the other was a party.

1 Greenl. Ev. 13th ed. § 334.

To this general rule excluding the husband and wife as witnesses there were some exceptions, which were allowed from the necessity of the case. So, a wife was held to be a competent witness on indictments for her forcible abduction, for rape committed on her own person, for an assault and battery committed upon her, etc.

1 Greenl. Ev. § 343; *Stein v. Bowman*, 13 Pet. 217, 10 L. ed. 133; *Crawford v. State*, 98 Wis. 623, 74 N. W. 537; *State v. Berlin*, 42 Mo. 572; *State v. Ulrich*, 110 Mo. 350, 19 S. W. 656.

The general object of the Codes was to render the rules and principles of law definite and certain, so far as might be, by enacting the existing law as it had been established by the decisions of the common-law courts, and, where the decisions were conflicting, by adopting those which were supported by the better reason.

People v. Langtree, 64 Cal. 259, 30 Pac. 813.

Our statute makes no change in the law in criminal cases.

NOTE.—For a case in this series holding that bigamy is not a "personal wrong or injury" within the meaning of a statute permitting a wife to testify against her husband in such cases, see *People v. Quanstrom* (Mich.) 17 L. R. A. 723.

For a case holding that an act of sexual intercourse with a girl by her consent when she was too young legally to consent is not an act of "criminal violence," within the meaning of a statute as to the right of a wife to testify against her husband, see *People v. Curiale* (Cal.) 59 L. R. A. 388.
62 L. R. A.

State v. Armstrong, 4 Minn. 335, Gil. 251; *People v. Langtree*, 64 Cal. 259, 30 Pac. 813; *People v. Mullings*, 83 Cal. 138, 23 Pac. 230; *Compton v. State*, 13 Tex. App. 271, 44 Am. Rep. 703; *Boyd v. State*, 33 Tex. Crim. Rep. 470, 26 S. W. 1090; *Baxter v. State*, 34 Tex. Crim. Rep. 516, 31 S. W. 394; *People v. Quanstrom*, 93 Mich. 254, 17 L. R. A. 723, 53 N. W. 165; *People v. Isham*, 109 Mich. 72, 67 N. W. 819; *Bassett v. United States*, 137 U. S. 496, 34 L. ed. 762, 11 Sup. Ct. Rep. 165.

Messrs. John H. Perry and A. W. Burt, Attorney General, for defendant in error:

The wife was a competent witness.

State v. Bennett, 31 Iowa, 24; *State v. Hazen*, 39 Iowa, 648; *State v. Sloan*, 55 Iowa, 219, 7 N. W. 516; *State v. Hughes*, 58 Iowa, 165, 11 N. W. 706; *State v. Chambers*, 87 Iowa, 1, 53 N. W. 1090; *Lord v. State*, 17 Neb. 529, 23 N. W. 507; *Owens v. State*, 32 Neb. 174, 49 N. W. 226; *Hills v. State*, 61 Neb. 589, 57 L. R. A. 153, 85 N. W. 836; *State v. Vollender*, 57 Minn. 225, 58 N. W. 978; *Jordan v. State*, 142 Ind. 422, 41 N. E. 817.

Haney, P. J., delivered the opinion of the court:

The defendant was convicted of incest with his daughter, and sentenced to imprisonment for the term of ten years. It is contended that the judgment of the circuit court should be reversed because defendant's wife was examined as a witness on behalf of the state, without the defendant's consent, and against his objection. As the wife's testimony was decidedly damaging to the defendant, and proper and timely objections were interposed, a reversal is unavoidable if she was not a competent witness against her husband without his consent. The statutes of this state contain the following provisions: "No person offered as a witness in any action or special proceeding, in any court, or before any officer or person having authority to examine witnesses, or hear evidence, shall be excluded or excused, by reason of such person's interest in the event of the action or special proceeding; or because such person is a party thereto; or because such person is a husband or wife of a party thereto, or of any person in whose behalf such action or special proceeding is brought, prosecuted, opposed, or defended, except as hereinafter provided: (1) A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage, or aft-

erward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this subdivision does not apply to a civil action or a proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other." Dak. Comp. Laws 1887, § 5260. Under this statute a wife cannot be examined for or against her husband without his consent, except in "a criminal action or proceeding for a crime committed by one against the other." What, then, is "a crime by one against the other," within the meaning of this statute? The language employed is unfortunately indefinite and uncertain, and has caused the courts no little difficulty in ascertaining the legislative intent. The general rule of the statute is that neither husband nor wife can testify for or against the other without the other's consent. Certain criminal actions are excepted. Clearly, all criminal actions are not excepted. It is only in an action for a crime committed by her husband against herself that the wife is a competent witness without his consent. Is incest such a crime? The same language is found in the statutes of Iowa and Nebraska, and the courts in those states hold that the wife is a competent witness against her husband in actions wherein he is charged with adultery, bigamy, or incest. *State v. Sloan*, 55 Iowa, 217, 7 N. W. 516; *State v. Chambers*, 87 Iowa, 1, 53 N. W. 1090; *Lord v. State*, 17 Neb. 526, 23 N. W. 507; *Owens v. State*, 32 Neb. 167, 49 N. W. 226. It was a well-known rule of the common law that neither husband nor wife was a competent witness in a criminal action against the other, except in cases of personal violence the one upon the other, in which the necessities of justice compelled a relaxation of the rule. *Bassett v. United States*, 137 U. S. 496, 34 L. ed. 762, 11 Sup. Ct. Rep. 165. Under a statute allowing the wife to testify against her husband without his consent only in "a criminal action or proceeding for a crime committed by one against the other," it is held in Minnesota that the exception was inserted simply to save those cases where at common law the wife could be a witness against her husband, and not to introduce any new rule or extend the old one. *State v. Armstrong*, 4 Minn. 335, Gil. 251. In Texas a statute providing that "the husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other," has been construed to mean some act of personal violence by the one against the other; and in case of incest, where the defendant's wife was permitted to testify

against him, the judgment was reversed for the reason that she was not a competent witness. *Baxter v. State*, 34 Tex. Crim. Rep. 516, 31 S. W. 394. Section 1881 of the California Code of Civil Procedure is identical; the same as the statute of this state, heretofore quoted, so far as it relates to the examination of either the husband or wife without the other's consent. Section 1322 of the California Penal Code contains the following. "Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties." "We think," says the supreme court of that state, "upon a fair construction both mean the same thing, although the Penal Code is more explicit than the other." *People v. Langtree*, 64 Cal. 256, 30 Pac. 813. These sections of the California Codes are identical with those of Utah which were construed by the United States Supreme Court in *Bassett v. United States*, 137 U. S. 496, 34 L. ed. 762, 11 Sup. Ct. Rep. 165; wherein that learned court followed the supreme court of California, holding that both sections meant the same thing; that they were merely declaratory of the common law; and that they did not permit a wife to testify against her husband, without his consent, in cases of polygamy or adultery. In that case Mr. Justice Brewer, speaking for the court, after stating the common-law rule, and alluding to the decisions in Iowa, Nebraska, Minnesota, and Texas, uses the following language: "We conclude, therefore, that the section quoted from the Code of Civil Procedure, if applicable to a criminal case, should not be adjudged as working a departure from the old and established rule, unless its language imperatively demands such construction. Does it? The clause in the Civil Code is negative, and declares that the exception of the incompetency of wife or husband as a witness against the other does not apply to a criminal action or proceeding for a crime committed by one against the other. Is polygamy such a crime against the wife? That it is no wrong upon her person is conceded, and the common-law exception to the silence upon the lips of husband and wife was only broken, as we have noticed, in cases of assault of one upon the other. That it is humiliation and outrage to her is evident. If that is the test, what limit is imposed? Is the wife not humiliated, is not her respect and love for her husband outraged and betrayed, when he forgets his integrity as a man, and violates any human or divine enactment? Is she less sensitive, is she less humiliated, when he commits murder, or robbery, or forgery, than when he commits

polygamy or adultery? A true wife feels keenly any wrong of her husband, and her loyalty and reverence are wounded and humiliated by such conduct. But the question presented by this statute is not how much she feels or suffers, but whether the crime is one against her. Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the wife; and, as the statute speaks of crimes against her, it is simply an affirmation of the old, familiar, and just common-law rule. We conclude, therefore, that under this statute the wife was an incompetent witness as against her husband." Further citation of authorities is unnecessary to show that the language of our statute has been employed in numerous states, and that there is irreconcilable conflict regarding its proper construction in cases of adultery, bigamy, and incest. After thoughtful consideration, realizing the importance of the question here presented to this court for the first time, we cannot avoid the conclusion that the legislature intended to exclude the wife's testimony in this class of cases when its introduction is not consented to by her husband. As heretofore suggested, the general rule relating to the examination of married persons excludes the testimony of each without the consent of the other. The competency of either in the absence of consent is the exception. He who relies upon an exception must show himself to be clearly within its provisions. Under the statute the wife can testify without the consent only in a criminal action or proceeding for a crime committed by the husband against herself. An assault and battery by the husband upon the wife would certainly fall within the exception. An assault and battery upon a third person would as certainly not fall within the exception. In cases of rape the crime is committed against the outraged female. In cases

of adultery and kindred offenses, the unlawful intercourse being voluntary, both parties are at fault, and it cannot be said that the crime is committed against any particular person. With reference to this statute the husband's crimes might be classified thus: (1) Those which are against persons other than his wife; (2) those which are against no particular person; and (3) those which are against his wife. It is only in actions for crimes belonging to the last-mentioned class that the wife can testify for or against her husband without his consent. Had the defendant, in the case at bar, been a widower when the acts were done for which he is being punished, his crime would have been the same. The existence of the marital relation between the witness and the defendant did not, in any legal sense, affect or constitute any element of the crime, for which he was convicted. Should we hold that the crime charged in this action was one against the wife, it would logically follow that the rape or murder of defendant's daughter would have been a crime against her within the meaning of the statute. To hold that a wife may testify for or against her husband, without his consent, in cases of incest, would be, in effect, to establish the rule that either husband or wife may testify for or against the other, without consent, in all actions wherein either is defendant; and such was manifestly not the legislative intent. With the policy of this statutory rule the courts are not concerned. If the law should be changed the duty of changing it devolves upon the legislature, not upon this court. As all of the wife's testimony should have been excluded because she was not a competent witness, assignments of error relating to particular portions of it need not be considered.

The judgment of the Circuit Court is reversed and a new trial ordered.

TENNESSEE SUPREME COURT.

STATE of Tennessee, *Appt.*,
v.

N. T. COOK.

(107 Tenn. 499.)

1. A state statute forbidding the taking of a note for an interest in a patent right which does not state that fact on its face is not repugnant to the provision of the

NOTE.—On the question of the validity of the statute requiring every obligation given in consideration of the sale of a patent right to so state on its face, see cases in *note* to *Com. v. Petty* (Ky.) 29 L. R. A. 786; also *Mason v. McLeod* (Kan.) 41 L. R. A. 548.
62 L. R. A.

Federal Constitution empowering Congress to secure to inventors the exclusive right to their discoveries.

2. The police power will authorize the passage of statutes requiring notes given for patent rights to state that fact on their faces.

3. A statute requiring notes given for patent rights so to state on their faces is not obnoxious to constitutional prohibitions of class legislation.

(June 24, 1901.)

A PPEAL by the state from a judgment of the Circuit Court for Henderson County quashing an indictment charging de-

fendant with taking a note for an interest in a patent right which did not show that fact upon its face. *Reversed.*

The facts are stated in the opinion.

Mr. G. W. Pickle, Attorney General, for the State.

Messrs. Ross & Ross for appellee.

Caldwell, J., delivered the opinion of the court:

In March, 1901, N. T. Cook was indicted in the circuit court of Henderson county for violating § 1 of chapter 77 of the Acts of 1897, in that he, in his own behalf, as charged in one count, and in the representative capacity of secretary for B. D. Keeton & Co., as charged in another count, on the 2d day of November, 1900, took and received the promissory note of W. P. Reddin for \$75, as part consideration for a territorial interest in a certain patent for a boring and mortising machine, without having the note show clearly on its face that it was given for an interest in a patent right. The indictment was quashed, on the ground that the enactment on which it was based is void for repugnancy to that provision of the Federal Constitution relating to patents; and the state appealed in error.

The statute in question is as follows: "Sec. 1. Be it enacted by the general assembly of the state of Tennessee, that hereafter it shall be unlawful for any person, either in his own behalf, or in a representative capacity, to take or receive for the sale of a patent right—or any interest therein—a note or other written security, given for such right or any interest therein unless it shall clearly appear upon the face of the note or other security, that the same is given in the purchase of a patent right or an interest therein. Sec. 2. Be it further enacted that every person violating the 1st section of this act shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished for each offense by imprisonment in the penitentiary not less than one year nor more than five years." Acts 1897, chap. 77.

That part of the Federal Constitution supposed to have been violated by that act provides that, "the Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U. S. Const. art. 1, § 8, subsec. 8. As expressly stated therein, the object of that provision is to promote the progress of science and useful arts in the United States, and that object is to be accomplished by congressional legislation which will secure to authors and inventors, for limited times, the exclusive right to their respective writings

and discoveries in every state. Congress has passed numerous acts with that end in view. Some of the most important of them are incorporated in the Revised Statutes of the United States at §§ 4883 to 4936, inclusive (U. S. Comp. Stat. 1901, pp. 3381-3400). They prescribe the mode of obtaining letters patent, and secure to patentees the exclusive right to their respective patents. "The exclusive right" referred to in the organic law, and secured by the statute, is the equivalent of exclusive ownership; and ownership includes the power to sell. The right of sale is an inherent and essential part of unlimited ownership; it is one of the most important elements of property. *Holden v. Hardy*, 169 U. S. 391, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Harbison v. Knoxville Iron Co.* 103 Tenn. 439, 56 L. R. A. 316, 53 S. W. 955. Moreover, § 4898 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3387) expressly authorizes every patentee to assign his patent, or any interest therein, by proper written instrument, and gives his assignee the same authority.

The essence of the objection urged by the defendant against the state legislation under which he stands indicted is that it, as he contends, violates the Constitution of the United States, in that it restricts and impairs his right to sell his patent or any interest therein. Though a great deal may be and has been said in support of that objection, this court does not think it tenable. The act assailed was not intended to have, and in fact it does not have, the effect ascribed to it by the defendant. It does not really restrict or impair the right of the true owner to legally sell any patent or interest therein. Since the passage of the act, as before, every patentee, and every assignee of a patent or interest therein, may, without let or hindrance on the part of the state, make as many sales as he can find purchasers, and at such prices and on such terms as the contracting parties may agree upon. No burden is placed on the seller; no restraint on the purchaser. The object is not to restrict or impair the right of sale in any degree, but only to protect purchasers in some measure against the deceptive and fraudulent exercise of that right. The legislature for more than twenty years has regarded such protection expedient for the general welfare of the state; and, to secure it, has passed two acts. The first one (chapter 228 of the Acts of 1879) provides that, "a note or other written security given in this state in the purchase of a patent right or any interest therein shall be subject in the hands of any holder or assignee to all legal and equitable defenses to which it was subject in the hands of the original payee, when the fact that it

was given in such purchase appears on its face." Milliken & V. Code, § 2481; Shannon's Code, § 3216. That act came before this court for construction, and was treated as valid, without considering the question of its constitutionality, in *Harmon v. Hagerty*, 88 Tenn. 705, 13 S. W. 690, and *First Nat. Bank v. Stockell*, 92 Tenn. 252, 20 L. R. A. 605, 21 S. W. 523. In each instance the enactment was confined to its terms, and was held not to embrace a note actually given for an interest in a patent but not showing that fact upon its face. With a view of compelling a recital of that fact in all such notes, and bringing them within the operation of that act, chapter 77 of the Acts of 1897, that now under consideration, was passed. It is supplemental to the act of 1879, and only penalizes the seller's failure to have any written obligation he may take for a patent, or any interest therein, to show upon its face the consideration for which it is given, and thereby renders the former enactment more efficient. The two statutes are to be construed together, as different parts of the same general legislative scheme. Their combined effect, when each is strictly observed and enforced, is simply to prevent written obligations for the purchase of patents or interests therein from being negotiable in the highest sense, and to subject them in whosoever hands to all defenses available to the maker against the original payee. So construed, neither act by itself, or the two combined into a single scheme, can be truly said to contravene any provision of the Federal Constitution or statutes in reference to patents, or to restrict or impair the right of sale guaranteed thereby. The grant of an exclusive right to sell a patent in Tennessee does not imply that the state shall maintain such laws as will make notes executed for such patents, or an interest therein, negotiable, nor that it shall not pass laws subjecting them to all proper defenses as against all holders. It might be of some pecuniary advantage to some real or pretended patentee that notes executed to him for his patent, or an interest therein, should be clothed with the completest negotiability: but the privilege of enjoying that advantage is not embraced in his right to sell, nor is a statute that denies him such advantage an abridgment of that right, or a detraction from it. A patentee's right of sale as such is, of course, the same in every state: and yet it is obvious that his sale notes may be negotiable in some states and non-negotiable in others, according to their local laws on that subject. Again, if his right of sale, which must be the same in every state, included the privilege of demanding negotiability of sale notes, all states, though otherwise empowered and per-

mitted to adopt laws of the one type or the other at will, would be constrained, at least as to him, to conform them to his personal interest,—an idea not to be entertained for an instant. See *Tod v. Wick Bros.* 36 Ohio St. 370.

These statutes are also sustainable as valid police regulations, having been passed in good faith for the real promotion of the public welfare, and being well calculated to accomplish that end through the fair and much needed protection thereby afforded against imposition and fraud, so often and so easily perpetrated in the sale of the peculiar incorporeal right, or intangible property, contemplated. We are aware of no case in which the Supreme Court of the United States has considered the validity or invalidity of such legislation. The decisions of other courts are not uniform. Some of them deny, and others affirm, the constitutionality of similar statutes; the earlier adjudications being mainly of the former class, and the later ones generally of the latter class. Among the cases in which the denial is made are: *Ex parte Robinson*, 2 Biss. 309, Fed. Cas. No. 11,932; *Helm v. First Nat. Bank*, 43 Ind. 167, 13 Am. Rep. 395; *Hollidu v. Hunt*, 70 Ill. 109, 22 Am. Rep. 63; *Cranston v. Smith*, 37 Mich. 309, 26 Am. Rep. 514; *Crittenden v. White*, 23 Minn. 24, 23 Am. Rep. 676; *Woollen v. Banker*, 2 Flipp. 33, 6 Am. Law Record, 236, Fed. Cas. No. 18,030, 22 Am. Rep. 69 note. And among those making the affirmative are: *Brechbill v. Randall*, 102 Ind. 528, 52 Am. Rep. 695, 1 N. E. 362; *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386; *Tod v. Wick Bros.* 36 Ohio St. 370; *Haskell v. Jones*, 86 Pa. 173; *Herdie v. Roessler*, 109 N. Y. 127, 16 N. E. 198; *Tilson v. Gatling*, 60 Ark. 114, 29 S. W. 35; *Mason v. McLeod*, 67 Kan. 105, 41 L. R. A. 548, 45 Pac. 76. If necessary, other cases of each line might be cited. *Ex parte Robinson*, 2 Biss. 309, Fed. Cas. No. 11,932, which stands at the head of those cases declaring legislation of this kind violative of the Federal Constitution, and upon whose authority the most of them seem to be rested, is believed by some courts to have been overthrown by the reasoning of the Supreme Court of the United States in *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Reeves v. Corning*, 51 Fed. 774; *Brechbill v. Randall*, 102 Ind. 528, 52 Am. Rep. 695, 1 N. E. 362, but a different view of that reasoning was expressed, and the doctrine of *Ex parte Robinson* applied, in *Castle v. Hutolinson*, 25 Fed. 394. However that may be, it is certain that the earlier Indiana cases, which followed *Ex parte Robinson*, have been overruled by later ones, which distinctly assert the opposite doctrine; as

Mason v. McLeod, 57 Kan. 105, 41 L. R. A. 548, 45 Pac. 76, which is the latest of all these cases coming under our observation, the court, after reciting the several provisions of the Kansas statute, including one like that contained in our act of 1897, said: "In our opinion these provisions do not trench upon the Federal power, nor interfere with the right secured to the patentee by the Federal law. It is true that no state can interfere with the right of the patentee to sell and assign his patent, or take away any essential feature of his exclusive right. The provisions in question, however, have no such purpose or effect. They are in the nature of police regulations, designed for the protection of the people against imposition and fraud. There is great opportunity for imposition and fraud in the transfer of intangible property, such as exists in a patent right, and many states have prescribed regulations for the transfer of such property differing essentially from those which control the transfer of other property. There were some early decisions holding that such regulations trench upon the Federal power and the rights of the patentee; but recent authorities hold that reasonable police regulations may be enacted by the state without usurping any of the powers of the Federal government, or infringing upon the exclusive right of the patentee."

It cannot properly be assumed that every requirement the state may make of a patentee in connection with the sale of his patent is an unauthorized and illegal interference with the right granted him by the Federal government. Some requirements that have been made from time to time deserve that characterization, because really of a burdensome and unjust nature; while others do not, because not of that nature. One instance of the former kind is a requirement that the patentee shall pay a license tax for the privilege of selling his patent in the state. Legislation making this exaction, like that laying a similar burden on interstate commerce (*Robbins v. Shelby County Tazing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *State v. Scott*, 98 Tenn. 254, 36 L. R. A. 461, 39 S. W. 1), is repugnant to the Federal Constitution, and therefore null and void. *People ex rel. Edison Electric Illuminating Co. v. Brooklyn*, 156 N. Y. 417, 42 L. R. A. 290, 51 N. E. 269; *Com. v. Petty*, 96 Ky. 452, 29 L. R. A. 786, 29 S. W. 291; *State v. Butler*, 3 Lea, 222. An instance of the other kind is afforded by the present enactment, which, as already seen, is neither burdensome nor unjust.

It should be observed, in passing, that there is a marked difference under the law between the right to sell the patent itself

and the right to sell the patented article. The Federal government protects the former (cases last cited), but not the latter, from state taxation (*Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565). Indeed, the state may, by reasonable police legislation, actually exclude the patented article, when deemed dangerous, from sale at all in the state. *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115, Affirming *Patterson v. Com.* 11 Bush, 311, 21 Am. Rep. 220. Notwithstanding the legal distinction between the right to sell the patent and the right to sell the patented article, so clearly defined in *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115, and *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565, and the greater latitude allowed the states in reference to the latter, we think the announcement of their general police power made in each of those cases conclusive in favor of the constitutionality of the act impeached in this case.

Another ground of the motion to quash (not sustained by the learned circuit judge) is that the act is vicious class legislation, and therefore violative of § 8 of article 11 of the state Constitution, and void. This impeachment is not sustainable. The act is in fact class legislation, in that it applies alone to those who sell patents or interests therein; but it is not of the vicious kind, because the classification is natural and reasonable, and not arbitrary and capricious. The latter, and not the former, kind of partial legislation is obnoxious to the organic provision mentioned, and also to § 8 of article 1 of the state Constitution, and to § 1 of the 14th Amendment to the Constitution of the United States. *Petit v. Minnesota*, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666; *State ex rel. Astor v. Schlitz Brewing Co.* 104 Tenn. 731, 732, 59 S. W. 1033, and citations.

The fact that patent rights constitute a large and peculiar class of property, and that sales of them afford unusual and peculiar opportunities for the employment of imposition and fraud, is a good reason for the passage of a law applicable to them alone. It commends the present act's classification as reasonable and natural, and saves it from condemnation as invalid class legislation. Indeed it is not essential to the validity of class legislation that the ground of the classification should be found by the court to be so distinct and potent as it undoubtedly is in this case. "The state may distinguish, select, and classify objects of legislation, and necessarily this power must have a wide range of discretion." *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 291, 42 L. ed. 1043, 18 Sup. Ct. Rep. 594. "And this because of the function of legislation

and the purposes to which it is addressed. Classification, for such purposes, is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary." *Orient Ins. Co. v. Daggs*, 172 U. S. 562, 43 L. ed. 554, 19 Sup. Ct. Rep. 281. The last two cases, with many others decided by the same distinguished court, were cited on the same subject in *State ex*

rel. Astor v. Schlitz Brewing Co. 104 Tenn. 732, 59 S. W. 1033.

Discovering no constitutional infirmity in the law challenged by the defendant, but being satisfied of its validity for the reason stated herein, *the judgment of the court below is reversed*, and the case remanded for further proceedings.

Writ of error dismissed by Supreme Court of United States January 12, 1903.

WEST VIRGINIA SUPREME COURT OF APPEALS.

PENNSYLVANIA RAILROAD COMPANY,

Plff. in Err.,

v.

W. W. ROGERS *et al.*

(52 W. Va. 450.)

- *1. Garnishment is the exercise of a special and limited statutory power, the requisites of which are jurisdictional.
2. Although, in such proceeding, there is no actual manual seizure of property by the executing officer, it is in the nature of a proceeding *in rem*, and jurisdiction of the debt or property sought to be thereby subjected must be obtained, else the court cannot pronounce judgment of condemnation against it.
3. Garnishment is a dual proceeding, moving against the garnishee *in personam* to compel him to answer and disclose what property and estate of the defendant he has in his hands and to hold the same subject to the order of the court, and against the property and estate itself to extinguish the right of the defendant in it by condemnation and appropriation of it to the satisfaction of the plaintiff's claim.
4. A nonresident, temporarily in the state, may be summoned and compelled to answer as garnishee, but if, upon his answer, it be established that he is a nonresident, he cannot be subjected to further proceedings in the cause, for want of jurisdiction, unless, when garnished, he have in the state property of the defendant in his possession, or be bound to pay the defendant money or deliver to him property within the state.
5. Foreign corporations and nonresident individuals stand upon the same footing in respect to garnishment, except that the former are subject to garnishment when doing business in the state in which the garn-

ishment issues, in such sense and to such extent as to have become domiciled therein.

6. A debt due from a foreign railroad corporation operating no railroad in this state, and doing no business here other than maintaining, jointly with other railroads, an agency relating to through freight service, and for the soliciting of freight for such company, to be handled on its lines without the state, is beyond the territorial jurisdiction of the courts of this state, and not subject to garnishment here.

7. The garnishee, in the eye of the law, is a mere stakeholder, a custodian of property or estate attached in his hands, and has no right to do any voluntary act to the prejudice of either the plaintiff or defendant in the action. He must let the law take its course, except that he may protect himself from jeopardy or injury by unauthorized acts and proceedings.

8. A garnishee cannot give jurisdiction of a debt due from him by his voluntary appearance, when not previously served with the order of attachment, nor when an attempted service is invalid.

9. Omission to show, in the return of service of an order of attachment upon a foreign corporation as garnishee, that the agent upon whom the service was made resides in the county in which he was served, renders the service invalid, and, in such case, the court obtains no jurisdiction of the *res*, for want of service on the garnishee.

10. Prohibition lies from a circuit court to a justice of the peace to restrain him from proceeding in an action when the subject-matter thereof is beyond his territorial jurisdiction, and also when, by reason of want of service or invalidity of service, he has not acquired such jurisdiction; although, when he has jurisdiction of the subject-matter, and the question of his jurisdiction of the person depends upon some fact to be determined by him, his erroneous decision

*Headnotes by POFFENBARGER, J.

NOTE.—As to protection of nonresident creditor against garnishment, see also, in this series, *Illinois C. R. Co. v. Smith* (Miss.) 19 L. R. A. 577, and *note*; *Douglass v. Phenix Ins. Co.* (N. Y.) 20 L. R. A. 118; *Bragg v. Gaynor* (Wis.) 21 L. R. A. 161; *Neufelder v. German-American Ins. Co.* (Wash.) 22 L. R. A. 287; *Reimers v. Seato Mfg. Co.* (C. C. App. 6th C.) 30 L. R. A. 364; *Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co.* (Mo.) 27 L. R. A. 651; *Lancashire* 62 L. R. A.

Ins. Co. v. Corbetts (Ill.) 36 L. R. A. 640; *Virginia F. & M. Ins. Co. v. New York Carousal Mfg. Co.* (Va.) 40 L. R. A. 237; *Louisville & N. R. Co. v. Nash* (Ala.) 41 L. R. A. 331; *Swedish American Nat. Bank v. Bleecker* (Minn.) 42 L. R. A. 283; *Stewart v. Northern Assur. Co.* (W. Va.) 44 L. R. A. 101; *Balk v. Harris* (N. C.) 45 L. R. A. 257; and *Strause Bros. v. Aetna Ins. Co.* (N. C.) 48 L. R. A. 452.

in favor of jurisdiction is only error, not subjecting him to prohibition.

11. In so far as *Mahany v. Kephart*, 15 W. Va. 609, and *Stevens v. Brown*, 20 W. Va. 450, hold that the exemption laws of another state have no extraterritorial force, and will not be enforced by the courts of this state, they are reaffirmed.

(March 21, 1903.)

ERROR to the Circuit Court for Ohio County to review a judgment refusing to grant a writ of prohibition to restrain the continuance of garnishment proceedings. *Reversed.*

The facts are stated in the opinion.

Mr. J. B. Sommerville, for plaintiff in error:

Justice Phillips is without jurisdiction in these cases: (1) Because of want of proper process; (2) because the funds sought to be reached in the hands of the garnishee are not the subject of attachment or garnishment; (3) because said funds are, by the laws of Pennsylvania, exempt from legal process; (4) because the laws of Pennsylvania prohibit the citizens of that state from assigning, or transferring, debts due to them, from citizens of that state, to parties outside of the state, for the purpose of having such debts collected by proceedings in attachment or garnishment.

The money involved in these cases, being for wages due from appellant to its employees, in the state of Pennsylvania and under contracts made in that state, is not subject to attachment in Pennsylvania.

1 Brightly's Purdon's Digest, 12th ed. p. 836.

The contracts involved in these cases were made in the state of Pennsylvania, by residents of that state, and its statutes entered into and became part of the contracts.

Bank of United States v. Donnelly, 8 Pet. 361, 8 L. ed. 974; *Andrews v. Pond*, 13 Pet. 65, 10 L. ed. 61; *De Wolf v. Johnson*, 10 Wheat. 367, 6 L. ed. 343; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 882; *Wooley v. Lyon*, 117 Ill. 244, 57 Am. Rep. 867, 6 N. E. 885; *Shoe & Leather Nat. Bank v. Wood*, 142 Mass. 563, 8 N. E. 753; *Floyd v. National Loan & Invest. Co.* 49 W. Va. 327, 54 L. R. A. 536, 38 S. E. 653; *Story, Conf. L. § 242.*

The provisions of such statute should be applied to these cases, by our courts.

Mason v. Beebe, 44 Fed. 556; *Missouri P. R. Co. v. Maltby*, 34 Kan. 125, 8 Pac. 325; *Kansas City, St. J. & C. B. R. Co. v.* 62 L. R. A.

Gough, 35 Kan. 1, 10 Pac. 89; *Kansas City, Ft. S. & M. R. Co. v. Cunningham*, 7 Kan. App. 47, 51 Pac. 972; *Drake v. Lake Shore & M. S. R. Co.* 69 Mich. 168, 37 N. W. 70; *Illinois C. R. Co. v. Smith*, 70 Miss. 344, 19 L. R. A. 577, 12 So. 461; *Wright v. Chicago, B. & Q. R. Co.* 19 Neb. 175, 56 Am. Rep. 747, 27 N. W. 90; *Sweeny v. Hunter*, 145 Pa. 363, 14 L. R. A. 594, 22 Atl. 653.

The court will take judicial notice of the statutes of Pennsylvania.

W. Va. Code, chap. 13, § 4; *Farmers' Bank v. Willis*, 7 W. Va. 42; *State v. Goodrich*, 14 W. Va. 842; *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16; *Wilson v. Phoenix Powder Mfg. Co.* 40 W. Va. 413, 21 S. E. 1035; *Hefferman v. Harvey*, 41 W. Va. 766, 24 S. E. 592.

Messrs. Caldwell & Caldwell, for defendants in error:

If the Pennsylvania railroad company, as garnishee, is compelled to pay, in West Virginia, in the suits brought against its employees here by Mr. Rogers, it cannot legally be made to pay a second time in Pennsylvania in suits brought against it there by such employees.

Stewart v. Northern Assur. Co. 45 W. Va. 734, 44 L. R. A. 101, 32 S. E. 218; *Morgan v. Neville*, 74 Pa. 52.

The justice of the peace in West Virginia plainly had jurisdiction to entertain these suits by Mr. Rogers against the railroad employees, and to issue the garnishee attachments against the Pennsylvania railroad company, and, having such jurisdiction, no prohibition should be granted the railroad company.

Drake, Attachm. 1st ed. § 523; *Mahany v. Kephart*, 15 W. Va. 625; *Hassinger v. Holt*, 47 W. Va. 350, 34 S. E. 728; *McConiha v. Guthrie*, 21 W. Va. 134; *Ward v. Evans*, 49 W. Va. 184, 38 S. E. 524; *Halteman v. Davis*, 28 W. Va. 324; *Buskirk v. Cabell County Circuit Judge*, 7 W. Va. 92; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; *Howland v. Chicago, R. I. & P. R. Co.* 134 Mo. 479, 36 S. W. 29; *Stevens v. Brown*, 20 W. Va. 458; *Todd v. Gates*, 20 W. Va. 464; *Paine v. Lester*, 44 Conn. 196, 26 Am. Rep. 442; *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; *Morgan v. Neville*, 74 Pa. 52; *Wilkins v. Ellett*, 9 Wall. 740, 19 L. ed. 586.

It matters not that the assignments were made to Rogers for the purpose of avoiding the exemption laws of the state of Pennsylvania. Such assignments are not, therefore, void, and such exemption laws of Pennsylvania will not be enforced or recognized in West Virginia.

Hooker v. De Palos, 28 Ohio St. 251;

Thomas v. Cronise, 18 Ohio, 54; *Congress & E. Spring Co. v. Knoulton*, 103 U. S. 58, 59, 26 L. ed. 350; *McWilliams v. Phillips*, 51 Miss. 196; *Beauchamp v. Comfort*, 42 Miss. 94; *Setter v. Alvey*, 15 Kan. 158; *Hall v. Costello*, 48 N. H. 176, 2 Am. Rep. 207; *Worcester v. Eaton*, 11 Mass. 368; *Marksbury v. Taylor*, 10 Bush, 519.

Our courts, through comity, will not give effect in West Virginia to the Pennsylvania act as to the assignments, nor to the Pennsylvania exemptions.

Paine v. Lester, 44 Conn. 203, 26 Am. Rep. 442; *Story*, Conf. L. § 414; *Bank of the Valley v. Gettinger*, 8 W. Va. 309; *Coryfield v. Coryell*, 4 Wash. C. C. 380, Fed. Cas. No. 3,230; *Morgan v. Neville*, 74 Pa. 57; *Bolton v. Pennsylvania Co.* 88 Pa. 261; *Howell v. Stewart*, 54 Mo. 400; *Watrous v. Blair*, 32 Iowa, 58; *Niemeyer v. Wright*, 75 Va. 246, 40 Am. Rep. 720; *Strong use of Reed v. Darling*, 9 Ohio, 201; *King v. Doolittle*, 51 W. Va. 91, 41 S. E. 146; *Chesapeake & O. R. Co. v. Wright*, 50 W. Va. 653, 41 S. E. 147; *Mahany v. Kephart*, 15 W. Va. 625; *Drake*, *Attachm.* 1st ed. § 523; *Johnston v. Hunter*, 50 W. Va. 52, 40 S. E. 449; *Sperry v. Sanders*, 50 W. Va. 70, 40 S. E. 328; *Ward v. Evans*, 49 W. Va. 184, 38 S. E. 624.

On petition for rehearing.

Section 34, chap. 50, of the Code provides that the service may be upon "any agent" of the corporation who may reside in the county; and, in any reasonable interpretation of the law, McCormick does have a business residence for business purposes in the county of Ohio.

Sedgw. Stat. & Const. L. 1st ed. p. 247; *Clark, Corp.* § 254; 14 Am. & Eng. Enc. Law, 2d ed. pp. 816, 817.

When a judgment is recovered against the garnishee by the attaching creditor, and paid, such judgment may be pleaded by the garnishee in bar of any action against him for the same debt, brought by the principal defendant, up to the amount which the garnishee has paid.

2 Black, *Judgm.* § 593; *Morgan v. Neville*, 74 Pa. 52; *Bolton v. Pennsylvania Co.* 88 Pa. 261; *Noble v. Thompson Oil Co.* 69 Pa. 410; 2 Shinn, *Attachm.* § 713; *Drake*, *Attachm.* 7th ed. § 710; *Rood*, *Garnishment*, chap. 10, § 202.

If the debt had been made payable in Pennsylvania by express contract, it is contrary to both reason and authority that it could not be attached in West Virginia, when service was made on the Pennsylvania Railroad Company by serving on its agent, McCormick.

Mahany v. Kephart, 15 W. Va. 621; *Drake*, *Attachm.* 7th ed. § 597; 14 Am. & Eng. Enc. 62 L. R. A.

Law, 2d ed. p. 805; *Harvey v. Great Northern R. Co.* 50 Minn. 405, 17 L. R. A. 84, 52 N. W. 905; *Bullard v. Chaffee*, 61 Neb. 83, 51 L. R. A. 715, 84 N. W. 604; *Cross v. Brown*, 19 R. I. 226, 33 Atl. 147.

Poffenbarger, J., delivered the opinion of the court:

This case involves the consideration of questions arising upon the invocation of the extraordinary legal remedy, prohibition, in restraint of the special and limited proceeding known as garnishment. As prohibition lies only to restrain a court or other tribunal from proceeding without jurisdiction, or in excess of its jurisdiction, and as attachment is a purely statutory proceeding, the questions presented are principally jurisdictional in character, and perspicuity demands an inquiry into the nature of both proceedings. This should be preceded, however, by a statement of the case.

W. W. Rogers, a citizen of Ohio county, doing a detective and collection business, and having taken, by assignment, a large number of claims from persons residing in Pennsylvania against employees of the Pennsylvania Railroad Company, a foreign corporation, which claims that it does not own or operate any railroad or do any business in this state, instituted, before D. Z. Phillips, a justice of the peace of Ohio county, more than 400 suits against the said nonresident employees on the accounts so assigned, and made the said railroad company a garnishee in each of them. The service of process, as to the garnishee, was by delivering a copy of the order of attachment "to J. J. McCormick, agent of the said garnishee in charge of its business, in the city of Wheeling, in said county, there being no other person within the state of West Virginia upon whom said order of attachment can be legally served." In some of these cases the railroad company appeared specially for the purpose of objecting to the service of process upon it, and moved to be discharged because the order of attachment issued therein had not been properly or legally served upon it. After hearing the evidence and argument of counsel upon the motion, the justice overruled it. Then the garnishee filed its answer, admitting indebtedness, but claiming it was not liable as garnishee, for the following reasons: First, because the justice was without jurisdiction in said cause; second, because said Pennsylvania Railroad Company and the principal debtor in the action were both citizens of the state of Pennsylvania, and the money due was for wages earned by the defendant as an employee of the railroad company, under a contract be-

tween him and the railroad company in Pennsylvania, and was not, therefore, subject to garnishment in West Virginia; third, because the wages of the defendant were exempt from execution or forced sale under the laws of Pennsylvania, and could not be subjected to garnishment in the state of West Virginia. The garnishee, therefore, again asked to be discharged, but the motion was overruled, and judgment entered against the garnishee for the amount of the indebtedness admitted. The record here shows a transcript of the proceedings in only one of these cases, that of Rogers, as signee, against James R. Snyder.

The bringing of these suits was commenced in July or August, 1901, and many judgments were rendered against the garnishee. On the 10th day of January, 1902, the Pennsylvania Railroad Company presented to a judge of the circuit court of Ohio county its petition, praying for a writ of prohibition to restrain Rogers and Phillips, and each of them, "from proceeding further in their said acts, doings, and proceedings, and from instituting any other or further proceedings against" the petitioner, "either in regard to the said claims of the said Rogers against" the petitioner "arising out of the assignment of claims to the said Rogers by any person or against" the petitioner's "said employees residing in the said state of Pennsylvania." In addition to the facts hereinbefore set out, the petition contains the following averment: "Your petitioner does not own, and does not operate any railroad, or any part of a railroad, in the county of Ohio, or in the state of West Virginia, and does no business in the said last-named state or county. There is, however, located in the said city of Wheeling, an agent of what is known as the 'Star Union Line,' which is an association of several railroads, formed and kept up for the purpose of facilitating the handling of certain freight business, in the city of Wheeling. The name of said agent is J. J. McCormick, and the only service which was had upon your petitioner in said suits brought before the said Phillips, justice as aforesaid, by the said Rogers, was had by serving copies of the orders of attachment issued in said cause upon said J. J. McCormick. Your petitioner is advised that the said J. J. McCormick is not your petitioner's agent, and that the said service of the said copies upon him is not such a service as should or will bind your petitioner in the said cases, and that, therefore, the said Phillips, justice as aforesaid, is without jurisdiction to render any decision, or enter any order or judgment, against your petitioner in the said cases." The petitioner further

shows that some of the employees against whom these actions were brought had instituted chancery suits in Pennsylvania, seeking to restrain the railroad company, by injunction, from paying the judgments recovered by Rogers in Ohio county, and a transcript of the record of one of said equity cases, showing all the proceedings therein and the opinion of the judge in the cause, is filed as a part of the petition. A rule was awarded against Rogers and Phillips, returnable on the 16th day of January, 1902, which on said date was continued until the 1st day of February, 1902, when there was a final hearing, and the court discharged the rule, dismissed the petition, and gave costs against the petitioner, and the cause is now here on a writ of error to said judgment.

Attachment is no part of the general jurisdiction of any court. It is purely statutory, and, though everywhere vested by statute in courts of general jurisdiction, it is still a special and limited power, resting upon its own peculiar grounds, acting in its own prescribed modes, and leading to its own specific results. Drake, Attachm. § 83; Waples, Attachm. §§ 635, 637. When jurisdiction by attachment is conferred upon and exercised by courts of general jurisdiction, it is special, and unsupported by presumptions in its favor. Waples, Attachm. § 639. The statutory prerequisites to attachment are jurisdictional. Id. §§ 625, 627.

Attachment is in the nature of a proceeding *in rem*. There is an actual seizure of property, except where it is in the form of garnishment. In the case of garnishment, it retains its character as one in the nature of a proceeding *in rem*, although there is no actual seizure of property under the order of attachment, for by service of the order upon the garnishee it arrests the debt in his hands, and holds it through him, subject to the judgment of the court. The claim subjected by garnishment is estate of the principal debtor in the hands of the garnishee, and the proceeding is against it as a *res*, a thing, and not against the garnishee personally, except to compel him to turn it over to the creditor of the principal defendant in satisfaction of his claim. In every practical sense, it amounts to a seizure of a thing. "Garnishment is in the nature of a proceeding *in rem*, since its aim is to invest the plaintiff with the right and power to appropriate, to the satisfaction of his claim against the defendant, property of the defendant's in the garnishee's hands, or a debt due from the garnishee to the defendant." Drake, Attachm. § 452; Wade, Attachm. § 338. Without such seizure, no jurisdiction over the *res* is acquired, and no judgment

against it can be rendered, although the court may have jurisdiction of the parties. Garnishment is no exception to this rule, as will be shown. Jurisdiction of the person of the garnishee must be acquired by service upon him, but this does not necessarily give jurisdiction of the *res* or debt owing by him, which belongs to the defendant, whose right to it must be extinguished by bringing it within the jurisdiction of the court by proper proceedings, and subjecting it to the satisfaction of the plaintiff's demand by a proper judgment.

Just here it is to be further observed that courts have no extraterritorial jurisdiction over either persons or property in attachment suits. To maintain a proceeding, there must be jurisdiction over the one or the other, or both. Waples, *Attachm.* § 644. "Jurisdiction over persons and property in any state is confined to the persons and property within the territorial bounds of the state. No court within it can exercise jurisdiction beyond it. To exercise it over persons or property in another state would be an unwarrantable assumption and arrogation of unlawful authority, entitled to no respect on the principle of comity, but meriting rebuke and resistance as a wanton abuse of power. A judgment rendered in any state against a person or property over which the court has no jurisdiction is not entitled to 'full faith and credit' in other states, but its validity may be questioned on jurisdictional grounds, and its enforcement resisted; for, not being by due process of law, it is entitled to no regard, even in the state where it is rendered; and it may be impeached collaterally anywhere." *Id.* § 648. In other words, such action is absolutely null and void for want of jurisdiction.

In exact alignment with this general proposition of law, which is not questioned anywhere, it has been held by the courts of this country, with practical unanimity, that a nonresident cannot be subjected to the process of garnishment, although caught within the state temporarily and served with process. The moment that it is made to appear to the court that he is a nonresident only temporarily within the state, without property or effects of the defendant in his possession in the state, or owing him a debt payable within the state, the jurisdiction of the court ends. "In this country the question has been repeatedly presented, and the uniform tenor of the adjudications is that, whether the defendant reside or not in the state in which the attachment is obtained, a nonresident cannot be subjected to garnishment there, unless, when garnished, he have in that state property of the defendant in his hands, or be bound to pay the defendant money, or to deliver to him goods, at some

particular place in that state." Drake, *Attachm.* § 474; Wade, *Attachm.* § 413; Waples, *Attachm.* §§ 387-392.

It is said that the first announcement of this doctrine in this country was made by the supreme judicial court of Massachusetts. In that state the proceeding is called "trustee process," and the garnishee here would there be called the "trustee." The reason given for holding that a nonresident cannot be subjected to garnishment is stated in *Tingley v. Bateman*, 10 Mass. 346, 347, as follows: "The summoning of a trustee is like a process in *rem*. A chose in action is thereby arrested and made to answer the debt of the principal. The person entitled by the contract or duty of the supposed trustee is thus summoned by the arrest of this species of effects. These are, however, to be considered for this purpose as local, and as remaining at the residence of the debtor or person intrusted for the principal; and his rights in this respect are not to be considered as following the person of the debtor to any place where he may be transiently found, to be there taken at the will of a third person, within a jurisdiction where neither the original creditor nor debtor resides." It is further stated in said opinion, in the process of foreign attachment, by the custom of London, out of which our system of attachment law originated, and from which it differs to no considerable extent, the garnishee must be suggested to be a man within the city. Proceeding, the court says: "The principal has not been made a party by any legal summons, and he may justly object to the transfer of his demands against Daggett, attempted to be made in this case by Daggett's conclusive or transient removal within the process of this court; that the credits or effects in his hands belonging to Bateman have never been legally attached, and that the summoning of Daggett was to no purpose a sufficient service of this writ; and, as this defect of service appears in the proceedings, the court dismiss the action *ex officio*." The same principle is announced in all the following cases: *Nye v. Liscombe*, 21 Pick. 263; *Hart v. Anthony*, 15 Pick. 445; *Lovejoy v. Albee*, 33 Me. 414, 54 Am. Dec. 630; *Lawrence v. Smith*, 45 N. H. 533, 86 Am. Dec. 183; *Baxter v. Vincent*, 6 Vt. 614; *Green v. Farmers' & C. Bank*, 25 Conn. 452; *Ray v. Underwood*, 3 Pick. 302; *Cronin v. Foster*, 13 R. I. 196; *Smith v. Eaton*, 36 Me. 307, 58 Am. Dec. 746; *Jones v. Winchester*, 6 N. H. 497; *Sawyer v. Thompson*, 24 N. H. 510; *Young v. Ross*, 31 N. H. 201; *Peck v. Barnum*, 24 Vt. 75; *Ringe v. Green*, 52 Vt. 204; *Squair v. Shea*, 26 Ohio St. 645; *Peters v. Rogers*, 5 Mason, 555, Fed. Cas. No. 11,033.

In 14 Am. & Eng. Enc. Law, 2d ed. p. 815,

it is said: "Under statutes providing generally for summoning, as garnishees, persons indebted to the defendant, or having in their possession property belonging to him, it has been held that nonresidents were exempt from liability to be so summoned, though found temporarily within the state, and in some jurisdictions the statutes have expressly provided that only residents of the state shall be so summoned. On the other hand, there are statutes which expressly provide that nonresidents may be summoned as garnishees, and by the weight of authority it seems that the mere fact that a person is a nonresident does not exempt him from liability to be so summoned when the question is not affected by the situs of the *res* sought to be reached by the process." A hasty reading of this might lead one to say that it is in conflict with the general proposition heretofore announced, but it is not. The distinction between summoning the garnishee, by which jurisdiction over his person is acquired, and the obtaining of jurisdiction of the *res*, the claim sought to be subjected, must be observed. If a nonresident be found temporarily within the state, he may undoubtedly be summoned, and must appear and answer. But when it is shown by his answer that he is a nonresident, having no property of the defendant in his possession within the state, nor owing him any debt payable within the state, nor bound by any contract to deliver any property to him within the state, the want of jurisdiction of the *res* appears, and, when established, the proceeding must end, although there is jurisdiction of the person of the garnishee. "When one is summoned as garnishee in a state of which he is not a resident, . . . it is, therefore, necessary for his own protection that he should answer to the proceeding, and avail himself of whatever defense he has against liability, or he will be liable to a judgment by default against him, if the law under which he was summoned authorize that course of proceeding; for, by the service of process, the court acquires jurisdiction of his person, and the question whether it has, or can take, jurisdiction of the effects in his hands, can only be raised by himself upon his answer." Drake, *Attachm.* § 476. It is to be observed that in the quotation from 14 Am. & Eng. Enc. Law, 2d ed. it is said the nonresident is liable to be summoned "when the question is not affected by the situs of the *res* sought to be reached by the process."

But two cases have been found which completely ignore the principle that a nonresident cannot be held as garnishee when it is shown that he is a nonresident, and has no effects of the debtor in his possession 62 L. R. A.

within the state, and owes him no debt payable within the state. They are *Molyneaux v. Seymour*, 30 Ga. 440, 76 Am. Dec. 662, and *Morgan v. Neville*, 74 Pa. 52. Both of these cases not only ignore that proposition, but fail to distinguish attachment, which is a special limited statutory proceeding, from proceedings in which the courts exercise general jurisdiction, and in which strict compliance with the requirements in matters of procedure is not ordinarily jurisdictional, as we have seen that it is in attachment and garnishment. Where the action is in *personam*, jurisdiction of the person of the defendant is plenary jurisdiction, giving the court full power for all purposes of the action. But in garnishment, as we have seen, jurisdiction of the person of the garnishee is only partial jurisdiction. It is generally so held. No attention whatever was paid to this distinction in the two cases named. The Pennsylvania decision is vigorously condemned by Mr. Thompson, in his *Commentaries on the Law of Corporations*. See vol. 7, § 8073, note 4, pp. 6432, 6433. In 14 Am. & Eng. Enc. Law, 2d ed. p. 805, the following is found: "The rule announced in a number of late and well-considered cases, and which seems to be the doctrine which will best protect the interest of commerce, is that a debtor may be charged as garnishee of his creditor, without regard to the illusive theories as to the situs of a debt, in any jurisdiction in which an action could have been brought by such creditor against the debtor for the recovery of the debt, though personal service cannot be had upon the defendant." For this proposition, several cases are cited. But these cases do not repudiate, overturn, nor say anything in conflict with, the proposition that a nonresident cannot be subjected to garnishment unless he has effects of the debtor within the state, or owes any debt payable within the state, or has contracted to deliver to him property within the state. Most of them are cases against foreign corporations doing business within the state, and which have, in some sense, become domestic corporations by having complied with the statute of the state, and voluntarily made themselves subject to its process, just as if they were domestic corporations. Such is *Mooney v. Buford & G. Mfg. Co.* 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 32. In *Pomeroy v. Rand, McN. & Co.* 157 Ill. 176, 41 N. E. 636, the garnishee was a resident of the state. In *Mooney v. Union P. R. Co.* 60 Iowa, 346, 14 N. W. 343, the garnishee railroad company operated its railroad within the state, and was held to be a citizen of the state. In *German Bank v. American Ins. Co.* 83 Iowa, 491, 50 N. W. 53, the garnishee insurance company was

held to be doing business within the state, and the case was assimilated to the *Mooney Case*, and the decision based upon the same principle. In *Burlington & M. River R. Co. v. Thompson*, 31 Kan. 180, 47 Am. Rep. 497, 1 Pac. 622, the garnishee railroad company had leased property and was doing business within the state. In *Missouri P. R. Co. v. Sharitt*, 43 Kan. 376, 8 L. R. A. 385, 389, 23 Pac. 430, the railroad company did business and operated its road in both of the states between the courts of which the conflict occurred, and the question was not one of jurisdiction on the ground involved here, but the enforcement of the exemption laws of a foreign state in the garnishment proceeding. In *Harvey v. Great Northern R. Co.* 50 Minn. 405, 17 L. R. A. 84, 52 N. W. 905, involving the validity of a garnishment made in Montana, it was found and held that the railroad company operated its railroad in the state of Montana. In *Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co.* 127 Mo. 242, 27 L. R. A. 651, 29 S. W. 1010, the garnishees were residents of the state. In *National F. Ins. Co. v. Chambers*, 53 N. J. Eq. 468, 32 Atl. 663, the garnishee insurance company was held to be doing business within the state in which it was garnished. In *Mobile & O. R. Co. v. Barnhill*, 91 Tenn. 395, 10 S. W. 21, the garnishee railroad company was held to be a domestic corporation of the state. It is also insisted in the brief that *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, at least countenances the proposition that a nonresident temporarily within the state may be subjected to garnishment. It certainly does not so decide. Mr. Justice McKenna says: "We are not concerned to inquire whether the cases which decide that a debtor temporarily in a state cannot be garnished there, are or are not justified by principle." At another place he says, of the locality of the debt: "But we do not think it necessary to resort to the idea at all, or to give it important distinction." On the contrary, the following language from him strongly indicates that, at least, the domicile of the garnishee determines the jurisdiction of the debt sought to be subjected: "The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditors. To do this, he must go to the domicile of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He, and he only, has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a

proceeding *in rem*." By the word "debtor" here he means the garnishee, the man owing the debt sought to be subjected by attachment. He quotes from the opinion in *Andreus v. Clerke*, Carthew, 25, passing upon the law of attachment under the custom of London, where it is said: "For it was always the custom in London to attach debts upon bills of exchange and goldsmiths' notes, etc., if the goldsmith who gave the note on the person to whom the bill is directed liveth within the city, without any respect had to the place where the debt was contracted." In that case a prohibition was denied which had been asked, upon the grounds that the cause of action did not arise in London, but was made in the county of Middlesex. What Mr. Justice McKenna was disposing of as fallacious and unsound was the proposition, advanced by a Kansas judge, that the situs of the debt is with the man to whom it is due, and not with the man who owes it. He not only abstains from questioning the soundness of the decisions holding that a debtor temporarily in a state cannot be garnished, but he shows, also, that the case he was considering was within that principle, for he says: "There is no fact of change of domicile in the case. The plaintiff in error was not temporarily in Iowa. It was an Iowa corporation and a resident of the state, and was such at the time the debt sued on was contracted." This opinion does not militate against the principle so generally recognized, but rather upholds it.

This question seems never to have been raised nor passed upon in this state. But two cases, not like, but in some respects similar to this, have been decided. *Mahany v. Kephart*, 15 W. Va. 609, and *Stevens v. Brown*, 20 W. Va. 450. By reference to them it will be seen that in each the Burlington & Ohio Railroad Company was proceeded against as garnishee and debtor of a nonresident person, and that the jurisdiction was sustained upon the ground that said railroad company maintained and operated its road in the state of West Virginia; and it was pointed out in the opinion that it had been held in *Hart v. Baltimore & O. R. Co.* 6 W. Va. 336, that the acts of the legislature had conferred corporate powers and privileges upon said railroad company, and that said railroad company is an incorporated railroad company within the boundaries of this state, and that the court would take judicial notice of the fact. It is thus seen that it was found and expressly determined, in order to uphold the jurisdiction of the court, that the railroad company was within the state of West Virginia, and subject to its process. While it is not said that it was domiciled in this state, somewhat

stronger language was used, importing that it was substantially a domestic corporation. In *Mahany v. Kephart*, the following is quoted from Drake, Attachm. § 479: "Where, as is sometimes the case, a corporation is chartered by two or more states, it is not in any of these states a foreign corporation, and may be subjected to garnishment in any of them, though its office and place of business be not in the state in which the garnishment takes place." The other case, *Stevens v. Brown*, was disposed of, and the jurisdiction sustained, upon the same grounds. As tending to uphold their position, counsel for defendants in error quote the following from the opinion in *Beirne v. Rosser*, 26 Gratt. 538, which was quoted also in *Mahany v. Kephart*: "All actions are either local or transitory. Real actions are local, and personal actions are transitory. This is a personal action, being for the recovery of damages for the breach of a contract, and is, therefore, a transitory action. It is a general principle of the common law that a transitory action can be brought against a party wherever he may be found and served with process, no matter where he may reside, or where the cause of action may have arisen." This has no shadow of application. It was quoted to uphold the action of the court in giving a personal judgment against Kephart, a nonresident who had appeared to the action, being the defendant, not the garnishee, in the action.

The principle which forbids garnishment of a nonresident individual temporarily in the state applies to foreign corporations. Unless doing business within the state, they are not subject to garnishment therein. This is the only extent to which the rule is relaxed in such cases. "Owing to the growth of corporations, and the transaction of their business in jurisdictions other than those in which they were incorporated, there are statutes in practically all jurisdictions which authorize the service of process upon certain officers or agents of foreign corporations, and a foreign corporation, transacting business in a jurisdiction in which such statutes exist, impliedly submits itself to the jurisdiction of the courts therein, and may be summoned as garnishee if corporations and nonresident individuals are liable to be so summoned." 14 Am. & Eng. Enc. Law, 2d ed. p. 816. Observe that this rule says they may be summoned. It does not say that, by summoning them under such circumstances, jurisdiction of the *res* is obtained. It is not enough in such case, to confer such jurisdiction, that jurisdiction of the person of the garnishee may be obtained, any more than in the case of an individual. "A corporation frequently does business at the same time in several different states, 62 L. R. A.

and it is liable to garnishment in any one of them where it has an officer upon whom the process may be legally served, if it has property of the defendant there. If a corporation is chartered in different states, it has corporate existence in each, as a matter of course, and may be treated in each as a resident. But if not thus chartered, so as to be, in contemplation of law, a resident of the state, it comes under the rule governing natural persons." Waples, Attachm. § 391. In this statement, Waples appears to be fully sustained by the numerous cases cited in support of the text from the American and English Encyclopædia of Law last above quoted. In most of these cases it appears that the foreign corporations garnished had places of business where they transacted their corporate business with agents in charge of it as their own business. In some, they were railroad companies operating lines through the states under legislative permission, and subjected by legislation to the liabilities of domestic corporations. In some, the statutes expressly made foreign corporations liable to garnishment. Generally, they uphold the propositions quoted from Waples.

The garnishee sought to be held by the justice in this state admitted in its answer that it owed the defendant \$24. As it was bound to answer fully, if at all, and make a full disclosure of all the estate of defendant in its hands, and this answer was not controverted or excepted to, the answer amounts to a denial that the railroad company had anything in its hands except said sum of money, and substantially denied that that sum was payable in the state of West Virginia. By the same answer it averred that it was a citizen of the state of Pennsylvania; that Snyder was a citizen of said state, and that said sum was due for wages earned in Pennsylvania under a contract made in Pennsylvania. Being uncontroverted, the answer must be taken as true as to all these matters. It negatives any liability to the defendant in West Virginia, either for money, or on account of property, and also the jurisdiction of the court because of the nonresidency of the garnishee. The uncontroverted averment that the money was due on account of wages earned in Pennsylvania under a contract there made, gives rise to the legal presumption that it is payable in Pennsylvania. *Heflbower v. Detrick*, 27 W. Va. 16. That negatives any mere presumption of money agreed to be paid to Snyder in this state. The petition admits, however, that the railroad company had some connection with the Star Union Line of which McCormick was agent, but denies that the railroad company itself was doing busi-

ness in the state. The existence of this Star Union Line and its operations in the county of Ohio is the only ground for saying that the Pennsylvania Railroad Company does business in the state. This seems to be fully admitted. It is not contended that the railroad company has complied with the statutory requirements giving to foreign corporations the rights, and subjecting them to the liabilities, of domestic corporations. So it must be determined whether its connection with the Star Union Line amounts to a doing business within the state so as to make it liable to garnishment. The Star Union Line is a sort of joint traffic arrangement maintained by several railroads to facilitate the handling and forwarding of freight. One of these is the garnishee company. It appoints the president of the Star Union Line, and he appointed McCormick, the agent in charge, and it is said McCormick solicits freight for the Pennsylvania Railroad Company. The garnishee company contributes to the expenses and maintenance of this arrangement, and in that way to the payment of the agent for his services. It does not amount to a doing business within the state within the meaning of the law of garnishment. The Pennsylvania Railroad Company has not in any sense made itself a West Virginia corporation by contributing to the maintenance of this joint-traffic arrangement, although it may in some sense—a limited sense—amount to a doing business within the state. It could not be regarded as being within the state otherwise than transiently. It operates no lines here, runs no cars here, and performs none of its business as a common carrier within the state. Whether it would amount to doing business within the meaning of the statute prohibiting a foreign corporation from doing business without complying with certain regulations is not the test. To do business within the meaning of the law of garnishment, it must bring itself within the state in some substantial way. It is not enough, as has been said, that process may be served upon it. That only gives jurisdiction *in personam*, not necessarily jurisdiction of the claim sought to be reached in its hands. This view is undoubtedly supported by the great weight of authority. In some states, non-residents are by statute expressly made liable to the process of garnishment, and many cases are to be found in which the decisions are based upon these statutes. Where they do not exist, the foreign corporation held as garnishee is held to be within the state in the transaction of its ordinary corporate business, and that holding is based, in the cases of railroads, in almost every instance, upon the operation of a line of railroad within the state, and not merely upon the

presence of an agent whose business it is to solicit freight, or to manage a joint traffic arrangement, which is handled over the line of some other railroad within the state. 7 *Thomp. Corp.* §§ 8069-8073, fully supports this decision. For a full discussion of the subject and a conclusion in exact accord with ours, see *Freeman, Executions*, § 161a.

The justice was without jurisdiction for another reason. The return of service of the order of attachment is clearly insufficient. It does not show that McCormick, the agent, resided in the county of Ohio. The service was evidently made under § 35 of chapter 50 of the Code. Section 38 of the same chapter provides that service, under any of the preceding four sections, shall be made in the county in which the person served resides and that the return must show that he resides in the county. It says further that, if the return does not show this, the service shall not be valid. In *Taylor v. Ohio River R. Co.* 35 W. Va. 328, 13 S. E. 1009, it has been decided that a judgment based on a return of service not showing that fact is void, there having been no appearance. To the same effect is *Frazier v. Kanawha & M. R. Co.* 40 W. Va. 224, 21 S. E. 723; and the doctrine is approved in *Hopkins v. Baltimore & O. R. Co.* 42 W. Va. 535, 26 S. E. 187, and *Cheapeake & O. R. Co. v. Wright*, 50 W. Va. 653, 41 S. E. 147.

This defect of service would be cured by an appearance in an action *in personam*, and especially in a justice's court, for § 33 of chap. 50 of the Code provides that an appearance by the defendant is equivalent to personal service. But it does not show that an appearance by a garnishee shall be equivalent to personal service, and to construe it to mean that would do violence to the spirit of the law of garnishment. Nor does the statute anywhere provide that a garnishee may confer jurisdiction by his appearance without service of process. Section 197, chap. 50, relating to that subject, requires the delivery of a copy of the order of attachment to the person designated by the plaintiff as garnishee, and there is no provision for his appearance until after that is done. Why is this? The garnishee is a stakeholder, and must be impartial. He cannot voluntarily place his creditor's debt within the jurisdiction of a court to the end that it may be taken by some other person. The debt must be arrested and detained in his hands by the service of process, and that must be a sufficient service to hold it. "Garnishment rests wholly upon judicial process, and depends upon the due pursuit of the steps prescribed by law for its prosecution. It can borrow no aid from volunteered acts of the garnishee. Such acts will be regarded as void, so far as they interfere

with the rights of third parties. Thus, where, under a law requiring the garnishment process to be personally served on the garnishee, . . . it was held that he had no right to do so, and that the acceptance or waiver of service was a nullity as against other attaching creditors, and equally so as against an assignee of the debt in respect of which the garnishee was charged. So, where the statute prescribed that process should be served on a corporation by service on the president, or any director or manager thereof, an admission of service of garnishment by the attorney of a corporation was held insufficient to give the court jurisdiction of the corporation. So, where no legal service of process had been made on a corporation as garnishee, and yet the secretary of the corporation appeared and answered, and made no objection to the sufficiency of the service, it was held that no judgment could be rendered against the corporation. So, where a garnishment was made after the return day of the writ, and the garnishee appeared and answered, and judgment was rendered against him, it was decided that the process under which he was summoned had no validity, and that he therefore stood as though he had voluntarily appeared and answered interrogatories without notice, and the judgment against him was set aside as against other creditors." *Drake, Attachm. § 451b*. "The garnishee, in the eyes of the law, is a mere stakeholder, a custodian of the property attached in his hands; he has no pecuniary interest in the matter; he has no cost to pay, and therefore none to save; his business is to let the law take its course between the litigants; he has no right to accept or waive service of the proceeding, thereby favoring one party at the expense of and injury to another, and creating actually a privilege with priority in favor of one creditor to the prejudice of another." *Schindler v. Smith*, 18 La. Ann. 476. To the same effect, see *Wade, Attachm. § 330*. It is to be remembered that there has been no service of process on the defendant.

The whole case rests upon the sufficiency of the proceeding against the garnishee, to arrest in its hands the right of the defendant to the debt sought to be subjected. In such case, the court's jurisdiction depends upon something having been seized. Without it, no suit can be maintained against the garnishee. The case is quite different from one in which the defendant has been served or has appeared, and is in a position to take his own exceptions to the proceedings on the ground of insufficiency. *Wales, Attachm. § 474*. "The return to the writ must state all the facts that are essential to a valid service thereof. It must be certain, and must show that the property

was attached in the hands of the garnishee, or the court acquires no jurisdiction over the *res*. The return should also state on whom the writ was served, and the time when service was made. It must recite the performance of those acts required by the statute as conditions precedent to a valid service in garnishment." 9 *Enc. Pl. & Pr.* pp. 827, 828. "In order that the defendant may be concluded by the proceedings, it has been held necessary that there should have been a proper service of process on the garnishee. The latter has no power to affect the rights of the defendant by voluntarily appearing as garnishee, and, if he does voluntarily appear, the proceedings will afford no protection to him against subsequent liability to the defendant." 14 *Am. & Eng. Enc. Law*, 2d ed. p. 885.

Counsel for defendant in error insist that jurisdiction is admitted by the plaintiff in error in its petition for the writ of prohibition. As before stated, that petition shows that employees of the company have instituted suits in equity in Pennsylvania to enjoin the petitioner from paying over their wages in satisfaction of the judgments rendered by Phillips in Ohio county, West Virginia. In the petition is incorporated the record of one of these chancery causes, namely, *O. C. Galbraith v. R. M. Rutter* and the petitioner. The answer of the railroad company in that suit set up the Ohio county judgment against Galbraith, and insisted upon its validity as a defense in the equity suit, and averred that the claim of Rutter was assigned to Rogers; that the attachment was issued by Phillips, "justice of the peace of Washington district, Ohio county, West Virginia, a competent tribunal under the laws of the state of West Virginia, having jurisdiction of the subject-matter; and that the summons was duly served, and the attachment was duly served on an agent of the defendant, garnishee, and that the proceedings affecting such jurisdiction are regular." The Pennsylvania court record further shows that evidence was taken to sustain the allegations of the answer, and that the court found against the railroad company as to several matters of fact, and that the railroad company excepted to the findings of the court in not holding that McCormick was in its employ; that he was district freight solicitor, whose principal duty it was to solicit freight for the defendant; that the Union Line was the through freight business of the defendant, and a bureau of the defendant for conducting its through freight business; that McCormick had an office in Wheeling, West Virginia, as freight solicitor of the Pennsylvania Railroad Company; and that the Pennsylvania Railroad Company had no other office in Wheeling.

This cannot amount to an estoppel. "The pleadings of a party in one suit may be used in evidence against him in another, not as an estoppel, but as proof, open to rebuttal and explanation, that he admitted certain facts. But in order to bring such admissions home to him, the pleadings must be either signed by him, or it must appear that it was within the scope of the attorney's authority to admit such facts." *Buzard v. McNulty*, 77 Tex. 438, 14 S. W. 138; *Perry v. Simpson Waterproof Mfg. Co.* 40 Conn. 313; *Tubb v. Cabell*, 17 Gratt. 160. It does not preclude or estop the petitioner on the ground of having taken an inconsistent position in judicial proceedings, for the reason that it does not appear to have obtained any advantage from it or injured the other party to this suit. Taken altogether, as a part of the petition, it only shows that the petitioner set up the Ohio county judgment as a defense in the Pennsylvania court, and that that court refused to find from the evidence offered in support of the answer certain facts, which, if found, as contended for by the railroad company, fall far short of establishing that said company is within the state of West Virginia in such sense as to make a debt due from it to a nonresident subject to condemnation by garnishment in the courts of this state. It is said that the agency of McCormick is admitted. Suppose it is; he is an agent, with an office in the city of Wheeling, whose business it is, not to operate a railroad in this state, nor to transact the ordinary business of the Pennsylvania Railroad Company here, but to solicit freight for it. The answer does not admit that the railroad company is a West Virginia corporation, or is doing business within the state as a foreign corporation, nor that the debt due from it is liable to garnishment in this state. True, it says that the justice's court is a competent tribunal, having jurisdiction of the subject-matter. That is a conclusion of law rather than an admission of fact. It also says the proceedings affecting jurisdiction are regular. That, too, is largely a conclusion of law. Treating these admissions as evidence on the questions of fact set up in the petition, eliminating from them the matters of law included, they do not overthrow the averments of the petition that the railroad company, and especially the debt due from it, are not subject to garnishment in this state, as insisted upon in its answer filed in the justice's court. The pleadings in the Pennsylvania equity cause are entitled to but little consideration here as admissions. Speaking of judicial admissions made in pleadings, 1 Am. & Eng. Enc. Law, 2d ed. p. 62 L. R. A.

720, says: "They are admissible . . . in behalf of either the adverse party or a stranger, provided they were sworn to by the client personally, or were drawn under his special instructions." The answer was filed by attorneys and sworn to by one of them, and there is nothing to show that it was prepared under instructions from anybody having authority to bind the railroad company generally. On the same page of the same book, in a note, it is said: "In *Boileau v. Rutlin*, 2 Exch. 665, it was held that pleadings in equity, as well as at common law, are not to be treated as positive allegations of the truth of the facts therein for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite side, and, if denied, to be proved and ultimately submitted for judicial decision." This is peculiarly applicable here, where it clearly appears that the railroad company against whom it is attempted to maintain this admission is struggling to protect itself against double liability for a great number of claims asserted against it in the courts of two different states. The record in the case relied upon was not made between the parties to the case in which the transcript of the docket of the justice is filed with the petition,—the only one that can be considered here. Hence it is not the same suit, nor between the same parties; and for that reason is entitled to less weight than it would otherwise be entitled to. 1 Am. & Eng. Enc. Law, 2d ed. pp. 719, 720.

As the justice was without jurisdiction of the *res* (the real subject-matter) for two reasons: First, that the service of process was invalid, and not cured by appearance, although appearance was made; and, second, because the subject-matter itself is not in the state, nor subject to the process of its courts,—the writ or prohibition prayed for ought to have been awarded by the court below. But it is insisted that, although jurisdiction was not acquired, the justice had the power to consider whether he had jurisdiction, and to decide the question of jurisdiction; and that, if he did decide that he had jurisdiction, when in truth he had not, his action in so holding was not without jurisdiction, nor an act in excess of jurisdiction, but simply an error to be corrected on appeal, and not an act without jurisdiction, or in excess thereof, subjecting the court and the parties to the writ of prohibition. For this, *Sperry v. Sanders*, 50 W. Va. 70, 40 S. E. 327, and *Houland v. Chicago, R. I. & P. R. Co.* 134 Mo. 479, 36 S. W. 29, are relied upon. The *Sperry Case* is not applicable. It only holds that a court has jurisdiction to determine whether a judgment is valid

or invalid. That is purely an exercise of jurisdiction, the parties being before the court, and the validity of the judgment being brought into the court upon the proper pleadings. The *Howland Case* does not sustain the contention, for it asserts that jurisdiction must be obtained,—that is, power to hear and determine. It must have jurisdiction, not only of the person, but of the *res*, after which what is done by the court is merely the exercise of jurisdiction. Works on Courts and Jurisdiction, at page 634, says: "Prohibition will lie to prevent action where the court has not jurisdiction of the person, as well as in cases where there is an absence of jurisdiction of the subject-matter." It must have jurisdiction of the subject-matter. 16 Enc. Pl. & Pr. 1094, 1110. Writ lies for excess of territorial jurisdiction. Id. 1120. It is necessary for the defendant, as a general rule, to plead and show want of jurisdiction before applying for a prohibition. But omission to do this does not prevent its issuance, when the declaration shows that the cause of action did not arise *infra jurisdictionem*, or that its subject-matter is not proper for the judgment and determination of the court, or if the defendant was prevented by artifice, etc., from pleading want of jurisdiction. 8 Bacon, Abr. 1852 ed. p. 232. The answer of the garnishee, setting up its nonresidence, was not controverted, so far as the record shows, and must be taken as true. That establishes a want of jurisdiction by showing that the subject-matter is beyond the territorial jurisdiction of the court. It is an utter want of jurisdiction, in defiance of which the justice went on and gave judgment. Had the subject-matter been within the territorial jurisdiction of the court, jurisdiction of it was not obtained, because there was no service upon the garnishee. What purports to be the return of service being void under the statute and decisions of this court, it could not confer any jurisdiction of the subject-matter, although the garnishee appeared and subjected itself to the jurisdiction of the court. Where the court has jurisdiction of the subject-matter, and the question of its jurisdiction of the person turns upon some fact to be determined by the court, its decision that it has jurisdiction, if wrong, is an error, and prohibition is not the proper remedy. Works, Courts and Jurisdiction, 634. But that is not the status of these matters. The return of service, as has been shown, is void on its face, and gives no jurisdiction of the subject-matter, even if the subject-matter were within the territorial jurisdiction of the court. It is not a mere irregularity. It is a statutory

62 L. R. A.

requisite of the return, for omission of which the statute says, not that the return is defective, insufficient, or invalid, but that "the service shall not be valid."

It is also objected that the prayer of the petition is defective because too general. The substance of it has been given in the statement of the case. It seeks the writ, as to all of the numerous cases mentioned in the list filed, as an exhibit with the petition. It can only go, of course, if at all, as to the one case, the record of which is exhibited, namely, that of *Rogers v. Snyder* and the railroad company. This court cannot presume that certain things appear, and certain defenses were made, in the other cases. They must be shown. After setting up and showing what has been done generally in these cases, including the particular case, the record of which is exhibited, it prays that Phillips and Rogers may be prohibited from proceeding in their said acts and proceedings. This, of course, embraces that particular case, although it is not specifically named in the prayer. The petition alleges that in doing the acts complained of the justice has acted without any jurisdiction, and that, if not restrained, he will continue his unauthorized proceedings. Although general, and somewhat indefinite in its terms, the petition and prayer are, in substance and effect, sufficiently certain.

It is insisted that the decisions in the cases of *Mahony v. Kephart* and *Stevens v. Brown*, to which reference has been made, ought to be re-examined, and overruled in so far as they hold that the exemption laws of a foreign state have no extraterritorial force or virtue, and will not be enforced by the courts of this state. As tested by the great weight of American authority, these two decisions are right, and no good reason is presented why they should be overruled.

The court below sustained a motion to quash the rule and dismiss the petition for insufficiency of cause shown for the issuance of the writ. The judgment, therefore, stands as one upon demurrer. *It must be reversed*, for the reasons shown, but judgment cannot now be entered awarding the writ of prohibition. It is only held that the petition is sufficient, and that the court below erred in not so holding, and in quashing the rule and dismissing the petition. Hence, an order will be entered reversing the judgment, and remanding the case to the circuit court of Ohio county for further proceedings in accordance with the principles here announced and further according to law.

Petition for rehearing denied.

NEBRASKA SUPREME COURT.

Endell N. LEAKE, *Plff. in Err.*,
v.

Lucy A. LUCAS.

(.....Neb.....)

- *1. When a husband is actually a part of the family, living with it as such, and is temporarily helpless and incapacitated by illness, his maintenance and support, including necessary medical attendance, come fairly within the rule of the statute which makes the wife liable, as surety, for necessities furnished the family.
2. In such case, where the husband and family, including the wife, remove to a sister state, and no judgment can be obtained against him in this state, the obtaining of a judgment against him in the courts where he resides, causing an execution to issue thereon, and having it returned unsatisfied, is a sufficient compliance with the provisions of Comp. Stat. chap. 53, § 1, to sustain an action against the wife to recover for such medical attendance.

(July 1, 1902.)

ERROR to the District Court for Dodge County to review a judgment in favor of defendant in an action brought to recover for medical services to defendant's husband. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. Courtright & Sidner, for plaintiff in error:

Medicines and medical attendance are necessities, under the general acceptance of the word.

Bishop, *Contr. Enlarged ed.* § 909; *Wailing v. Toll*, 9 Johns. 141; *Hoyt v. Casey*, 114 Mass. 397, 19 Am. Rep. 371.

The statute is broad enough to cover this kind of a case.

Murdy v. Skyles, 101 Iowa, 549, 70 N. W. 714.

A family is "a collective body of persons who live in one home under one head or manager. Husband and wife, living together, as they are presumed to do, are both members of the family, and included in this definition."

Neasham v. McNair, 103 Iowa, 695, 38 L. R. A. 847, 72 N. W. 773; *George v. Edney*, 36 Neb. 604, 54 N. W. 986.

A statutory liability exists under the laws of Missouri. We come to Nebraska and find that the wife has considerable property. We begin action. The wife enters an appearance. The court then has jurisdiction of the

subject-matter, and also of the parties. This state will enforce a statutory liability arising under the Missouri statute.

Delahaye v. Heitkemper, 16 Neb. 475, 20 N. W. 385; *Morris v. Chicago, R. I. & P. R. Co.* 65 Iowa, 727, 54 Am. Rep. 39, 23 N. W. 143; *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413; *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132; *Aldrich v. Anchor Coal & Development Co.* 24 Or. 32, 32 Pac. 756.

Messrs. Dolzal, Cook, & Cook for defendant in error.

Barnes, C., filed the following opinion:

On the 23d day of February, 1900, the plaintiff commenced a suit in the district court of Dodge county against the defendant by filing the following petition (omitting title): "Comes now the plaintiff, and for cause of action herein states: (1) The plaintiff is now, and for more than seven years last past has been, a duly authorized and practising physician in Fremont, Dodge county, Nebraska. (2) During the year 1896 and early part of 1897 the plaintiff herein furnished medicine and medical attendance to William A. Lucas, for and at the request of said William A. Lucas, in said county, which medicine and medical attendance was of the value and agreed price of \$38.50. (3) Thereafter, on October 31, 1899, judgment was recovered against said William A. Lucas by the plaintiff herein for \$38.50, in Howells county, Missouri, where said defendant and William A. Lucas, her husband, then resided, and where they still reside. (4) Thereupon a transcript of said judgment was filed in the circuit court of said Howells county, Missouri,—the same being a court of general jurisdiction, and of the same jurisdiction and powers as the district court of Nebraska,—and an execution issued thereon, commanding the sheriff of said county to levy the same upon the goods, chattels, lands, and tenements of said William A. Lucas. Said execution was thereafter returned by the said sheriff, with his return thereon showing no property, goods, chattels, lands, or tenements of said William A. Lucas could be found in said county upon which to levy. (5) The defendant herein is, and for more than ten years last past has been, the wife of said William A. Lucas; and at the time of furnishing said medicine and medical attendance the defendant herein and the said William A. Lucas were living together in Fremont, Nebraska, as husband and wife. (6) Said medicine and medical attendance were necessary for the defendant's family. (7) No part of said judgment and no part of the value of said medi-

*Headnotes by BARNES, C.

NOTE.—As to liability of wife for family expenses, see, in this series, *Dodd v. St. John* (Or.) 15 L. R. A. 717, and *note*. 62 L. R. A.

cine and medical attendance has been paid, and the whole thereof is now due and payable. (8) There is now due and unpaid from defendant to plaintiff upon said judgment and for said medicine and medical attendance the sum of \$38.50, and interest thereon from July 1, 1897. (9) At the time of furnishing said medicine and medical attendance the defendant was the owner and held a fee title to lots 4, 5, and 6, block 3, of East Side addition to the city of Fremont, in Dodge county, Nebraska, and pledged said property for the payment of said debt. (10) Neither the defendant nor said William A. Lucas has any personal property within Dodge county, Nebraska, nor within the state of Nebraska, and the said William A. Lucas has no real estate in Dodge county, Nebraska, nor in the state of Nebraska. Wherefore, plaintiff asks judgment against the defendant for the sum of \$38.50, with interest thereon at 7 per cent per annum from July 1, 1897, and costs, and that said judgment be decreed to be a lien upon said real estate, and for such other and further relief as equity may require." At the same time he procured an attachment to be issued and levied upon the property of the defendant situated in said county, and thereupon obtained service against her by publication. She appeared in the case and filed a general demurrer, which was overruled; and thereafter she filed an answer to the petition, in which she admitted the third and fourth paragraphs thereof, and denied all of the other allegations therein contained. She further answered as follows: "Further answering, for another and further defense this defendant avers the property in this action attached (being lot 4 of block 3 of East Side addition to the city of Fremont, lot 5 in said block 3, and 6 in said block 3) is the sole and separate property of the defendant, and was acquired by her through and by means of a conveyance of the same to her from persons other than her said husband, William A. Lucas, and that the same is not liable for the debts of the said William A. Lucas." Upon the issues thus made, the cause was tried to a jury. At the close of all of the evidence the court held that the medical services which were the basis of the plaintiff's cause of action were not necessities furnished the family of the said defendant; that the plaintiff had not complied with the law, and first obtained a judgment against the husband for the indebtedness sued on in this action, and had an execution issued, and the same returned unsatisfied, for want of goods, chattels, lands, and tenements whereon to levy and make the same,—and thereupon directed the jury to return a verdict for the defendant, which was accordingly done. The plaintiff's

motion for a new trial being overruled, he brought the case here on a petition in error. The evidence sustained all of the allegations of the petition, except the one which charged that the defendant had pledged her separate property for the payment of the debt. Upon that point the evidence shows that the husband made the request for the services.

1. The plaintiff contends that the medical attendance and services in question furnished by him to the defendant's husband were necessities furnished the family of the defendant, within the meaning of § 1, chap. 53, of our statutes. It was established on the trial that at the time the plaintiff attended the defendant's husband they resided together at their home, in Fremont, Dodge county, Nebraska, and were maintaining their home and family relations as husband and wife; that the members of the family were William A. Lucas, his wife, the defendant herein, and defendant's mother; that the said Lucas was ill with rheumatism, and unable to get about or help himself in any particular. It would seem that the medical attendance necessary to cure defendant's husband of his illness, and thus place him in a position to labor and support the family, herself included, was a necessary furnished for its benefit. The husband, although the head of the family, while living with his wife, maintaining the family relations and keeping up the home, is certainly a part and a member of it. There can be no doubt but that the defendant would be liable as surety for her husband for the necessary food furnished the family, himself included. It would seem to be necessary, and for the benefit of the family, that the husband be cured of his temporary illness, so as to be able to earn the means with which to pay for such food, and thus relieve the defendant of that charge. We do not intend to establish a rule of law by which we shall be conclusively bound in such cases hereafter, for every decision upon this question must necessarily be largely governed by the facts existing in the particular case in which it is rendered. In this case we are unable to see why defendant should not be held liable as surety for necessary medical attendance furnished to her husband when temporarily disabled by illness. In the case of *Wailing v. Toll*, 9 Johns. 141, it was held that medicine and medical attendance was a family necessity. In that case the medicine and attendance had been furnished by the plaintiff to a daughter while she was a minor living with her father. The court held that the father was liable therefor, notwithstanding the medicine and attendance had not been requested by him, because it was a family necessity. The statutes of the state of Iowa make a husband and wife joint-

ly liable for the necessary family expense. In the case of *Murdy v. Skyles*, 101 Iowa, 549, 70 N. W. 714, the supreme court of that state held that a claim for medical services rendered the husband was a family expense, for which the husband and wife were jointly and severally liable. This is the first time this question has been before us, and we find but little authority upon it elsewhere. We ought to give the statute a reasonable construction, and we therefore hold, under the facts in this particular case, that when the husband is actually a part of the family, living with it as such, and is for some reason temporarily incapacitated by illness, his maintenance and support, including medical attendance, come fairly within the rule of the statute which makes the wife liable as his surety therefor.

2. Plaintiff claims that he has complied with the statute; that he procured a judgment against the defendant's husband, and caused an execution to be issued thereon; and that the officer had returned the same unsatisfied, for want of goods and chattels, lands and tenements, whereon to levy and collect the same,—and thus fixed the defendant's liability before he commenced this suit. It was established upon the trial that shortly after the medical attendance was furnished to defendant's husband he recovered, and with the defendant and the rest of the family, moved to the state of Missouri; that they made a home there, continued the family relations, and were living in said state at the time this action was commenced; that the husband owns no property in this state; that no action can be commenced or judgment obtained against him here, because no service of summons can be made upon him which will give the courts of this state jurisdiction to render a judgment against him. It is apparent, then, that it would be an impossibility for the plaintiff to obtain a judgment against the defendant's husband in this state. A judgment was regularly obtained against him in the state where he resides, and was transcribed to the proper court, and an execution was issued thereon, which was returned by the proper officer unsatisfied for want of goods and chattels, lands and tenements, whereon to levy and make the same. Strictly speaking, this judgment is not a judgment in this state until suit is brought thereon as the judgment of a sister state, and the same has been reduced to a judgment here. It is clear that this cannot be done, because, as we have 62 L. R. A.

stated, there is no way to get service on the judgment debtor in this state. The plaintiff, therefore, has exhausted every remedy and taken every proceeding open to him against the husband of the defendant. It further appears that the defendant owns all of the property possessed by the family, and has the title to the real estate attached in this action. It remains for us to determine whether or not there has been such a compliance with the statute as will support this action. A judgment obtained in the state of Missouri is as much a judgment as though obtained in the courts of this state. It is true, it is not a judgment of the courts of this state until an action has been brought thereon, and some court in this state has rendered judgment in such action. In such an action the judgment of the court of the sister state is recognized as having such force that practically no defense can be made against it but the defense of fraud in obtaining it. Again the Constitution requires the courts of this state to give full faith and credit to the judgments of the courts of our sister states. The maxim that the law does not compel the impossible applies with much force in this case. We ought to give the statute a fair, common-sense construction. When it says a judgment shall be obtained, and an execution issued and returned unsatisfied, it should be held to mean that a judgment shall be obtained in the place of jurisdiction, where it can be obtained, there is nothing in the terms of the statute itself which would seem to require us to hold otherwise.

We therefore hold that there has been sufficient compliance with the requirements of § 1, chap. 53, of our statutes, to authorize the plaintiff to maintain this action against the defendant; that the trial court erred in directing the jury to return a verdict for the defendant. We therefore recommend that the judgment of the district court be reversed, and the cause remanded for a new trial.

Pound, C., concurs.

Per Curiam:

For the reasons stated in the foregoing opinion, it is ordered that the judgment of the District Court be reversed, and the cause remanded for a new trial.

Petition for rehearing granted but original opinion adhered to.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York
v.

Roland B. MOLINEUX, Appt.

(168 N. Y. 264.)

1. Evidence of the killing of a third person is not admissible upon trial of an indictment for murder which was induced by hatred engendered by quarrels of which the third person had no knowledge, where the motive for the other killing was jealousy caused by intervention in a love affair.
2. Proof of the killing of a third person is not admissible on a trial for murder to show motive, upon the ground that accused had forged the name of both decedents to letters, where there is nothing in either set which sheds any light upon the question of motive for the other crime.
3. Proof of intent to commit a murder by poison, which conclusively appears from the attending circumstances, cannot be aided

by evidence of another murder committed by similar means, but for a different cause.

4. Upon trial of an indictment for murder by poison, where there is no doubt as to the cause of death, and the circumstances show transparent criminality, evidence of the commission of another murder by poison is not admissible to negative mistake or accident.
5. The exception to the rule that evidence of one crime is not admissible to prove another, which permits such proof in case of a common plan or scheme, will not permit the admission, upon a trial for murder by poison, of evidence of the commission of another similar crime, where one occurred several weeks later than the other, and one was induced by jealousy caused by interference in a love affair, and the other by hatred resulting from quarrels over the management of an athletic club; and it is immaterial that at different times accused was carrying on correspondence under the names of those against whom the murders

NOTE.—Evidence of other crimes in criminal case.

I. General rule, 194.

II. To show motive.

a. In general.

1. Common scheme, plan, or system, 190.
2. In particular instances.
 - (a) Murder, 201.
 - (b) Assault with intent to murder, 207.
 - (c) Arson, 208.
 - (d) Other crimes, 208.

b. Concealment; resisting arrest; escape, 211.

III. To show intent.

a. In general, 214.

1. When there is other evidence or presumption of intent, 215.
2. When intent is immaterial, 218.

b. Common scheme, plan, or system.

1. In general, 218.
2. False pretenses; fraud, 222.
3. Forgery, 224.
4. Counterfeiting, 225.
5. Embezzlement, 226.

c. In particular instances, 227.

1. Murder, 227.
2. Assault with intent to murder, 228.
3. Assault with intent to commit rape, 228.
4. Abortion and attempt to procure, 229.
5. Slander and libel, 230.
6. Violation of liquor law, 230.
7. Larceny, 231.
8. Burglary and attempts to commit, 236.
9. Arson, 238.
10. Killing and injuring animals, 239.
11. Sending obscene, threatening, etc., letters, 230.
12. False pretenses; fraud.
 - (a) In general, 240.

III. c.—continued.

(b) Acquisition of money, 240.

(c) Acquisition of property, 244.

(d) Other instances, 248.

13. Forgery.

- (a) In general, 240.
- (b) Making, 249.
- (c) Uttering, 252.
- (d) Making and uttering, 258.

14. Counterfeiting.

- (a) In general, 257.
- (b) Making, 257.
- (c) Uttering, 258.
- (d) Possession with intent to utter, 262.

15. Embezzlement, 264.

16. Receiving stolen property, 269.

17. Miscellaneous crimes, 274.

IV. To show malice, 277.

V. To prove defendant's connection with act charged.

a. In general.

1. Assault and murder, 278.
2. Defiling young women, 281.
3. Larceny, 281.
4. Burglary, 285.
5. Robbery, 288.
6. Arson, 289.
7. Forgery, 289.
8. Violation of liquor law, 290.

b. Common scheme, plan, or system, 291.

VI. To rebut special defenses.

- a. General rule, 299.
- b. Insanity, 300.
- c. Good character, 300.
- d. Accident or mistake, 300.

VII. When other crime is part of the res gesta.

- a. Murder, 308.
- b. Assault with intent to murder, 313.
- c. Other assaults, 314.
- d. Rape, 314.
- e. Larceny, 315.

were planned, where the correspondence under neither name had any reference to the other person, and the only similarity was in the correspondence and the results obtained, with nothing to show that the result in one case had any connection with the other.

6. **The exception permitting evidence of other crimes to prove the identity of one on trial for murder does not justify proof of the commission of another murder by similar means, whose perpetrator is not shown, merely because accused had the requisite knowledge and opportunity to concoct the poison with which both crimes were committed, which is a rare one, where he is not the only person who possessed such knowledge and opportunity.**
7. **Evidence of the commission of another similar crime is not admissible against one accused of murder, as tending to establish the identity of accused,**

merely because he had carried on a correspondence in the name of both victims, which was similar in subject-matter and results, but which was not connected with either of the murders, and the series of letters in one set of correspondence contains no reference to, and throws no light upon, the matters referred to in the other.

8. **Upon trial of one accused of murder by poison evidence that a third person, also killed by poison, whose killing is sought to be proved as evidence against accused, informed his physician that he had received a box of powder through the mail, and taken part of the contents, is incompetent.**
9. **Comparison of handwriting to determine the authorship of a disputed writing is not limited to cases where the disputed writing is the subject-matter of the issue to be tried, but may be made in case of a disputed address upon a poison package**

VII.—continued.

- f. *Receiving stolen property*, 317.
- g. *Burglary*, 317.
- h. *Robbery*, 318.
- i. *Forgery*, 319.
- j. *Arson*, 319.
- k. *Other crimes*, 319.

VIII. Relevancy.

- a. *Murder*, 320.
- b. *Rape*, 322.
- c. *Larceny*, 322.
- d. *False pretenses*, 323.
- e. *Burglary*, 324.
- f. *Forgery*, 324.
- g. *Robbery*, 324.
- h. *Arson*, 325.
- i. *Violation of liquor law*, 325.
- j. *Treason*, 325.
- k. *Miscellaneous*, 326.

IX. Sexual offenses.

- a. *General rule; previous acts*, 329.
- b. *Subsequent acts*, 335.
- c. *Acts with other persons*, 338.

X. Committed in resisting arrest, or attempting to escape after commission of crime charged, 338.

XI. Effect of indictment for, conviction or acquittal of, evidential crime.

- a. *Indictment*, 339.
- b. *Conviction*, 341.
- c. *Acquittal*, 342.

XII. Election of offense relied on, 344.

XIII. Right to question defendant concerning, on cross-examination, 345.

XIV. When not prejudicial, 347.

XV. Statement or insinuation by prosecution of other crime, 348.

XVI. Necessity and correctness of instruction to jury.

- a. *General rule.*
 1. *Necessity*, 350.
 2. *Correctness*, 353.
- b. *Effect of instruction to disregard*, 355.

XVII. Miscellaneous, 356.

XVIII. Recapitulation, 357.

I. General rule.

It is a general rule of criminal evidence that, on the trial of a person accused of crime, proof of a distinct, independent offense is inadmissible.

The following are cases showing particular instances where the rule has been applied:

62 L. R. A.

Defendant was indicted for the murder of a young girl, who was killed while passing over a certain road on her way to school. Her body had been cut in different parts, some of which—her head—had been found a quarter of a mile away, and another portion had been cut out and carried away and was never recovered. The theory of the prosecution was that the defendant had assaulted and violated the person of the deceased, and then murdered her, either in the commission of the former crime, or afterward. Upon the trial it was proved by several witnesses that the prisoner, about the time of the murder, was frequenting that neighborhood with a view to the commission of the crime of rape upon the person of some one of the young females whom he knew to have occasion to pass over that road. This evidence was held to be competent. The prosecution was also permitted to prove, upon the trial, by the sister of the wife of the defendant, that about four years and a half before the trial, at a place beyond the jurisdiction of the United States, the defendant committed the crime of rape upon her. It was held that the admission of such evidence was error, because it violated the fundamental principle of law, that evidence that a defendant committed one offense cannot be received to prove that he committed another and distinct offense. The claim of the prosecution was that the respondent killed the deceased in perpetrating, or in attempting to perpetrate, a rape upon her. And that, as having some tendency to show that he committed, or attempted to commit, a rape upon the deceased, the state was permitted to show that four years and more previous he had committed a rape upon the witness in Canada. The question was, Had the testimony any such tendency? There was obviously no connection whatever between the two offenses or transactions, either in the persons upon whom the crimes were committed, or in the places where, or times when, committed. The evidence of the witness, at most, would only show that the respondent was depraved enough to commit the crime of rape. The court proceeded to reason as follows, and stated that it was not claimed that the defendant killed the deceased to enable him to commit a rape. The rape preceded the killing, and the killing was done to conceal the rape. That, to illustrate, suppose the respondent had committed only the crime of rape upon the deceased, and then had spared her life:

by means of which a murder was committed for the commission of which the alleged writer is on trial.

10. For the purpose of determining the authorship of a disputed writing, specimens of writing, which a person suspected of being the author was requested to make, by a prosecuting attorney before he was in custody or any formal charge had been made against him, are admissible in connection with the writing, although there was a strong suspicion against him, and, because of the publicity of the case, refusal to comply with the request would have subjected him to criticism.
11. Under a statute permitting comparison of a disputed writing to be made with any writing proved to the satisfaction of the court to be genuine, letters, to be admissible in evidence for purposes of such

comparison in a criminal case, must be proved to be genuine beyond a reasonable doubt.

12. Statutes permitting a comparison of writings to determine the genuineness of one in dispute are not in conflict with the provision of the Constitution preserving the right of trial by jury inviolate.
13. A statute permitting a comparison of a disputed writing to be made with any writing proved to the satisfaction of the court to be genuine does not deprive the jury of the right to pass upon the genuineness of the standards submitted for comparison.
14. Comparison of disputed writing with standards produced in court may be made by witnesses, or by the court and jury, without the aid of witnesses.
15. Testimony at the coroner's inquest, of one subsequently accused of murdering the one the cause of whose death the coroner is investigating, is not inadmissible upon his

No case can be found that would authorize the state, upon the trial of an indictment against the respondent for the rape, to give in evidence the rape committed upon another person more than four years previously. That no case of a more marked and distinct offense, as to time, place, victims, and circumstances, can be found. And the court further said that such evidence does not become any more relevant when the trial is upon an indictment for killing while committing a rape. *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69.

This case has become celebrated as a leading authority exemplifying the application of the general rule. It has probably been cited more frequently than any other case in the courts of the several states and in the Federal courts, as sustaining the general rule that, upon a trial for crime, evidence of a remote crime cannot be admitted.

On a trial for murder the respondent, while on the stand as a witness in his own behalf, testified that on a previous occasion he was arrested for the murder of a woman, and was discharged on examination. On rebuttal the prosecution was permitted to go into all the details of the alleged offense, and to urge before the jury that the accused had been guilty of murder on that occasion. It was held that such testimony did not come within any exception to the general rule prohibiting evidence of another distinct offense, and was inadmissible, and could not have failed to affect the rights of the respondent. *People v. Ascher*, 126 Mich. 637, 86 N. W. 140.

The admission, on the trial of a father for rape upon his daughter, of evidence that he also committed a rape upon another daughter, is reversible error, although the court attempts to confine its application to the question why the latter daughter left home, and to the contradiction of defendant's testimony. *Janzen v. People*, 159 Ill. 441, 42 N. E. 862.

Upon the trial of an indictment for larceny, evidence that defendant had other stolen property in his possession is inadmissible where it does not appear that such other larceny was a part of the transaction for which the defendant was on trial, or was connected with it with respect to time or locality. *State v. O'Donnell*, 36 Or. 222, 61 Pac. 892. In this case the rule that evidence of a distinct crime, unconnected with that laid in the indictment, cannot be given in evidence against the prisoner, is fully considered, and also the exceptions to it; and 62 L. R. A.

the case abounds with authorities showing the exceptions to the rule and the applicability to particular cases.

In *Davis v. State*, 54 Neb. 177, 74 N. W. 599, an information was filed in which the defendant was charged with the crime of larceny as bailor. On the trial it was shown that defendant claimed to be the advance agent of a circus, made contracts with different parties, secured from a firm running a livery stable the horse, buggy, and harness, which it was alleged he subsequently converted to his own use with a felonious intent. For the purpose of showing such intent, a witness was called with whom he had made a contract to furnish baked goods, and who testified, over the objection of the defendant, that, after defendant had given his firm the contract, he asked for a loan of \$5 until 2 o'clock of the same day, and that he never came back and never paid the \$5. On the admission of this testimony, the conviction was reversed, the court holding that, under the operation of the general rule in relation to admissibility, the testimony should have been excluded; but that the general doctrine has been varied, or there has been a departure therefrom to a greater or lesser degree, in cases of a particular or peculiar nature in some, if not all, jurisdictions. The court made the further statement that, in some courts, and in some cases, the departure has been quite marked in extent and degree, while in others there has been exhibited a decided hesitancy to indulge in a modification of the general rule. And that of the latter class was this court.

The vast number of decisions and citations upon the subject under consideration, and contained in this note, attest the correctness of the frank statement of the court in this case. And it is to the facts thus stated that the divergent opinions, decisions, and authorities which appear to have been made in the several jurisdictions, and in one or two instances in the same jurisdiction, are due.

Upon the trial of an indictment for burglary, after a witness, in giving a narrative of what took place at the time, has stated that the defendant said he was the man who had broken into the house on a previous occasion, it is reversible error to permit the prosecution to ask if, and of witness to answer that, the house was broken into on such previous occasion, and to describe the breaking. *Lightfoot v. People*, 16 Mich. 507. That is to say, what de-

trial for the murder because he was not advised of his rights when it was given, if at that time he was not under arrest, or formally accused of the crime.

16. One called to testify at a coroner's inquest as a mere witness, who fails to claim a privilege on the ground that his testimony may tend to inculpate him, cannot object to the introduction of his testimony on his subsequent trial for the commission of the crime then under investigation by the coroner.

17. That the prosecuting attorney suspects a witness before a coroner's jury of the commission of the crime under investigation will not give him the status of an accused person with reference to the use of his testimony at a subsequent trial of him for commission of the crime.

(*Parker, Ch. J., and Gray and Haight, JJ., dissent from Propositions 1-7.*)

(October 15, 1901.)

defendant said at the time of the burglary for which he was being tried, in reference to the former breaking, was admissible; but evidence of the fact of that breaking was not.

A conviction for obtaining goods by false pretenses will not be upheld where the indictment charges the obtaining of certain goods in the first count; and, in the second count, the obtaining of other goods three days later, from the same person, by false pretenses, where evidence is given under both counts and as to both articles of property, if the second count should have, for reasons peculiar to it, been quashed; since the evidence relating to the second count was inadmissible upon the trial of the first. *Reg. v. Fuldge, Leigh & C. 390, 33 L. J. M. C. N. S. 74, 10 Jur. N. S. 160, 9 L. T. N. S. 777, 12 Week. Rep. 351, 9 Cox C. C. 430.*

Upon the trial of an indictment for having in possession counterfeit bank bills with intent to pass the same, after a witness had stated that he inquired of the prisoner about some money which had been stolen from a bank, and the prisoner had declared his innocence of any participation in the robbery, it was error to prove by the same witness that the prisoner further stated that he should never have been suspected of robbing the bank if it had not been his misfortune to have once been in the state prison in another state. *People v. White, 14 Wend. 112.* The court said that it was highly probable that the prisoner's confession turned the scale against him. That the evidence was entirely circumstantial,—sufficient, perhaps, to raise a strong probability of the prisoner's guilt of the crime for which he was indicted; but certainly leaving the fact involved in so much doubt that the jury might well have come to a different conclusion. That it was precisely one of those cases in which the fact that the prisoner had already been convicted of an infamous crime, and had been sent to the state prison, would be likely to operate with decisive effect against him.

Upon the trial of an indictment for arson, which contains five counts, after the prosecution has elected to claim a conviction upon the last two counts evidence of threats by the defendant to burn the buildings of the persons named as owners in two of the other three

A PPEAL by defendant from a judgment of the Court of General Sessions of the Peace in and for the County of New York convicting him of murder. *Reversed.*

The facts are stated in the opinion.

Messrs. John G. Milburn and Weeks, Battle, & Marshall, for appellant:

The admission of the testimony in regard to the death of Henry C. Barnet was prejudicial error.

The state cannot prove against a defendant any crime not alleged, either as foundation for a separate punishment, or as aiding the proofs that he is guilty of the one charged, even though he has put his character in issue.

1 Bishop, *New Crim. Proc.* § 1120; *Coleman v. People*, 55 N. Y. 81; *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319; *People v. Shea*, 147 N. Y. 78, 41 N. E. 505; *Shaffner v. Com.*

counts, and of other persons not named in the indictment, is inadmissible, because they have no connection with, or reference to, the burning of the property for which he is being tried. Neither are they admissible to prove malice, for the reason that they were not made against the parties whose property he is charged with burning. *State v. Smalley, 50 Vt. 736.*

As a general rule, it is not admissible, on a prosecution for one offense, to prove that the defendant had, before, committed another offense. To this there are exceptions, but the offense must be brought home to the defendant. When two offenses are committed in two different years, it is erroneous for the judge to permit the state, in a prosecution for the second offense, in order to show the animus of the defendant, to prove irrelevant facts which only tend to cast a suspicion on the defendant as to the first offense. *State v. Alston, 94 N. C. 930.*

On a trial for rape evidence that the defendant, nine months after the commission of the act charged, abducted another woman from the home of her parents and married her against their wishes, is inadmissible, as it would be introducing other offenses or acts that shed no light upon the crime, for which the defendant is being prosecuted. *Lee v. State (Tex. Crim. App.) 72 S. W. 1005.*

Evidence of a burglary committed by defendant on the same night and in the same town as that for which defendant is on trial, but at a different time and place, and which was fully consummated before the commission of the crime charged, is inadmissible. *Hill v. State (Tex. Crim. App.) 73 S. W. 9.*

On the trial of an indictment for giving and offering a bribe to a member of the common council of a city for the purpose of securing a franchise from the city to a railroad corporation, evidence tending to show that, a year previous, the defendant made a corrupt proposal to the clerk of one of the houses of the state legislature in regard to an alteration of a certain bill then pending before that body in reference to street railways is inadmissible. *People v. Sharp, 107 N. Y. 427, 14 N. E. 319.*

Under the provisions of the Code of Georgia requiring the maximum penalty to be inflicted upon conviction for the commission of a crime

72 Pa. 60, 13 Am. Rep. 649; *State v. La-page*, 57 N. H. 245, 24 Am. Rep. 69; *Goersen v. Com.* 99 Pa. 388; *Com. v. Jackson*, 132 Mass. 16, 44 Am. Rep. 299, note; *State v. Raymond*, 53 N. J. L. 260, 21 Atl. 328; *Farris v. People*, 129 Ill. 521, 4 L. R. A. 582, 21 N. E. 821; *People v. Seaman*, 107 Mich. 348, 65 N. W. 203.

It is apparent that the exceptions to the rule fall roughly into three general classes:

1. Where the evidence of another offense tends to show intent on the part of the defendant to commit the crime charged in the indictment.

(a) Where such evidence tends to rebut a probable, or an avowed, defense of mistake.

The most obvious illustration of this sub-

a second time, the law will not require the first conviction to be set out in the indictment, nor allow it to be proved, as such allegation and proving would naturally tend to his prejudice. If he is convicted of the second offense, the court will then take into consideration the record of the first. *McWhorter v. State* (Ga.) 44 S. E. 873.

The following are authorities recognizing the rule and its general application: *United States v. Burr*, Fed. Cas. No. 14,694; *United States v. Mitchell*, 2 Dall. 357, 1 L. ed. 414, Fed. Cas. No. 15,789; *Boyd v. United States*, 142 U. S. 450, 35 L. ed. 1077, 12 Sup. Ct. Rep. 292, Reversing 45 Fed. 851; *Brock v. State*, 26 Ala. 105; *Hailey v. State*, 63 Ala. 89; *People v. Jones*, 31 Cal. 565; *People v. Jones*, 32 Cal. 80; *People v. Barnes*, 48 Cal. 551; *People v. Hartman*, 62 Cal. 562; *People v. McNutt*, 64 Cal. 118, 28 Pac. 64; *People v. Elliott*, 119 Cal. 593, 51 Pac. 955; *People v. Lynch*, 122 Cal. 501, 55 Pac. 248; *People v. Arlington*, 123 Cal. 356, 55 Pac. 1003; *People v. Hurley*, 126 Cal. 351, 58 Pac. 814; *People v. Williams*, 127 Cal. 212, 59 Pac. 551; *People v. Carpenter*, 136 Cal. 391, 68 Pac. 1027; *State v. Riggs*, 39 Conn. 498; *Selph v. State*, 22 Fla. 537; *Mann v. State*, 22 Fla. 600; *McDonald v. People*, 126 Ill. 150, 18 N. E. 817; *Farris v. People*, 129 Ill. 521, 4 L. R. A. 582, 21 N. E. 821; *Bishop v. People*, 194 Ill. 365, 62 N. E. 785; *Redman v. State*, 1 Blackf. 96; *McIntire v. State*, 10 Ind. 26; *Bonsall v. State*, 35 Ind. 460; *Pittsburgh, Ft. W. & C. R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111 (Implied); *State v. Sterrett*, 71 Iowa, 386, 32 N. W. 387; *State v. Rainsbarger*, 71 Iowa, 746, 31 N. W. 865; *State v. By-song*, 112 Iowa, 419, 34 N. W. 505; *State v. Boyland*, 24 Kan. 186; *State v. Stevens*, 56 Kan. 720, 44 Pac. 902; *Miller v. Com.* 78 Ky. 15, 39 Am. Rep. 194; *Wyatt v. Com.* 8 Ky. L. Rep. 55, 1 S. W. 196; *Spurlock v. Com.* 14 Ky. L. Rep. 605, 20 S. W. 1095; *Combs v. Com.* 14 Ky. L. Rep. 703, 21 S. W. 353; *Ballowe v. Com.* 19 Ky. L. Rep. 1867, 44 S. W. 646; *State v. Johnson*, 38 La. Ann. 686; *State v. Bates*, 46 La. Ann. 849, 15 S. W. 204; *Com. v. Wilson*, 2 Cush. 590; *Com. v. Jackson*, 132 Mass. 16, 44 Am. Rep. 299, note; *Com. v. Campbell*, 155 Mass. 537, 20 N. E. 72; *People v. Schweitzer*, 23 Mich. 301; *People v. Henry*, 129 Mich. 100, 88 N. W. 77; *State v. Hoyt*, 13 Minn. 132, Gll. 125; *State v. Austin*, 74 Minn. 463, 77 N. W. 301; *Herman v. State*, 75 Miss. 340, 62 L. R. A.

division is to be found in the trial of an indictment for passing counterfeit money.

People v. Sharp, 107 N. Y. 467, 14 N. E. 319; *Com. v. Bigelow*, 8 Met. 235; *Com. v. Stone*, 4 Met. 43; *Stalker v. State*, 9 Conn. 341; *People v. Dibble*, 3 Abb. App. Dec. 518; *Reg. v. Forster*, Dears. C. C. 456.

Also under this head may be included cases of the administering of poison in which the defense was interposed that the poison was administered by the defendant in ignorance of its poisonous character.

Reg. v. Francis, L. R. 2 C. C. 128, 12 Cox C. C. 612; *Reg. v. Roebuck*, 1 Dears. & B. C. C. 24.

Also under this head may be included cases of larceny by false pretenses, forgery in the third degree by making false entries

22 So. 873; *Kearney v. State*, 68 Miss. 233, 8 So. 292; *Brown v. State*, 72 Miss. 997, 17 So. 278; *Whitlock v. State* (Miss.) 6 So. 237; *Cotton v. State* (Miss.) 17 So. 372; *State v. English*, 67 Mo. 136; *State v. Reavis*, 71 Mo. 419; *State v. Harris*, 73 Mo. 287; *State v. Martin*, 74 Mo. 547; *State v. Turner*, 76 Mo. 350; *State v. Reed*, 85 Mo. 194; *State v. Young*, 110 Mo. 495, 24 S. W. 1038; *State v. Roberts*, 33 Mo. App. 524; *Columbia v. Johnson*, 72 Mo. App. 232; *State v. Davies*, 80 Mo. App. 239; *State v. Renton*, 15 N. H. 169; *Clark v. State*, 47 N. J. L. 556, 4 Atl. 327; *Meyer v. State*, 59 N. J. L. 310, 36 Atl. 483; *Parke v. State*, 59 N. J. L. 573, 36 Atl. 935; *Leonard v. State*, 60 N. J. L. 8, 41 Atl. 561; *Roper v. Territory*, 7 N. M. 255, 33 Pac. 1014; *People v. Gibbs*, 93 N. Y. 470; *People v. Fitzgerald*, 156 N. Y. 253, 50 N. E. 846; *People v. Drake*, 65 Hun. 331, 20 N. Y. Supp. 228; *People v. Zulier*, 62 App. Div. 508, 71 N. Y. Supp. 129; *People v. Thurston*, 2 Park. Crim. Rep. 49; *Hall v. People*, 6 Park. Crim. Rep. 671; *Blake's Case*, 1 N. Y. City Hall Rec. 99; *State v. Shuford*, 69 N. C. 486; *State v. Frazier*, 118 N. C. 1257, 24 S. E. 520; *Cheney v. State*, 7 Ohio pt. 1, p. 222; *Farrer v. State*, 2 Ohio St. 54; *Coble v. State*, 31 Ohio St. 100; *Knight v. State*, 54 Ohio St. 365, 43 N. E. 995; *Shaffner v. Com.* 72 Pa. 60, 13 Am. Rep. 649; *Snyder v. Com.* 85 Pa. 519; *Com. v. Saulsbury*, 152 Pa. 554, 25 Atl. 610; *Com. v. Wilson*, 186 Pa. 1, 40 Atl. 283; *State v. Dukes*, 40 S. C. 481, 19 S. E. 134; *Kinchelow v. State*, 5 Humph. 9; *State v. Poe*, 8 Lea, 647; *Wilburn v. State*, 41 Tex. 237; *Gilbraith v. State*, 41 Tex. 567; *Ivey v. State*, 43 Tex. 425; *Cesure v. State*, 1 Tex. App. 19; *Persons v. State*, 3 Tex. App. 240; *Fore v. State*, 5 Tex. App. 251; *Somerville v. State*, 6 Tex. App. 433; *Webb v. State*, 8 Tex. App. 115; *Williamson v. State*, 13 Tex. App. 514; *Kelley v. State*, 18 Tex. App. 262; *Chumley v. State*, 20 Tex. App. 547; *Conley v. State*, 21 Tex. App. 495, 1 S. W. 454; *Carter v. State*, 23 Tex. App. 508, 5 S. W. 128; *Guarjardo v. State*, 24 Tex. App. 603, 7 S. W. 331; *Williams v. State*, 24 Tex. App. 412, 6 S. W. 318; *English v. State*, 29 Tex. App. 174, 15 S. W. 649; *Crass v. State*, 30 Tex. App. 480, 17 S. W. 1096; *Welshousen v. State*, 30 Tex. App. 623, 18 S. W. 300; *Felsenthal v. State*, 30 Tex. App. 675, 18 S. W. 644; *Nixon v. State*, 31 Tex. Crim. Rep. 205, 20 S. W. 364; *Miers v. State*, 34 Tex. Crim. Rep. 161, 29 S. W. 1074;

in books of account, uttering forged instruments, receiving stolen goods, and other like offenses in which guilty knowledge is an essential ingredient of the offense, and in which the defense of lack of such knowledge either has been interposed, or may reasonably be interposed.

Mayer v. People, 80 N. Y. 364; *People v. Shulman*, 80 N. Y. 373, note; *People v. Everhardt*, 104 N. Y. 591, 11 N. E. 62; *Com. v. Russell*, 156 Mass. 196, 30 N. E. 763; *Anson v. People*, 148 Ill. 494, 35 N. E. 145; *People v. McClure*, 148 N. Y. 95, 42 N. E. 523; *Jackson v. People*, 126 Ill. 139, 18 N. E. 286; *Com. v. Johnson*, 133 Pa. 293, 19 Atl. 402.

(b) Where such evidence tends to rebut a probable or avowed defense of accident.

Walters v. People, 6 Park. Crim. Rep. 15,

Campbell v. State, 35 Tex. Crim. Rep. 160, 32 S. W. 774; *Hoover v. State*, 35 Tex. Crim. Rep. 342, 33 S. W. 337; *Schwen v. State*, 37 Tex. Crim. Rep. 368, 35 S. W. 172; *Unsell v. State*, 39 Tex. Crim. Rep. 330, 45 S. W. 1022; *Latham v. State*, 39 Tex. Crim. Rep. 472, 46 S. W. 638; *James v. State*, 40 Tex. Crim. Rep. 190, 49 S. W. 401; *Beach v. State* (Tex. App.) 11 S. W. 832; *Marshall v. State* (Tex. Crim. App.) 22 S. W. 878; *Smith v. State* (Tex. Crim. App.) 24 S. W. 27; *Chaffin v. State* (Tex. Crim. App.) 24 S. W. 411; *Buck v. State* (Tex. Crim. App.) 38 S. W. 772; *Isham v. State* (Tex. Crim. App.) 41 S. W. 622; *Walton v. State* (Tex. Crim. App.) 55 S. W. 566; *Woodward v. State* (Tex. Crim. App.) 58 S. W. 135; *Spriggins v. State* (Tex. Crim. App.) 60 S. W. 54; *Denton v. State* (Tex. Crim. App.) 60 S. W. 670; *Scott v. State* (Tex. Crim. App.) 68 S. W. 680; *Cole v. Com.* 5 Gratt. 696; *Walker v. Com.* 1 Leigh, 574; *State v. Thompson*, 14 Wash. 285, 44 Pac. 533; *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523; *Watts v. State*, 5 W. Va. 532; *Schaser v. State*, 36 Wis. 429; *Porath v. State*, 90 Wis. 527, 63 N. W. 1061; *Rex v. Birdseye*, 4 Car. & P. 386; *Reg. v. Regan*, 4 Cox C. C. 335; *Reg. v. Fairlie*, 8 El. & Bl. 486, 4 Jur. N. S. 300, 6 Week. Rep. 56, 8 Cox C. C. 66, Post. C. L. 246; *Reg. v. Harris*, 4 Fost. & F. 342; *King v. Vandercomb*, 2 Leach C. L. 720, 2 East P. C. 519; *Rex v. Cole*, Phillips, Ev. 170, 4 Mews Dig. 1878; *State v. Fitchette* (Minn.) 92 N. W. 527.

The foregoing are not the only cases which subscribe to this general rule. They comprise, simply, those which hold in varied phraseology the existence of the rule. It is believed that every case in the note affirms, or at least admits, the rule to be as stated; but the cases other than those contained in this division refer more particularly to the explanation and application of the different exceptions to it.

The foregoing are only cases in which the general rule has been asserted, and the evidence of the independent crime rejected. As before stated, every case in the note acknowledges the existence of the general rule, either openly or tacitly; but those which follow relate to, and exhibit one or more of the exceptions to, the general rule, an attempt to state which will now be made.

That is to say, when evidence offered by the prosecution in a criminal action tends to prove a relevant or essential fact, and is competent 62 L. R. A.

Affirmed in 32 N. Y. 147; *Painter v. People*, 147 Ill. 444, 35 N. E. 64; *Hope v. People*, 83 N. Y. 418, 38 Am. Rep. 460; *People v. O'Sullivan*, 104 N. Y. 481, 58 Am. Rep. 530, 10 N. E. 880; *State v. Nugent*, 71 Mo. 136; *State v. McDonald*, 14 R. I. 270; *People v. Jones*, 99 N. Y. 667, 2 N. E. 49; *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492; *Wiggins v. Utah*, 93 U. S. 465, 23 L. ed. 941; *Com. v. Crouce*, 165 Mass. 139, 42 N. E. 563; *Com. v. McCarthy*, 119 Mass. 354; *Com. v. Bradford*, 126 Mass. 42; *Kramer v. Com.* 87 Pa. 299; *State v. Day*, 79 Me. 120, 8 Atl. 544; *People v. Eaton*, 59 Mich. 559, 26 N. W. 702; *Reg. v. Geering*, 18 L. J. M. C. N. S. 215; *Reg. v. Dossett*, 2 Car. & K. 306; *Reg. v. Bailey*, 2 Cox C. C. 311; *Reg. v. Garner*, 3 Fost. & F. 681, 4 Fost. & F. 346; *Reg. v.*

for that purpose, the circumstance that it also tends to prove another distinct or independent crime than that for which the accused is being tried does not render such evidence inadmissible. These exceptions have generally been stated to occur when the evidence of the independent crime tends to prove, either: Motive; intent; the identity of the accused as the perpetrator of the crime charged; or where the independent crime is so related to that for which the accused is being tried as to form part of a common scheme, plan, or system.

To these may, or rather should, be added: Where the evidence of such other independent crime forms part of the *res gestæ*. The acquisition of a knowledge of the general principles governing those exceptions to the general rule that the distinct offense is inadmissible is comparatively easy. The difficulty lies in the application of those principles to the individual case. As was well said by the Lord Chancellor in delivering the judgment of the privy council in a recent case: "The principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. . . . The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line, and to decide whether a particular piece of evidence is on the one side or the other." *Makin v. Atty. Gen.* [1894] A. C. 57, 63 L. J. P. C. N. S. 41, 6 Reports, 373, 69 L. T. N. S. 778, 17 Cox C. C. 704, 58 J. P. 148.

It has been said that it would be a singular rule of law that a person accused of a grave crime could compel the exclusion of important and relevant testimony, merely by committing two felonies at the same time, or so nearly and intimately connected that the one could not be proved without proving the other. *State v. Folwell*, 14 Kan. 105.

In *People v. Tucker*, 104 Cal. 440, 38 Pac. 195, the court said: "The fact that testimony offered tends to prove another offense is never a valid objection to its introduction. On the other hand, testimony is not relevant simply because it tends to show that the defendant at some other time was guilty of a similar offense. Guilt cannot be shown, nor can the weight of evidence be increased, by showing that the defendant has committed other offenses. When such evidence is offered, the same considerations arise as upon the offer of other

Roden, 12 Cox C. C. 630; *Reg. v. Heesom*, 14 Cox C. C. 40; *Reg. v. Flannagan*, 15 Cox C. C. 403; *Makin v. Atty. Gen.* 17 Cox C. C. 704; *Reg. v. Oddy*, 5 Cox C. C. 210; *Reg. v. Holt*, Bell C. C. 280; *Reg. v. Burch*, 4 Fost. & F. 411; *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778.

2. Where such evidence tends to show motive.

As instances, may be mentioned those cases in which improper relations between the defendant and the wife of deceased have been held competent as showing a motive on the part of the defendant to murder the deceased.

Pierson v. People, 79 N. Y. 424, 35 Am. Rep. 524; *Stout v. People*, 4 Park. Crim.

testimony. Is the evidence relevant and competent? Does it tend to prove any fact material to the issues?"

And in *State v. Adams*, 20 Kan. 311, the court, among other things, said: "A party cannot, by multiplying his crimes, diminish the volume of competent testimony against him. A man may commit half a dozen distinct crimes, and the same facts, or some of them, may tend directly to prove his guilt of all; and on the trial for any one of such crimes it is no objection to the competency of such facts, as testimony, that they also tend to prove his guilt of the others. By this rule, whatever is done, in preparation for a crime, or in concealing the fruits, is competent, although in such preparation or concealment is committed another and distinct offense."

In trying a person charged with one offense it is ordinarily inadmissible to offer proof of another and distinct offense, but this is only because the proof of a distinct offense has ordinarily no tendency to establish the offense charged. But whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion. *People v. Walters*, 98 Cal. 138, 32 Pac. 864.

Defendant had been convicted for the theft of a mare, the property of the person named in the indictment as the owner; and, upon the trial, the state proved by another person that he went to a certain house in another county to look for stolen horses, and while there the defendant came out of a room and went to a wood pile; that witness followed and arrested him; that he, witness, found a gray pony at that place which had been stolen from his brother a short time before; that defendant claimed this pony before his arrest. It was held that this evidence in relation to the gray pony was not admissible. *Musgrave v. State*, 28 Tex. App. 57, 11 S. W. 927. In this case the court, after stating the rule that "there are cases in which it is admissible, in support of the charge under investigation, to adduce in evidence facts which may refer to, and be more directly connected with, other offenses than the one for which the accused is on trial; or even to go directly into and show other criminal transactions of a similar character,"—gave a very apt illustration of the application 62 L. R. A.

Rep. 132; *Johnson v. State*, 17 Ala. 618; *Com. v. Ferrigan*, 44 Pa. 386.

Here, also, may be included that class of cases in which it has been held competent to show evidence of a previous crime, where it is charged that the crime for which the defendant was on trial was committed as a preparation for, or a means of committing, concealing, or escaping from, the other crime.

Rea v. Clewes, 4 Car. & P. 221.

Cases in which two or more crimes have been charged against the defendant, upon the ground that the crimes were all committed with a single motive, and with a single end and purpose in view.

People v. Zucker, 20 App. Div. 363, 46 N. Y. Supp. 766; *People v. Wood*, 3 Park.

of the rule, showing that it was not the theft of the other property that made the evidence competent, but it was the taking of anything, even a thing of no value, for the taking of which an accusation for larceny could not be based, because the taking of such thing at the same time as the felonious taking of the property for the larceny of which he is charged, tends to show that he took the latter; and the fact that the thing taken contemporaneously with the property mentioned in the indictment is something of value, and therefore might be the subject of another criminal accusation, in no manner affects the question of the competency of the evidence.

II. To show motive.

a. In general.

1. Common scheme, plan, or system.

The first of the exceptions is that evidence of the motive which suggests the doing of the act constituting the crime charged is always admissible, notwithstanding it may tend to prove an independent crime.

As is stated in *PEOPLE v. MOLINEUX*, it is not infrequently regarded in the popular mind as one and the same thing as intent. And, as will be seen, not only in the popular mind, but in the legal and judicial also, are they mixed and mingled and "jumbled together like poisons and antidotes on an apothecary's shelf."

There is, however, a distinct and material difference. Criminal motive is the inducement, existing in the minds of persons, causing them, first, to intend and afterwards to commit crime. It exists as a component in every crime,—faintly in some; prominently in others; but in all, it exists. But it is not such an essential ingredient of the crime as to be necessary, and in some cases even of use, in securing a conviction. In the abstract it might be said that it is unnecessary.

But in those cases in which the evidence of the crime charged is for the most part or wholly of a circumstantial character, motive frequently becomes a powerful aid in identifying the accused, and thus connecting him with the commission of the crime.

And where, on the trial of a criminal action, evidence is offered which is competent proof of its presence in the mind of the accused, such evidence is not to be rejected because it also shows

Crim. Rep. 681; *Goersen v. Com.* 99 Pa. 388; *Shaffner v. Com.* 72 Pa. 60, 13 Am. Rep. 649; *Hawes v. State*, 88 Ala. 37, 7 So. 302; *People v. Murphy*, 135 N. Y. 450, 32 N. E. 138.

3. Where such evidence tends to establish the identity of the person affected by it with the person who committed the offense charged in the indictment.

People v. Sharp, 107 N. Y. 427, 14 N. E. 319; *Com. v. Choate*, 105 Mass. 451; *People v. Rogers*, 71 Cal. 565, 12 Pac. 679.

Proof of other offenses is allowed in cases where the offense charged is the result of a conspiracy between the defendant and others, and the other offense forms an integral part of, and tends to prove, the conspiracy to commit the crime charged in the

indictment, and shows the defendant to be one of an organization banded together to commit the crime.

Hester v. Com. 85 Pa. 139; *McManus v. Com.* 91 Pa. 57; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898.

Another offense can be proved where both crimes are so connected that it is impossible to distinguish them, and the other offense forms part of the *res gestæ*.

Brown v. Com. 76 Pa. 319; *People v. Foley*, 64 Mich. 148, 31 N. W. 94.

The case at bar is not included in any of the exceptions.

People v. Smith, 162 N. Y. 520, 56 N. E. 1001; *People v. Lonsdale*, 122 Mich. 388, 81 N. W. 277.

The testimony of the expert witnesses,

or tends to show a distinct and different crime. These particular cases show when such evidence should be admitted, and why; and also when the motive comprehends, and the evidence of it discloses, a common scheme, plan, or system.

Where the defendant was on trial under an indictment for the murder of one of his children, and two other indictments were pending against him for the murder of his wife and another child; and the prosecution having adduced evidence tending to support the theory that his motive for killing them all was to remove an obstacle to the consummation of a second marriage, which was in fact celebrated a few days after their deaths,—any evidence connecting him in any way with the murder of the other members of his family is relevant and admissible, as bearing on the question of motive. *Hawes v. State*, 88 Ala. 37, 7 So. 302. The court said that the theory of the prosecution in this case, as developed on the trial, was, that the defendant conceived that the lives of his wife and their two children stood between him and the consummation of a second marriage; and hence, that the motive which prompted the murder of each of them was the same. There was evidence tending strongly to support this theory, and to show that the death of each one of the victims was but a part of the system in which the lives of all were involved, and in the working out of which to the accomplishment of defendant's ulterior purpose the life of each was, in substantially the same manner, ruthlessly sacrificed. Under these circumstances, all evidence going in any way to connect the defendant with the murder of his wife or one of his daughters was relevant to the issues involved on his trial for the murder of the other daughter, and was properly admitted.

Upon a trial for arson, where it appeared from the testimony of a witness that he set fire to the premises mentioned in the indictment, which were in New York city, and that he was employed by the defendant to do so, proof upon the part of the people that, prior to the fire charged in the indictment, the premises were insured by the accused in his own name, and he concocted and subsequently carried out a scheme to burn, at about the same time, in a house which he owned in Newark, New Jersey, and had insured in the name of another person, personal property removed from the New York house to the house in Newark, New Jersey, 62 L. R. A.

sey, to the end that it might there be destroyed by an incendiary fire; coupled with proof that the same accomplice was concerned in both fires, and that both fires were planned by the accused to secure the insurance money,—is competent upon the trial of the indictment for the fire in New York, as the two fires were so inseparably related in plan and execution that they might be regarded as a single transaction having two branches. *People v. Zucker*, 20 App. Div. 363, 46 N. Y. Supp. 756, Affirmed in 154 N. Y. 770, 49 N. E. 1102.

On a trial for larceny in stealing horses, evidence that, upon the same night that the horses were stolen, the smokehouse of the owner of the horses, with its contents, was burned, is not competent upon the theory that the defendant set fire to the prosecutor's smokehouse for the purpose of creating a diversion so as more effectually to make escape with the horses, where it appeared from the record that the burning of the smokehouse of the prosecutor was wholly unconnected with the stealing of his horses, although it may have been on the same night. *Wiley v. State*, 3 Coldw. 362.

This particular subject is also generally discussed in the following cases: *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452; *Beberstein v. Territory*, 8 Okla. 467, 58 Pac. 641,—*infra*, III. b, 1; *Mayer v. People*, 80 N. Y. 364; *People v. Peckens*, 153 N. Y. 576, 47 N. E. 883,—*infra*, III. b, 2; *Carroll v. Com.* 84 Pa. 107; *Campbell v. Com.* 84 Pa. 187; *Hester v. Com.* 85 Pa. 139; *McManus v. Com.* 91 Pa. 57; *Duffy v. Com.* 6 W. N. C. 311; *State v. Phelps*, 5 S. D. 480, 59 N. W. 471,—*infra*, V. b; *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778,—*infra*, VI. d; *People v. Ascher*, 126 Mich. 637, 86 N. W. 140,—*infra*, VII. a; *Barton v. State*, 28 Tex. App. 483, 13 S. W. 783; *Leeper v. State*, 29 Tex. App. 63, 14 S. W. 398,—*infra*, XVI. a, 1.

The following cases are other instances of when evidence of another crime which tends to show motive for the commission of the crime being investigated should be admitted or rejected, and in which a common scheme, plan, or system is not suggested.

2. In particular instances.

(a) Murder.

Evidence of a distinct substantive offense as a general rule cannot be admitted in support of another offense. Such proof is never admis-

given upon the trial, by comparison of the conceded writings of the defendant with those writings which were not conceded by him, was illegal, inasmuch as the authenticity of the writings not conceded by the defendant was not directly the subject-matter of the issue to be tried, and its admission was prejudicial error.

Under the common law, and prior to the enactment of any statute on the subject, handwriting would be proved (1) by the testimony of the party who wrote; (2) by a witness who saw the writing done; (3) by the opinion of a witness who had seen the party write on other occasions, if once only; (4) by the opinion of a witness who had seen documents purporting to be written by the same party, which, by subsequent com-

munication with such party, he had reason to believe were the authentic writings of such party.

Doe ex dem. Mudd v. Suckermore, 5 Ad. & El. 703; *Stranger v. Scarle*, 1 Esp. 14; *People v. Kennedy*, 34 Misc. 101, 69 N. Y. Supp. 470; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538; *Miles v. Loomis*, 15 N. Y. 288, 31 Am. Rep. 470; *Randolph v. Loughlin*, 48 N. Y. 456; *Dubois v. Baker*, 30 N. Y. 355; *Van Wyck v. McIntosh*, 14 N. Y. 439; *Stokes v. United States*, 157 U. S. 187, 39 L. ed. 667, 15 Sup. Ct. Rep. 617.

Comparison cannot be made by an expert in handwriting placing two pieces of evidence (not being the subject of the action) in juxtaposition, and comparing one with the other, and declaring his opinion as to

ble unless there is some logical connection between the two crimes, from which it can be said that the one tends to establish the other. *Farris v. People*, 129 Ill. 521, 4 L. R. 2. 582, 21 N. E. 821.

On a trial for murder, the admission of evidence that defendant committed the crime of rape upon the wife of the murdered man within half an hour after the killing, upon the theory, that such evidence tended to prove the motive or intent with which the homicide was committed, was prejudicial error. *Ibid.*

On a trial of an indictment for murder the facts tended to prove that robbery was the motive for the killing of deceased, who was a guest at the house of another; that a fair had been held at such house on the night of the homicide, and that defendant was present during such fair, and at its close, and witnessed the counting of the money taken thereat; that he went off for a few minutes, returning with a gun and wearing a disguise, and, meeting the proprietor of the house just outside of the house, shot and killed him, and then immediately entered the house and shot deceased, leaving none remaining except some females from whom he took the proceeds of the fair. The killing of the other person than the deceased was objected to, because the defendant was not on trial for the killing of such third party. It was held that the evidence of such killing tended to show that the purpose of the defendant was to kill all the men present who could offer resistance to his intended robbery, and was properly admitted. *West v. State*, 42 Fla. 244, 28 So. 430.

Where the public prosecutor, on the trial of an indictment for murder of the prisoner's wife, in the absence of direct evidence of the alleged murder, offered, with other presumptive evidence, testimony to prove an adulterous intercourse subsisting between the prisoner and another woman for some months before and down to the time of the alleged murder, it was held that such testimony was admissible, not to prove the *corpus delicti*, but to repel the presumption of innocence arising from the conjugal relation. *State v. Watkins*, 9 Conn. 47, 21 Am. Dec. 712. Nothing appears to be said in this case as to the proof being that of another crime.

But by a statute of Connecticut adultery is made an indictable offense. *Ibid.* It is suggested that the evidence was also admissible 62 L. R. A.

for the purpose of showing a desire on the part of the accused to be rid of his wife, thereby furnishing a motive for effecting her death.

On the trial of a criminal prosecution, where the facts and circumstances offered in evidence amount to proof of a crime other than that charged, and there is ground to believe that the crime charged grew out of it, or was caused by it, such facts and circumstances may be admitted to show the *quo animo* of the accused. Consequently, evidence was admissible on the part of the commonwealth, on a trial for murder, of an adulterous intercourse between the wife of the deceased and the prisoner, continuing down to or near the time of the homicide, as tending to show a motive for the act; though independent acts of adultery, disconnected from other evidence in the case, could not have been shown. *Com. v. Ferrigan*, 44 Pa. 386.

On a trial for murder of a policeman, where it appeared that, about three weeks before the homicide, defendant, in speaking of his previous arrests by deceased and other policemen, remarked, in substance, that, in case of his arrest again, and he was not allowed to give bond, and he had a gun with him, "he'd be damned if the fight didn't begin right there."—It was held that the evidence was admissible on the issue of malice and motive. *Miller v. State*, 31 Tex. Crim. Rep. 600, 21 S. W. 925.

Where, on the trial of an indictment for murder, it appeared that the accused and deceased lived together alone, and that the deceased had lost a baby for whose death accused was suspected to be responsible, it is competent for the state to prove the circumstances of the death of the baby of the deceased, and that it exhibited symptoms which might have been caused "by air being choked off from the blood," as these circumstances, although remote, indicate the probable motive that defendant had in killing deceased. *Hamblin v. State* (Tex. Crim. App.) 50 S. W. 1019.

On the trial of an indictment for murder, where it appeared that the defendant was a married man not having lived with his wife for some years, and that the deceased, who had kept house for him, was a married woman living separate from her husband, evidence on the part of the state is admissible to show that, on the Sunday night before the murder, the defendant met the deceased and another woman, and, after endeavoring to persuade her to re-

whether one was written by the accused, or the other written by the accused, or both by one person.

People v. Kennedy, 34 Misc. 101, 69 N. Y. Supp. 470; *People v. Dorothy*, 50 App. Div. 44, 63 N. Y. Supp. 592; *People v. Corey*, 148 N. Y. 476, 42 N. E. 1066; *Shaw v. Bryant*, 90 Hun, 374, 35 N. Y. Supp. 909; *McKay v. Lasher*, 42 Hun, 270, 121 N. Y. 477, 24 N. E. 711; *Clark v. Douglass*, 5 App. Div. 547, 40 N. Y. Supp. 769; *Mutual L. Ins. Co. v. Suiter*, 131 N. Y. 557, 29 N. E. 822; *Kanouse v. Martin*, 15 How. 198, 14 L. ed. 660; *Knight's Appeal*, 19 Pa. 493; *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675; *Tompkins v. Hunter*, 149 N. Y. 117, 43 N. E. 532.

The rule of the common law requiring personal knowledge on the part of the witness

has been relaxed in two cases: First, where the writings are of such antiquity that living witnesses cannot be had, and yet are not so old as to prove themselves; and, second, where other writings admitted to be genuine are already in the case.

A case cannot be found where the standard of comparison was proved in the case only by the opinion of experts, and where the coefficient of error was increased, as it was in this case, by successive comparisons on comparisons on comparisons.

Miles v. Loomis, 75 N. Y. 288, 31 Am. Rep. 470; *Randolph v. Loughlin*, 48 N. Y. 456; *Dubois v. Baker*, 30 N. Y. 355.

The writings made by the defendant at the request and under the instruction of the expert witness, Kinsley, were inadmissible

turn home with him, followed her, using threatening and insulting language to her, and violently assaulted her and the woman companion who was with her,—as it bore directly on the question of malice and motive; since it tended to show that a crisis had been reached in their affairs, and that the defendant was very angry at the deceased. *State v. Bradley*, 67 Vt. 465, 32 Atl. 238.

On a trial of a person for the murder of his wife, the prosecution was permitted to prove by a police justice that the deceased had made a complaint against the prisoner for assault and battery, upon which the prisoner was arrested, an examination was had, and the prisoner was held to bail. It was held that the testimony was properly received, as it tended to show the extent of the difficulty between the parties. *McCann v. People*, 3 Park. Crim. Rep. 272.

Upon the trial of an indictment for the murder of a surety on the bail bond of a person charged with theft, the court admitted in evidence an indictment against the defendant and another for an assault with intent to murder the person so charged with theft. It was held that, in and of itself, the evidence would have been clearly inadmissible, but, taken in connection with the other facts in the case, the evidence tended to establish a reason for, and a motive which actuated, the hostility of the defendant towards the deceased, and was an appropriate matter to be considered and weighed by the jury, in connection with the other testimony, in determining the question of motive, and fixing the identity of the murderer. *Rucker v. State*, 7 Tex. App. 549.

On the trial of a person for murder evidence that, immediately after the shooting, there was found in a pocket of the clothing of the deceased a purse with some change in it, and that the pocket was partly turned inside out, is admissible, even though it tends in some degree to show that robbery was the motive of the assault,—which seemed to be the particular objection made to it; as that consideration would not make the evidence inadmissible, and there was no ground for the contention by the defendant that it was so because it tended to prove another and distinct crime. *People v. Gleason*, 127 Cal. 323, 59 Pac. 592.

Upon the trial of a wife and her paramour for poisoning her husband, it appeared in the evidence that the defendants, for several years

before, had been guilty of adultery with each other. The court instructed the jury that the evidence of the adultery was admissible, not for the mere purpose of proving that the man had been guilty of adultery with the wife of the deceased, but such proof was held admissible on the question of motive; and the court, in such instruction, merely called the attention of the jury to a particular portion of the evidence, which it was proper for the court to do. *Siebert v. People*, 143 Ill. 571, 32 N. E. 431.

On a trial for murder the court should not permit a witness to detail the facts connected with an alleged robbery of the deceased by the accused, the mode of extorting the money from the deceased, and all the facts connected with the commission of that offense,—and to do so was reversible error. *Ibid.*

But see *State v. Kent*, 5 N. D. 516, *sub nom.* *State v. Pancoast*, 35 L. R. A. 518, 67 N. W. 1052, *infra*.

It is proper, in a criminal case, to prove the commission by the accused of another and collateral crime where such crime furnishes a motive for the commission of the crime for which the accused is being tried; and where the accused, as a witness for himself, has denied the existence of the motive which the evidence of the state tends to show prompted the commission of the crime for which he is being tried, it is proper to show by him, on cross-examination, the commission of the collateral crime that furnishes such motive. *State v. Kent*, 5 N. D. 516, *sub nom.* *State v. Pancoast*, 35 L. R. A. 518, 67 N. W. 1052.

But see *Martin v. Com.* 93 Ky. 189, 19 S. W. 580, *infra*, 11. b.

Upon the trial of an indictment for murder evidence is admissible, on the part of the state, to prove that, immediately following the homicide, the defendant tore down, and destroyed with fire, a cabin upon the ground which was the subject of controversy between him, upon the one hand, and the deceased and others, on the other hand, for the purpose of showing the motive and intent of the defendant. *State v. McGann* (Idaho) 60 Pac. 823.

But upon the trial of an indictment for murder the minutes of the grand jury showing that an indictment for blackmailing had been ordered by that body against the accused upon the complaint of the person killed is inadmissible, if there is no proof tending to show that the prisoner had any knowledge of such action

as standards of comparison, or for any other purpose.

Hynes v. McDermott, 82 N. Y. 41, 37 Am. Rep. 538; *Hickory v. United States*, 151 U. S. 303, 307, 38 L. ed. 170, 173, 14 Sup. Ct. Rep. 334; *Com. v. Allen*, 128 Mass. 46, 35 Am. Rep. 356; *Gilbert v. Simpson*, 6 Daly, 29; *Williams v. State*, 61 Ala. 33.

Chapter 36 of the Laws of 1880, as amended by chap. 555 of the Laws of 1888, is unconstitutional and void. This statute permits the comparison of a disputed writing with any writing "proved to the satisfaction of the court to be genuine."

Hall v. Van Vranken, 28 Hun, 404; *McKay v. Lasher*, 121 N. Y. 477, 24 N. E. 711.

The defendant is entitled to a trial by jury.

by the grand jury; since, under such circumstances, it has no tendency to show a motive in the prisoner for killing the deceased. Had the prisoner known of the action of the grand jury there would have been no error in receiving it. *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 402.

On a trial for murder the state was permitted to prove that defendant's brother was killed, about two years before, by deceased and another; that such other was waylaid and killed about a year before, and that defendant and his brother-in-law were arrested on suspicion of that murder, but defendant was not indicted therefor. Objection was urged to this testimony on the ground that the defendant was in no way connected with the killing of the person who had united with the deceased in killing defendant's brother, and that such testimony was irrelevant and calculated to prejudice defendant's cause before the jury. It was held that the testimony as to the killing of the person who united with the deceased in killing defendant's brother should have been excluded, but that the testimony as to the killing of defendant's brother—by the deceased (for whose murder the defendants were on trial) and the other person—was permissible, as it tended to prove motive on the part of defendant for the killing of deceased. *Pryor v. State*, 40 Tex. Crim. Rep. 643, 51 S. W. 375.

On the trial of an indictment for murder, it appeared that the defendant and deceased lived together just as a man and wife would do, and, after proving this, the witness by whom it was proved, was asked: "Did they ever have any difficulty before (meaning the deceased and the prisoner at the bar), and what was the nature of those difficulties if they had any?"—to which question the prisoner objected as tending to prove a separate and distinct offense, unless shown by the commonwealth to be connected in point of time with the offense charged in the indictment; but the court overruled the objection, and instructed the jury that evidence of antecedent difficulties was not admitted to show that because they had had difficulties before they had the one which is the subject of this investigation, but to show motive and the relation of the parties to each other. And this was affirmed. *O'Boyle v. Com.* 100 Va. 785, 40 S. E. 121. The opinion states that "this whole subject was most exhaustively 62 L. R. A.

Under this statute the judge may have in his absolute power the determination of what may be in other cases, as it was in this, the chief question of fact.

Mr. David B. Hill, with *Mr. Eugene A. Philbin*, for respondent:

The evidence tending to show the death of Henry C. Barnet by poisoning at the hands of the defendant, shortly prior to the poisoning of Mrs. Adams, was properly admitted.

We concede the general rule to be that, upon the trial of a defendant for one crime charged in an indictment, it is improper to prove the commission of another and distinct offense. The only material questions presented upon this subject arise upon the

investigated in the recent case of *PEOPLE v. MOLINEUX*, on an indictment for murder."

Where the defendant was indicted for the murder of a girl ten years of age, whose body was found with that of her mother, who had also been murdered, lying upon a bed at their residence, the mother's underclothing bearing evidence of an assault,—it was held that the state was entitled to show, in connection with the situation of the body of the child, the condition of the body of the mother when found, and of the clothing of it, in order that the connection of the defendant with the crime of which he was accused, the circumstances under which it was committed, and the motives which prompted it, might be more fully understood. *State v. Dooley*, 89 Iowa, 584, 57 N. W. 414.

By a statute of Ohio it is provided "that every person who shall wilfully and maliciously remove, break, displace, throw down, destroy, or in any manner injure, any iron, wooden, or other rail, etc.; . . . or who shall wilfully and maliciously place any obstruction or obstructions upon the rails or tracks of any such railroad,—shall, on conviction thereof, be punished: . . . Provided, however, that, if any person shall, by the commission of either of the aforesaid offenses, occasion the death of any person or persons, the person so offending shall be deemed guilty of murder in the first or second degree, or manslaughter, according to the nature of the offense."

On the trial of an indictment for murder, where it appeared that on the 7th of May the defendant placed an obstruction upon the railroad track, which struck the engine under where the deceased was standing, threw him out, forward on the track, when he was run over and instantly killed, evidence was admitted in reference to the cutting of a derrick and putting of a tie on the track on the 22d of February, and a rail on the 5th of March. Defendant's counsel asked the court to charge that such evidence could not be taken into consideration in determining the fact that defendant put the obstruction on the track on the 7th of May, when deceased was killed. On this subject the court charged: "Alone, such testimony would be entitled to no weight. The commission of the offense must be clearly shown by other testimony; circumstances must point to the defendant as the guilty person, and then you may consider his acts and declarations, though they do not pertain to the specific of-

application of the exceptions to the facts involved herein.

Whether the evidence in any particular case comes within the well-known exceptions to the general rule is often the difficult question to solve, and not as to what the rule itself really is.

People v. Sharp, 107 N. Y. 467, 14 N. E. 319.

Evidence of other poisonings is admissible in poisoning cases.

Goorsen v. Com. 99 Pa. 388; *Jones*, Ev. § 143; *Taylor*, Ev. § 328; *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778; *Reg. v. Flannagan*, 15 Cox C. C. 403; *Makin v. Atty. Gen.* 17 Cox C. C. 704; *Reg. v. Cotton*, 12 Cox C. C. 400; *Reg. v. Geering*, 18 L. J. M. C. N. S. 215.

fense charged, so far as they indicate a feeling that will supply a motive for the deed, or show a continued purpose to do it." *State v. Brooks*, 1 Ohio Dec. Reprint, 407.

On the trial of a husband for the murder of his wife, the prosecution has the right to prove a long course of illtreatment by the husband towards his wife, and violent quarrels between them, resulting in personal assaults upon her, accompanied with threats against her life, or any other motive likely to instigate the commission of the homicide. In such a case, where his wife was forced by him to lead a life of prostitution, proof of many former assaults by him on her, generally to make her give him money obtained by her as the fruits of her shameful life, is admissible, as tending to show the relations between them, his want of affection for her, and the motive or intent with which he committed the fatal assault. *Painter v. People*, 147 Ill. 444, 33 N. E. 64.

On the trial of a husband for the murder of his wife, as tending to show that his motive and intent were to get rid of his wife in order that he might marry another woman, it was competent for the state to introduce in evidence a certain deed which had been forged by defendant, and conveyed land to him, for the purpose of inducing the second woman to believe that he was a man of means and wealth. And the fact that said deed was forged subsequent to the death of his wife did not affect its admissibility as a potent circumstance to indicate the design which had actuated him in killing his wife. Any evidence that goes to explain, illustrate, or prove motive for which a crime has been committed, is admissible, even though the facts proved occurred after the death of the person killed. *Morrison v. State*, 40 Tex. Crim. Rep. 473, 51 S. W. 358.

And, his motive being to marry another woman, with whom he was infatuated, it was competent, as going to his motive, for the state to prove that a recommendation of defendant's character and standing, gotten up to be used in furtherance of his purpose to marry the other woman, was a forgery; the court in its charge having properly limited it to the purpose of showing defendant's motive in the murder. *Ibid.*

Upon the trial of an indictment charging the defendant with murdering his wife by administering poison to her, it was proved that the

Evidence of other arsons is admissible in prosecutions for arson.

Com. v. Bradford, 126 Mass. 42; *Com. v. McCarthy*, 119 Mass. 354; *Kramer v. Com.* 87 Pa. 299; *People v. Zucker*, 20 App. Div. 363, 46 N. Y. Supp. 766, Affirmed in 154 N. Y. 770, 49 N. E. 1102; *Com. v. Choate*, 105 Mass. 451.

Evidence of a previous robbery has been received in a case of burglary.

Hope v. People, 83 N. Y. 418, 38 Am. Rep. 400.

Evidence of other forgeries is admissible in forgery cases.

People v. Everhardt, 104 N. Y. 591, 11 N. E. 62.

Where goods are obtained by means of fraudulent representations, other similar

defendant, 'in a conversation with the witness, after boasting of his previous extensive intercourse with women, and of his successful methods for violating their persons, admitted having previously contracted two secret marriages, made necessary to overcome the scruples of the women. It was held that this evidence was clearly admissible on the question of motive. That it threw light upon it. That, with a previous secret marriage, the publicity of his later marriage with the deceased would have stamped him as a bigamist, and have ruined his reputation, if it would not have subjected him to criminal prosecution. *People v. Harris*, 136 N. Y. 423, 33 N. E. 65.

Where it appeared from the evidence that the deceased, for the killing of whom the defendant was being tried for murder and another person were traveling together, and they both disappeared at the same time, a witness was permitted to testify, over defendant's objection, about the finding of another dead body several miles distant from the supposed dead body of the deceased, for the killing of whom the defendant was being tried. It was held that the testimony was admissible to show motive, knowledge, and intent on the part of the defendant, and also as a circumstance developing the *res geste* of the transaction under investigation; the court properly limiting and restricting the objects and purposes for which the testimony was adduced, and for which alone it could be legitimately considered by the jury. *Morris v. State*, 30 Tex. App. 95, 16 S. W. 757.

In *Johnson v. State*, 24 Fla. 162, 4 So. 535, which was an indictment for murder, it appeared that the deceased was killed in his own bed, in the house inhabited only by himself, his wife, and the defendant. The testimony as a whole showed that an intimacy had subsisted for several years prior to, and continuing up to, the homicide, between the defendant and the wife of the deceased. The testimony, objected to, showing the existence of this intimacy at the place of their residence before they came to the county where the homicide was committed, their conduct going to show that it was a criminal and adulterous intimacy, and their association having continued down to the time of the murder, the court held that the testimony, thus objected to and sought to be stricken out, was entirely competent to show the relations of all the parties in the

frauds by the defendant at about the same time may be shown.

Weyman v. People, 4 Hun, 511; *People v. Peckens*, 153 N. Y. 576, 47 N. E. 883; *Mayer v. People*, 80 N. Y. 364.

The instances in which evidence of other and similar crimes is admissible are probably correctly enumerated in *Goersen v. Com.* 99 Pa. 388, as follows: (1) To establish identity; (2) to show that the act charged was intentional and wilful, and not accidental; (3) to prove motive; (4) to show guilty knowledge and purpose, and to rebut any inference of mistake; (5) in case of death by poison, to prove that the defendant knew the substance administered to be poison; (6) to show him to be one of an organization banded together to commit

crimes of the kind charged; (7) to connect the other offense with the one charged as part of the same transaction.

The evidence of another offense is admissible where it is shown to be "a part of the same criminal scheme" as the main offense.

People v. Murphy, 135 N. Y. 451, 32 N. E. 138; *People v. Van Tassel*, 156 N. Y. 561, 51 N. E. 274; *People v. Place*, 157 N. Y. 585, 52 N. E. 576.

The evidence relating to the poisoning of Barnet was admissible upon the ground that the two crimes were "a part of the same criminal scheme."

The proof as to the other crime may have been inclusive, but the people had the right to give it, and have it submitted to the jury

house at the time of the murder, as well as the motive of the defendant to murder the deceased.

Upon the trial of a person charged in the indictment for the murder of a woman to whom he had been married and with whom he was living as his wife, the state was permitted to prove that he had a former wife still living, and that he had married deceased under a different name from that which he had before borne, and that he had imposed upon her by false letters and papers, and also that he had married another woman five weeks after the death of the deceased. All this evidence was held to be admissible for the purpose of repelling the presumption of conjugal affection on the part of the prisoner. *State v. Green*, 35 Conn. 203. The fact that proof of the defendant's previous marriage to another person was proof that in marrying the deceased he had been guilty of bigamy does not appear to have been adverted to by either the court or counsel.

Upon the trial of an indictment for murder, the prosecution was permitted to prove, for the purpose of showing a motive for the commission of the crime, that, a few days after the death of the deceased, the defendant began to sell his property, and, eleven days after the death, disappeared from his home; and that, seven days thereafter, he was married in another state to the wife of the deceased, and, being put upon his oath by a clergyman who performed the marriage, and, being asked by him if he knew any legal objection to his entering into the matrimonial alliance, he answered that he did not. He was married, and his wife was living. This was objected to by the defendant as tending to show another and distinct offense. It was held that the evidence was admissible as tending to show a motive or reason why the defendant desired the removal of the deceased. *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 527.

Upon a trial for murder, where the theory of the prosecution is that the homicide was committed by the defendant because of the passion which he entertained for the wife of the deceased, and of the criminal intimacy which existed between them, of which the deceased had knowledge, testimony of the criminal intimacy is admissible in evidence, in order to show motive in defendant for killing the deceased, and also to show the degree or grade of the crime that has been committed. As a general rule, 62 L. R. A.

testimony tending to show the commission of another offense than the one charged is not admissible; but, where such other evidence is intimately connected with the one charged, important proof tending to establish the latter cannot be excluded because it may tend to prove the defendant guilty of the other offense. *State v. Reed*, 53 Kan. 767, 37 Pac. 174.

Upon the trial of one for the murder of his wife, it was held that it was permissible for the state to prove an improper intimacy between the defendant and a woman other than his wife. *Hall v. State*, 40 Ala. 698.

Living together in adultery or fornication is a crime in Alabama.

42 Ala. Code 1896, § 4310.

Accused and his sister were indicted, jointly, for the murder of the sister's husband, and upon the trial of the accused the people were permitted to give evidence showing incestuous relations between the accused and his sister as a motive for removing the deceased out of the way, so as to afford more full and free and safe opportunity for vicious intercourse with her. It was held that the evidence was competent, although it tended to prove the accused guilty of the crime of incest. *Stout v. People*, 4 Park. Crim. Rep. 132.

Upon the trial of a person charged with murdering his wife, where there had been a secret marriage, and it was shown that the defendant had written notes to his wife, and also had corresponded with a girl whom he had promised to marry, and with a prostitute with whom he was intimate, the court, in holding that the notes to his wife and the correspondence with the other two women were competent evidence against him as showing motive, stated that, necessarily, where the commission of crime can be shown only by proof of circumstances, the evidence should be allowed to take a wide range, otherwise the guilty would often go unpunished; and said, incidentally: "Even evidence tending to prove a distinct offense is, therefore, admissible, if it shows facilities or motives for the commission of the one in question." *O'Brien v. Com.* 80 Ky. 354, 12 S. W. 471.

Upon a trial for murder, evidence that the defendant and an accomplice entered the houses of two of the neighbors of their victim, committing a theft in each one, a few minutes before entering the latter; and that their mission on that night was theft and robbery; and

with proper instructions for their consideration.

People v. Dimick, 107 N. Y. 13, 14 N. E. 178.

Evidence of the death of Barnet and the circumstances thereof was admissible upon the broad ground of establishing "motive."

People v. Hurris, 136 N. Y. 423, 33 N. E. 65; *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524; *People v. Stokes*, 2 N. Y. Crim. Rep. 382; *Stout v. People*, 4 Park. Crim. Rep. 71; *Osborne v. People*, 2 Park. Crim. Rep. 583; *Johnson v. Com.* 115 Pa. 369, 9 Atl. 78.

The evidence of the previous death of Barnet was admissible to prove that the defendant knew the substance administered to Mrs. Adams to be poison,—to show guilty knowledge and purpose, and to repel any inference of mistake.

that such, therefore, were their motive and purpose in entering the house of the person killed,—is admissible for the purpose of showing such motive and purpose. *O'Brien v. Com.* 24 Ky. L. Rep. 2511, 74 S. W. 666; *Whitney v. Com.* 24 Ky. L. Rep. 2524, 74 S. W. 257.

Proof that the defendant, prior to the commission of the alleged crime of murder, had seduced the deceased, is incompetent, unless it affirmatively appear that such seduction was in some way connected with said crime as motive therefor, or otherwise. *Rose v. State*, 13 Ohio C. C. 342.

Upon the trial of an indictment against the defendant for the murder of his wife, the people were permitted to show that he had repeatedly used violence to her person, and had threatened to injure her and to kill her. It was held that the evidence was competent; that, while it did not, of itself, establish the fact that the defendant intended to kill his wife at the time he fired the fatal shot, it was to be weighed by the jury, in connection with all the facts surrounding the homicide, for the purpose of determining the motive and intent of the defendant at the time. *People v. Jones*, 3 N. Y. Crim. Rep. 252.

In *Sayres v. Com.* 88 Pa. 291, the prisoner being indicted for the murder of his wife, the commonwealth offered to prove on the trial that, something more than two years before the murder, the prisoner quarreled with the deceased and threw her down stairs, breaking her arm; that he was arrested, prosecuted by her, and sentenced to imprisonment; and that she thereafter refused to live with him,—to be followed by proof of previous quarrels and difficulties, and disputes about the property, and that their relations had been of an unfriendly character,—in order to show motive and malice. This evidence was objected to, and the objection overruled, and the evidence admitted by the court. The opinion in this case is devoted, mostly, to the consideration of the constitutionality of a statute, and, after deciding that question, in regard to the other matters the supreme court said nothing except: "We have examined the merits of this case with care, and with a disposition, *in favorem vite*, to allow the writ *nunc pro tunc*, if the record presented a question of even reasonable doubt." 62 L. R. A.

Reg. v. Heesom, 20 Moak, Eng. Rep. 384; *Pontius v. People*, 82 N. Y. 340; *Brown v. Com.* 76 Pa. 319; *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778; *Rea v. Clewes*, 4 Car. & P. 221; *People v. Wood*, 3 Park. Crim. Rep. 681; *People v. Rogers*, 71 Cal. 565, 12 Pac. 679; *Weed v. People*, 56 N. Y. 628; *People v. Dowling*, 84 N. Y. 479.

Prior to the statute of 1880 expert witnesses in handwriting were permitted to express their opinions as to the genuineness of a disputed writing upon a comparison thereof with other writings conceded or satisfactorily proved to be genuine, provided such other writings were properly in evidence in the case for other purposes.

Lawson, Expert Ev. 2d ed. 422, 423.

Where the genuineness of a signature is in question in an action, experts in handwriting, who have no other knowledge of the

But it does not. The case was tried with marked accuracy and care by the learned judge of the court below, and there is nothing to justify our interference." (The memorandum of the decision at the end of the case states that the writ of error was quashed.)

In *People v. Walters*, 98 Cal., 138, 32 Pac. 864, the defendant was charged with the murder of a man, and on the trial evidence was admitted, over the defendant's objection, to the effect that, at the time of the homicide, deceased and his mother were together, and, immediately after shooting and killing deceased with one barrel of his shotgun, the defendant fired with the other barrel upon the mother, and wounded her. In applying the rule first stated to this case, the court said: "On the occasion of this homicide Mrs. Wall and her son were the representatives of one side of a long standing controversy, which had resulted in a bitter family feud, and the shooting of the mother immediately after the shooting of the son, by a representative of the other side, was convincing evidence of the motive of the act. It showed the malice which is an essential ingredient of the crime charged, and tended strongly to disprove the claim of self-defense, which the people could anticipate if they chose to do so."

On the trial of a man for the murder of his second wife by poison, evidence is inadmissible to prove that the husband of a woman who had been the paramour of the accused had died nearly four months previous to the death of the wife of the accused, from the same kind of poison; that his symptoms were the same as hers, that both died at the house of accused, and that he attended upon both; and that the accused had obtained the money from a life insurance company, on a policy on the life of the husband of his paramour. *Shaffner v. Com.* 72 Pa. 60, 13 Am. Rep. 649. It appeared that the intercourse between the accused and his paramour had commenced and continued during the life of his first wife, and that at the time of the death of the latter the paramour was unmarried. The court said he might have then married her had he so desired, but he did not, but married the wife he was charged with poisoning; and it could not be said that he poisoned her and the husband of

handwriting of the person whose signature the one in question purports to be than that derived by a comparison in court of such signature with other signatures of the person to instruments proved and properly in evidence, are competent as witnesses to give their opinion, derived from such comparison, as to the genuineness of the disputed signature, and as to whether it appears to be a natural or simulated hand.

Miles v. Loomis, 75 N. Y. 288, 31 Am. Rep. 470.

It was the established practice of the trial courts to permit the opinions of experts to be received to prove the genuineness of a disputed signature by comparison of hands, if the writings compared were properly in evidence for other purposes.

Goodyear v. Fosburgh, 63 Barb. 154; *Johnson v. Hicks*, 1 Lans. 151; *Dubois v.*

Baker, 30 N. Y. 355; *Roe v. Roe*, 8 Jones & S. 1; *Randolph v. Loughlin*, 48 N. Y. 456; *Miles v. Loomis*, 75 N. Y. 288, 31 Am. Rep. 470; *Sudlow v. Warshing*, 108 N. Y. 520, 15 N. E. 532; *Rogers*, Expert Testimony, 2d ed. 321, 322; *Shaw v. Bryant*, 90 Hun, 374, 35 N. Y. Supp. 909, Affirmed in 157 N. Y. 715, 53 N. E. 1132.

The statute of 1880 was clearly a remedial statute, designed to meet the difficulties occasioned by the fact that in nine cases out of ten comparison by experts became impossible, because the genuine writings were not properly in evidence in the case, and under the decisions could not be received in evidence solely for purposes of comparison. The only object of this statute was to allow other writings, not in other respects material to the case, to be introduced

his paramour for the purpose of marrying the latter. So, also, if he poisoned his second wife in order to obtain her money (which seems to have been claimed), it was not necessary to put the husband of the other woman out of the way to do it. And that, as to the obtaining of the insurance money, if the accused had been on trial for the murder of the husband of the other woman it would have been admissible, but that it furnished no motive for the murder of his wife.

On a trial for the murder of a boy, where the accused had been examined as a witness in his own behalf, and had claimed and testified that his confession to having shot the boy, made to a detective, was made as a joke, and it appeared from the testimony as to the confession that the boy was killed while running from the accused, who feared that the boy would give information to his father as to the presence of the accused in the vicinity; and it appeared that there had been difficulty between the father of the boy and the accused relative to the pasturing of sheep; and the accused had also, upon cross-examination, admitted that he had a conversation with a witness in which he had stated that he had shot four or five times at a man, and also admitted that the man was the father of the boy,—it is competent for the prosecution, in rebuttal, to prove, by the witness to whom he made the latter statements, what the accused said to him in reference to shooting at the father of the boy, and why he had missed him, as the reference to the shooting at the father was a material fragment of the confession tending to illuminate the transaction, uncover the motive, and explain generally the situation. *Horn v. State* (Wyo.) 73 Pac. 705.

Where it appeared on a trial for murder that the person killed, stated in the presence of the accused not long before the homicide, that he had offered an amount for a horse, and that he had paid part of it by a debt which was due him and had gone down in his pocket for the balance, and that he had \$200; and that after the murder there was missing from his person a \$5 bill which he had a short time before; and it also appeared that the accused had stated, the afternoon before, that he had no money,—evidence that after the murder the accused was in possession of a \$5 bill is relevant, in connection with the evidence that the deceased had 62 L. R. A.

money, and that the accused knew, or had means of knowing, it, as tending to show a motive for the commission of the crime. *Kiefer v. State* (Wyo.) 73 Pac. 556.

(b) *Assault with intent to murder.*

Upon the trial of an indictment for assault, found against a husband who, after charging his wife with infidelity, threw her down and burned her across the legs and abdomen with a poker which he had previously heated, evidence that on former occasions, entirely independent of, and disconnected from, the offense in question, and extending through a period of eight years, the husband had assaulted the wife for her alleged infidelity, is inadmissible upon the question of the husband's motive and intent on the occasion in question. *People v. Flanigan*, 42 App. Div. 318, 59 N. Y. Supp. 101.

Upon the trial of an indictment for assault and battery with intent to kill, the trial court permitted the prosecution to prove forgery of the notes of the complainant as a motive for the commission of the crime, and for that purpose permitted the prosecution to introduce in evidence the forged notes and an account book found in defendant's possession. These were admitted without objection, but, after the prosecution rested, the defendant's counsel moved to strike them out, stipulating that, if the assault and battery was proved, the defendant committed it with the intent to kill. The trial court refused to strike them out, and, on a writ of error, the court of appeals held that such refusal was correct; they not having objected to their admission, and having cross-examined the complainant in regard to the genuineness of the alleged forged notes, it was too late to have them stricken out. After so holding, the court of appeals said, further: "It should not be thought, however, that but for this the exception would avail; on the contrary, a careful examination of the record leads to the conclusion that the evidence was properly received, and that the court did not err in retaining it. It was competent evidence for the purpose of showing the existence of a motive for the commission of the offense charged, and was none the less so because it also proved the commission of another crime." *Pontius v. People*, 82 N. Y. 339.

in evidence solely for purposes of comparison.

Peck v. Callaghan, 95 N. Y. 73.

After the decision in *Peck v. Callaghan*, in 1884, which limited the instances of comparison to specimens of the genuine handwriting of the particular person whose signature is in question, the legislature, in 1888, stepped in and amended the act of 1880 by the insertion of an additional section, which is as follows:

§ 2. Comparison of a disputed writing with any writing proved to the satisfaction of the court to be the genuine handwriting of any person, claimed on the trial to have made or executed the disputed instrument or writing, shall be permitted and submitted to the court and jury in like manner.

Upon the trial of an indictment for assault with intent to murder, the state introduced the prosecuting witness, who testified that the defendant had been concerned in an assault on him with a knife, whereby he was severely cut in the neck, a short time before the assault charged in the indictment. It was held that such testimony was admissible as tending to show malice, ill-will, or other motive for the act of the accused for which he was upon trial. *Gray v. State*, 63 Ala. 66.

Upon the trial of an indictment for an assault with intent to murder a certain person, testimony of a former attempt upon the life of that person by the defendant, only the day before the assault charged in the indictment, is admissible to throw light on the acts of defendant, and prove motive. *Sullivan v. State*, 31 Tex. Crim. Rep. 486, 20 S. W. 927.

Upon a trial for an attempt to murder by poison, evidence that for some time prior to the attempt a criminal intimacy existed between the prisoner and the wife of the subject of the alleged attempt is competent and pertinent as bearing upon the means and opportunity to commit the offense, and also upon the question of motive. *Templeton v. People*, 27 Mich. 501.

Upon the trial of an indictment for an assault with intent to murder a woman, evidence by the prosecutrix that at the time she received the injury she had been seduced by the defendant under promise of marriage, and that she was then pregnant with an illegitimate child, of which the defendant was the father; and that defendant procured medicine for her, to produce an abortion, and solicited her to take it; that the last time he visited her was about two weeks before she was shot, and that he then said that was the last time he would visit her,—is not inadmissible because the evidence tends to impeach the character of the defendant by proving criminal conduct other than that charged in the indictment. The rule that evidence of a distinct substantive offense cannot be admitted in proof of another offense is subject to the exception that whatever serves to establish the *scienter* or *quo animo*, or a motive for the commission of the crime charged, may be shown. *State v. Kilne*, 54 Iowa, 183, 6 N. W. 184.

(c) Arson.

Upon the trial of an indictment for arson in setting fire to and burning a gin house, evidence

This amendment permits the introduction for the purposes of comparison, not only of specimens of the genuine handwriting of the person whose signature is in question, but specimens of the handwriting of any person claimed on the trial to have made the disputed writings.

Shaw v. Bryant, 90 Hun, 374, 35 N. Y. Supp. 909, Affirmed in 157 N. Y. 715, 53 N. E. 1132.

The admissibility of other writings for the purpose of comparison in cases where the disputed instrument has not been the subject of the action, as well as where it has been, has always been recognized.

People v. Corcy, 148 N. Y. 476, 42 N. E. 1066; *Dresler v. Hard*, 127 N. Y. 235, 12 L. R. A. 456, 27 N. E. 823; *People v. Flech-*

that while the fire was raging, and all the family of the prosecutor were at and about it, a trunk containing money was stolen from the prosecutor's bedroom, is competent as tending to show that the probable motive of the arson was to open up an opportunity for committing a larceny from the dwelling. *Jones v. State*, 63 Ga. 395.

Upon the trial of an indictment for arson, the theory of the prosecution being that the firing was done to defraud an insurance company, it is not error to admit in evidence the entries in defendant's book, and, when such entries were ambiguous, the explanations thereof by an expert witness, where the entries were proved to be in the handwriting of the defendant in the book used by him in the conduct of the business, and were shown to be untrue, falsely representing that produce had been purchased and received by the defendant into the house immediately preceding the burning thereof, which, if it had been in the house, would have been covered by a policy of insurance; and where, in connection, an accomplice witness testified that defendant, shortly before the house was burned, told him that he wanted the house burned in order to get the insurance money, and that he saw defendant writing on his books, and defendant told him he was fixing his books so as to swindle the insurance company, so as to make it appear that he had as much as the insurance, and that he had his books about ready. *Rogers v. State*, 26 Tex. App. 404, 9 S. W. 762.

(d) Other crimes.

Upon the trial of an indictment for procuring persons to cut, stab, and wound with intent to maim, another person, a witness testified, over the objection of the defendant, that on the evening the offense charged in the indictment was committed, about dark, he was passing the store of defendant in a wagon; that the person for injuring whom the defendant was charged in the indictment with having procured others to shoot, etc., was in the wagon with the witness; that defendant and such person got into an altercation, and that defendant struck at that person with a knife, and he jumped out of the wagon and threw a stone at defendant. It was held that this evidence was properly admissible to show "the existence of a motive likely to instigate the defendant to the com-

ter, 44 App. Div. 199, 60 N. Y. Supp. 777; *Re Koch*, 33 Misc. 153, 68 N. Y. Supp. 375; *Mutual L. Ins. Co. v. Suiter*, 131 N. Y. 557, 29 N. E. 822; *Affirming* 38 N. Y. S. R. 553, 14 N. Y. Supp. 404; *People v. Kennedy*, 164 N. Y. 449, 58 N. E. 652.

The authenticity of handwriting must be subject to proof by comparison of some sort, or by testimony which is based upon comparison between the writing in question and that which is in some manner recognized or shown to be genuine.

Morrison v. Porter, 35 Minn. 425, 59 Am. Rep. 331, 29 N. W. 54; *Rogers*, Expert Testimony, 2d ed. p. 309, § 130; 10 Yale L. J. 217.

In England and in the states comparisons have been allowed, not only in cases where

the disputed writing was the very subject-matter of the controversy, but also in cases where it was merely evidential.

Com. v. Williams, 105 Mass. 62; *State v. Thompson*, 80 Me. 194, 13 Atl. 892; *Morrison v. Porter*, 35 Minn. 425, 59 Am. Rep. 331, 29 N. W. 54; *State v. Shinborn*, 46 N. H. 497, 88 Am. Dec. 224; *Woodman v. Dana*, 52 Me. 13; *Sweetser v. Lowell*, 33 Me. 440; *State v. Ward*, 39 Vt. 225; *Abbott v. Coleman*, 22 Kan. 250, 31 Am. Rep. 186; *Bell v. Brewster*, 44 Ohio St. 690, 10 N. E. 679; *State v. Webb*, 18 Utah, 441, 56 Pac. 159; *People v. Sliney*, 137 N. Y. 570, 33 N. E. 150.

The alleged disputed writings have been duly proved, not by expert witnesses merely, but by witnesses with personal knowledge, and, being relevant to the issue, and

mission of the offense in question." *Watts v. State*, 5 W. Va. 532.

On the trial of an indictment for larceny it appeared that the defendant was a member of a firm of insurance agents, and as such was the agent of the insurance company alleged in the indictment to have been defrauded, and of other insurance companies, one known as the Continental. That defendant insured a schooner in the Continental, and, after being apprised of the loss of the vessel, changed the insurance by erasures on the books and papers and new entries, to the company alleged in the indictment to have been defrauded. It was held that it was competent for the people, for the purpose of showing the evil motive and fraudulent intent of the defendant in changing the insurance after the knowledge of the loss, from the Continental to the company named in the indictment, to prove that the defendant had done other similar acts, although it might thus be shown that he was guilty of other crimes. *People v. Dimick*, 107 N. Y. 13, 14 N. E. 178.

In a prosecution for rape, it is competent for the state to prove, for the purpose of showing a motive for the crime, that the place to which the defendant took the prosecuting witness was a house of prostitution kept by him; as it is always competent for the state to prove the accused guilty of another crime, if such other crime furnishes a motive for the one upon which he is on trial. *Cross v. State*, 138 Ind. 254, 37 N. E. 790.

On a trial upon the charge of petty larceny alleged to have been committed by the accused in stealing \$10, the property of a person named in the indictment, it appeared that the defendants went into that person's store, asked to purchase some candy, and tendered a \$20 bill in payment therefor, for which they received back \$19 and some change. Thereupon one of the defendants, stating that he had found sufficient money to purchase the candy, requested the person from whom the purchase had been made to hand back the \$20 bill, which was done, and some money was returned, which at the time the person in the store supposed to be the money he had given in exchange for the \$20 bill, but which was, in fact, \$10 less. It was held that evidence that the defendants, on the same evening and at another place, were guilty of a similar transaction, was competent for the purpose of showing motive. *People v. Williams*, 58 Hun. 278, 12 N. Y. Supp. 249, 62 L. R. A.

Upon the trial of an indictment for the larceny of a gold watch and other articles of jewelry, the state offered in evidence against the accused the record of a proceeding in the county court wherein the accused had been charged, tried, and convicted of the crime of petty larceny in the stealing of one watch chain and charm. This record was admitted over the objection of the defendant. The attorney general declined to make expense to the state in an effort to sustain the conviction, admitting that for this error it would have to be reversed. The court, in disposing of the case, said: "The following observations are made in view of the new trial in the case: As a general rule, when a prisoner is on trial for a crime, his guilt or participation in the commission of another crime, wholly unconnected with that for which he is put on his trial, cannot be admitted in evidence against him. But this rule has a great many exceptions, in cases where the degree of knowledge with which the act charged has been committed, or the motive for its commission, are material elements of the crime." *Smith v. State*, 17 Neb. 358, 22 N. W. 780.

In view of the circumstances stated above, it would seem that, as the observations of the court were unnecessary and entirely gratuitous, what is stated would not be, in and of itself of much force; and yet the case has been cited and approved in several instances in Nebraska since the date of the decision.

Defendant was indicted for perjury alleged to have been committed on the trial of a person for murder. Over objection, the state introduced in evidence, on the trial of the indictment for perjury, an indictment against the defendant charging him with the same murder, together with oral testimony that the person on whose trial for the murder the perjury was alleged to have been committed by the defendant was a witness against the defendant upon his trial for the murder; counsel for the state explaining that these facts were admissible to show motive for the perjury. It was held that the indictment was properly admitted in evidence. *Kitchen v. State*, 26 Tex. App. 165, 9 S. W. 461.

On the trial of an indictment for subornation of perjury, evidence was received of other attempts made to induce other persons to testify falsely upon the trial, and it was held that the same became competent, in view of all the circumstances; that motive and intent were ele-

being in evidence for all purposes, the rules of the common law apply; or, at least, the settled rules of evidence which were recognized in our state prior to 1880-1888 apply and permit expert witnesses to compare any relevant writings with each other properly in the case for purposes other than comparison, and to express their opinion as to the genuineness of any such writings.

Miles v. Loomis, 75 N. Y. 288, 31 Am. Rep. 470; *Merritt v. Campbell*, 79 N. Y. 625; *Peck v. Callaghan*, 95 N. Y. 73; *Dubois v. Baker*, 30 N. Y. 355; *Randolph v. Loughlin*, 48 N. Y. 460; *Johnson v. Hicks*, 1 Lans. 150; *Goodyear v. Vosburgh*, 63 Barb. 154.

Werner, J., delivered the opinion of the court:

In various forms and in several separate counts the indictment herein charges the de-

ments in the commission of the offense, and the evidence received bore directly upon these subjects. *People v. Van Tassel*, 26 App. Div. 445, 50 N. Y. Supp. 53, Affirmed in 156 N. Y. 561, 51 N. E. 274.

Defendant was convicted of malicious mischief, charged to have consisted in his having unlawfully, maliciously, and wilfully beaten and killed 25 head of hogs, naming the owner. In his second bill of exceptions the point of objection was that the court erred in its refusal to compel the prosecution, after all the evidence in the case had been adduced, to elect on which killing shown by the evidence the cause would be submitted to the jury,—the evidence having shown the killing to have been done on different days. The court were of opinion that the better practice in such cases as the one at bar, where the indictment is for a misdemeanor containing but a single count and purporting to cover but a single transaction is to move the court—should the evidence after its introduction develop more than one transaction—to exclude all evidence but such as goes to sustain the single transaction. But that, inasmuch as the case was one where the motive or intent with which the act was committed was the gist of the offense, it was permissible to go into and show other criminal transactions of a similar character, as evidence of the intent or motive; and to this extent the evidence was admissible. *Street v. State*, 7 Tex. App. 5.

Defendant was indicted for obstructing a certain railroad. As tending to prove a motive, the state, against the exception of the defendant, was permitted to show that the defendant had been twice arrested on criminal charges at the instance and on the complaint of the same railroad company, once about four years, and once about a year, before the act charged in the indictment. Exceptions to the admission of this evidence were overruled. *State v. Dearborn*, 59 N. H. 348.

Evidence is admissible in a criminal action which tends to show motive, although it tends to prove the commission of another offense by the defendant. *Moore v. United States*, 150 U. S. 61, 37 L. ed. 998, 14 Sup. Ct. Rep. 26.

Upon the trial of an indictment charging the offense of fraudulently disposing of mortgaged property, it appeared that there was property included in the mortgage other than that

defendant with the crime of murder in the first degree. The substance of the charge is that defendant killed one Katharine J. Adams while engaged in the commission of a felony upon and against the body of one Harry S. Cornish. The agency charged to have been employed for this purpose is cyanide of mercury, a rare and deadly poison, which is said to have been sent through the mails by the defendant to said Cornish with the intent that it should be taken by the latter. Direct evidence was adduced upon the trial to establish the fact that Cornish received by mail a package which contained cyanide of mercury, and that he innocently administered to said Katharine J. Adams a portion of its contents, thereby causing her death. The legal questions which it is our duty to consider upon this appeal cannot be intelligently discussed without a clear un-

named in the indictment. It was held that it was competent to permit the state to prove on such trial the sale by the defendant of said other property prior to the sale charged in the indictment, and that such evidence was properly admitted upon the question of motive being specifically limited by the charge of the court to such purpose. *Martin v. State*, 28 Tex. App. 364, 13 S. W. 151.

Upon the trial of an indictment under Penal Code, § 881, prohibiting officers of a corporation from falsifying its books, which indictment charges that the president of a corporation did "alter, mutilate, and falsify, and cause to be altered, mutilated, and falsified, a book in writing;" and which shows that but one alteration is complained of,—evidence is admissible of alterations in other parts of the book, which are not embraced in the indictment, but which bear on the good faith of defendant and on his motives in the commission of the act charged. *Qualey v. Territory (Ariz.)* 68 Pac. 546.

Defendant was indicted for publishing a malicious libel. Upon the trial copies of his paper were permitted to be introduced by the state in evidence for the purpose of showing different articles published in the defendant's newspaper, and, on appeal from a conviction, error was alleged on account of such admission. The court, after stating that the admission was correct for other reasons, further said: "If it can be said that the objection was based upon the theory that publications made after the alleged libel appeared were immaterial, the answer is that the subsequent articles tended to show the motive with which the first one was published, and were competent evidence for that purpose." *State v. Heacock*, 106 Iowa, 191, 78 N. W. 654.

The following cases also decide that evidence of the extraneous crime is competent to prove motive: *Martin v. State*, 28 Ala. 71; *People v. Walters*, 98 Cal. 138, 32 Pac. 864; *Schints v. People*, 178 Ill. 320, 52 N. E. 908; *State v. Kline*, 54 Iowa, 183, 6 N. W. 184; *State v. Lowe*, 6 Kan. App. 110, 50 Pac. 912; *Maden v. Com.* 4 Ky. L. Rep. 45; *State v. Deschamps*, 42 La. Ann. 567, 7 So. 703; *People v. Saunders*, 25 Mich. 119; *People v. Bussey*, 82 Mich. 49, 16 N. W. 97; *State v. Williamson*, 106 Mo. 162, 17 S. W. 172; *State v. Palmer*, 65 N. H. 216, 20 Atl. 6; *People v. Wood*, 3 Park. Crim. Rep. 681; *Brown v. Com.* 76 Pa. 319; *Com. v. Bir-*

derstanding of the complicated facts and circumstances upon which the prosecution seeks to sustain the judgment of conviction against the defendant. In the effort to simplify the recital of these facts and circumstances we shall classify them into the several separate co-ordinate groups to which they belong, without reference to their chronological relation to each other, and without discussing the competency of the evidence by which they are claimed to have been established.

The facts which bear immediately upon the death of Katharine J. Adams and its cause are as follows: On the morning of December 24, 1898, Cornish received through the mail a package in which was found a pale blue box containing a silver bottle holder and a blue bottle bearing a "bromo seltzer" label, and filled with a powder pur-

porting to be "bromo seltzer." The bottle fitted into the bottle holder. Accompanying these articles was a small envelope of the kind in general use for inclosing cards which are sent with gifts. There was no card in the envelope. Cornish, believing that some person had sent him a Christmas gift, and finding no card, recovered the outside wrapper of the package, which had been thrown into the waste basket, and found written upon it the address "Mr. Harry Cornish, Knickerbocker Athletic Club, Madison Avenue and Forty-Fifth St., New York City." He cut, or tore, this address from the wrapper and placed it in his desk, together with the envelope, the bottle, and silver bottle holder. On the following day, December 25, 1898, Cornish, who was a member of the household of Katharine J. Adams, mentioned the receipt of these articles to the

riolo, 197 Pa. 371, 47 Atl. 355; *Dubose v. State*, 13 Tex. App. 418; *Morris v. State*, 30 Tex. App. 95, 16 S. W. 757; *Medina v. State* (Tex. Crim. App.) 40 S. W. 380; *Barkman v. State* (Tex. Crim. App.) 52 S. W. 60; *Hamilton v. State* (Tex. Crim. App.) 58 S. W. 926.

b. Concealment; resisting arrest; escape.

Motive to commit the crime charged is the subject treated and discussed in the foregoing cases. There is one special class of cases, however, in which the motive for the crime charged is a desire to escape the consequences of another crime already committed. These are cases in which the crime charged is committed for the purpose of concealment of a former crime, or in resisting arrest, attempting to escape, or actually escaping.

The prisoner was indicted for the murder of one Hemmings. On the trial of the indictment the prosecution offered to prove that the prisoner and others employed Hemmings to murder another person, and that, he being detected, the prisoner and others then murdered Hemmings to prevent a discovery of their own guilt. The evidence was received. *Rex v. Clewes*, 4 Car. & P. 221.

On the trial of an indictment for murder the district attorney, on the part of the state, introduced an indictment against the defendant charging him with attempting to induce the person killed to commit perjury. It was held that the evidence thus offered was competent to show a motive, on the part of the defendant, to put deceased out of the way. *Dill v. State*, 1 Tex. App. 278.

Where a defendant was accused of an assault with a deadly weapon with intent to murder a police officer who was endeavoring to arrest him for shooting at another person, evidence is admissible to show the circumstances of the previous shooting, for the purpose of showing the motive of the defendant in the commission of the offense charged, and to prove his intent in resisting arrest and assaulting the policeman; and the fact that such evidence of motive and intent includes the proof of a distinct offense for which the arrest was sought does not render such evidence inadmissible. *People v. Wilson*, 117 Cal. 688, 49 Pac. 1054.

Where it appeared upon the trial of an indictment for murder that the deceased, a deputy sheriff, became informed of a robbery, and he and a constable started in pursuit of the robbers, and, coming upon them attempted to arrest them, and, in resisting such attempt, they shot and killed the deputy sheriff, evidence in relation to the robbery is admissible to show that the defendant was engaged in the commission of the robbery, and that he and his confederates had a motive beyond their own protection, as men innocent of crime, in killing the deceased while in pursuit of them. *People v. Pool*, 27 Cal. 573.

On the trial of an indictment against the defendant as accessory before the fact of the murder of a person, evidence as to the admissions of the defendant that he had been engaged with others in an attempt to murder another person is admissible, where it was shown that the deceased, for whose murder the defendant was on trial as accessory, had manifested an interest to ferret out and bring to justice those who had attempted the assassination of the person mentioned, as material and legitimate to show the motive by which the defendant was influenced in his conduct toward deceased. *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54.

On a rule for a new trial for a murder committed, as the report seems to indicate, by persons who were then, or had been immediately before, engaged in a robbery,—if it was not done in the actual commission of the robbery,—the court held that the fact that another crime had been committed, of such a nature and character as to incite the officers to pursue the perpetrators thereof without delay, and that defendant and his associates had committed such a crime, and were then armed, and, according to the evidence, had resolved on their action towards the officers in case they came upon them at the time and place indicated, were relevant facts, not to make out the charge, but to show motive, intent, or *quo animo*. *Com. v. Major*, 24 Pa. Co. Ct. 100.

On the trial of an indictment for murder, against the defendant and two others, the defendant being tried separately, it appeared that two special policemen of a railroad company were shot and killed in its yards at 2 o'clock A. M., and there was evidence tending to show that the defendants, or some of them, fired the shot. Four witnesses were permitted to tes-

On the trial of an indictment for murder, against the defendant and two others, the defendant being tried separately, it appeared that two special policemen of a railroad company were shot and killed in its yards at 2 o'clock A. M., and there was evidence tending to show that the defendants, or some of them, fired the shot. Four witnesses were permitted to tes-

latter and her daughter, Mrs. Rodgers, and on the 27th of December, 1898, he took them home with him and exhibited them to the same persons. As a result of the conversation which ensued, Cornish presented the silver bottle holder to Mrs. Rodgers, who had other toilet articles resembling it in design. Cornish placed the "bromo seltzer" bottle on the dresser in his room, and retired for the night. On the next morning December 28, 1898, Cornish arose shortly before 9 o'clock, and went to the door for his morning paper. In passing the kitchen door he observed Mrs. Adams with her head bandaged, and a few minutes later Mrs. Rodgers informed Cornish that her mother had a headache, and asked him for some of the bromo seltzer he had brought home. Cor-

nish gave the bottle to Mrs. Rodgers, who attempted to open it, without success, and she thereupon returned it to Cornish, requesting him to do so. He opened the bottle, and, after reading the directions upon the label, he poured a teaspoonful of the contents into a glass held by Mrs. Adams, and stirred it while she poured water upon it from another glass. After the dose had been prepared Mrs. Adams drank from it. As she put down the glass she commented upon the peculiar taste of the mixture, whereupon Cornish remarked, "Why that stuff is all right," and swallowed a portion of what remained in the glass. Meanwhile Mrs. Adams had started for the kitchen, and in less than a minute Mrs. Rodgers called from the bathroom for help for Mrs. Adams. As

tify, over the objection of the defendant, that he and one of the other defendants and another person had held them, the witnesses, up between 10 and 11 o'clock previous to the killing. In an instruction to the jury the trial court said: "This evidence has been admitted in this case, not to show that the accused are bad men, devoid of a proper sense of social duty, and therefore more likely than other or better men to have killed Frith [the deceased, special policeman for whose murder defendant was being tried], but to show that Frith, if he was attempting to arrest the accused, had the right to do so, and that the accused had a motive to resist such arrest. Frith and Talcott [the other special policeman killed] were private citizens, and not officers, and, to justify them in attempting to arrest the accused, it must appear from the evidence that the felony of robbery, or attempt to rob, had been committed by the accused, and that Frith and Talcott had been informed of that fact, and had reasonable grounds to believe that the accused were guilty thereof." The relative duties and rights of the deceased and the accused were then defined in event an arrest were attempted. It was held that the foregoing undoubtedly correctly stated the law, and the circumstances shown warranted the introduction of the evidence and the instruction given. *State v. Healy*, 105 Iowa, 162, 74 N. W. 916.

On the trial of an indictment, as charged in the first count, for shooting at a person with intent to kill, and, as charged in the second, for shooting, maiming, and disabling the same person, it is competent to show that the person shot was a constable, and at the time of the shooting was engaged in the attempt to arrest the defendant, the prisoner, upon warrant issued by a justice of the peace charging him with robbing another person of his pocket book containing about \$400. *Baker v. State*, 4 Ark. 56.

In *Cortez v. State* (Tex. Crim. App.) 66 S. W. 453, which was a conviction for murder in the second degree in killing one of the sheriff's posse, it appeared that the defendant, a few days before the alleged killing in one county, had killed the sheriff of another county, and had fled, and the sheriff of the first-named county, with a posse, was searching for defendant in his county. The state was permitted to prove by a witness that he went with the sheriff who was killed to where defendant and his brother

were, in that county, to arrest defendant on a charge of horse theft; that an altercation occurred, and defendant shot and killed the sheriff after the sheriff had shot and badly wounded defendant's brother. It was held that the testimony of the original killing of the sheriff was admissible on the trial of the defendant charged with the murder of one of the members of the posse of the other sheriff while endeavoring to effect his arrest.

Where, upon a trial for murder, it appeared that the defendant, when the crime was committed, was in company with other persons, and the evidence left it in doubt whether the fatal shot was fired by the defendant, or by any one of his companions, the testimony for the prosecution tending to prove, however, that the defendant participated with his companions in the resistance of arrest which resulted in the homicide; and where there was evidence tending to prove that the defendant and the other persons had, prior to the time of the homicide, acted in consort as conspirators in the commission of a felonious assault upon, and robbery of, a railroad train, and had thereafter been for several days associated in a common endeavor to escape apprehension by flight,—it was held that instructions by the court, to the effect that, if the jury believed the defendant to be a party to a conspiracy of common design to make violent opposition to arrest, and that, in the carrying out of such conspiracy or common design the homicide in question was perpetrated by one of his coconspirators, they might then hold the defendant guilty, as if he himself had fired the fatal shot; and that, if the jury believed the evidence as to the train robbery, they were to consider it as a fact tending to show that a felony had been committed, and that there was probable cause to believe that the defendant had taken part in such felony. *Territory v. McGinnis* (N. M.) 61 Pac. 208.

When the commission of two offenses is closely linked or connected, as, for instance, when, upon the consummation of the first, and while being hotly pursued, the prisoner, to avoid capture, commits the second offense,—it is difficult to perceive why evidence of the whole transaction should not be legal, notwithstanding two distinct felonies have thus been perpetrated. *State v. Mulholland*, 16 La. Ann. 376.

Upon the trial of an indictment for murder the theory of the state was that the defendant

Cornish arose from his chair to respond to the summons, his "knees went out from under him," but by an effort he succeeded in reaching Mrs. Adams just as she dropped to the floor in a state of collapse. Cornish being unable to lift Mrs. Adams, the daughter called a Mr. Hovey, who was in the house, and together they carried Mrs. Adams to a couch in the dining room. Cornish despatched a hall boy for a physician, returned for his coat and hat, picked up the bottle from which the dose had been taken, and ran to a neighboring druggist, who gave him aromatic spirits of ammonia, with directions for administering it. Cornish returned to the house, and Dr. Hitchcock closely followed him. The doctor hurried to Mrs. Adams, who was breathing hard, her

face overspread with a dark blue pallor and exhibiting evidence of great pain. Restorative measures were employed without avail, and upon the arrival of Dr. Potter, who had also been sent for, Mrs. Adams was dead. During the period which elapsed between the taking of the dose and the death of Mrs. Adams, Cornish had been retching and trying to vomit. After the death of Mrs. Adams, Dr. Hitchcock went in to see Cornish, who told him that Mrs. Adams had taken a dose of bromo seltzer, and handed the bottle to the doctor. Mrs. Rodgers informed Dr. Hitchcock that Cornish had taken some of the same stuff that Mrs. Adams had taken. The doctor put his finger into the bottle, and, extracting some of the powder, tasted it. He detected the odor of al-

had stolen clothing and other articles which were in the house belonging to young men who lived there, and that, to conceal his crime, he set fire to the house, and was making his escape with the plunder when he was met by deceased, whom he killed in order to escape the consequences of his theft and arson. It was held that evidence going to show that the house occupied by the party to the homicide and other young men had been set fire to and was consumed about the time of the killing was competent. *Blackwell v. State*, 29 Tex. App. 194, 16 S. W. 597.

In a trial for homicide evidence that defendant sold the deceased liquor in violation of a local-option law is incompetent for the purpose of proving motive for the commission of the offense for which defendant is on trial. *Walker v. State* (Tex. Crim. App.) 72 S. W. 997.

In *People v. Bussey*, 82 Mich. 49, 46 N. W. 97, a witness was permitted to give testimony to identify an information filed against the respondent for false pretenses, and what the witness did as acting prosecuting attorney before the justice in such case. This testimony was offered to show that, in the examination of the false-pretense case before the justice an enrolled decree, alleged in this case to have been stolen by the respondent, was used in evidence in support of such charge, to show another and additional motive for the commission of the offense here charged. It was held that, for this purpose, the testimony was admissible, it being shown that the false-pretense case was pending when these papers were alleged to have been taken by the respondent. See this case, *infra*, XIII.

On the trial of an indictment for murder the trial court admitted in evidence an affidavit made by the person killed, a short time before her death, charging the defendant with a violation of law, which affidavit was made for the purpose of having the defendant arrested and tried for such violation, and was pending at the time of deceased's death. It was held that the evidence was properly admitted. *Robinson v. State*, 16 Tex. App. 347.

On the trial of an indictment for the killing of a woman, where the evidence showed that the killing resulted from an attempt by several, among whom were the defendants, to kill or injure the father and brother of the deceased, evidence that one of the defendants had been prosecuted for larceny, and that the father and

brother of the deceased were witnesses against that defendant on that trial, is admissible for the purpose of showing the motive by which the accused were actuated. *Mask v. State*, 32 Miss. 405.

Upon a trial for murder evidence that deceased had procured an indictment for robbery against the accused, by the production of the indictment and the name of the deceased as a witness, is admissible for the purpose of showing motive. *Martin v. Com.* 93 Ky. 189, 19 S. W. 580.

Upon the trial of an indictment for murder, an indictment against the defendant, charging him with a separate offense from the one for which he is on trial, may be introduced in evidence against him when such indictment tends, even in a remote degree to show a motive on the part of the defendant to commit the crime for which he is on trial. So, where the indictment offered in evidence presumptively showed that the defendant and others were therein charged with wilfully and maliciously killing hogs belonging to deceased, and it appeared from other testimony in the case that the deceased was an important and indispensable witness to prove such charge, such indictment is properly admissible in evidence on the trial of the defendant for the murder of the deceased, to prove motive. *Kunde v. State*, 22 Tex. App. 65, 3 S. W. 325.

Upon the trial of an indictment for the murder of the deceased by the defendant by shooting him, the state read in evidence an indictment against the defendant charging him with having murdered, by poison, a child of the person for whose murder he was on trial, and which indictment was pending; as this indictment, together with the fact, otherwise proved, that deceased had accused defendant and others of poisoning his child, and that he was prosecuting him for it, were circumstances tending to establish, and were legitimate for the jury to consider in determining, defendant's motive in killing deceased. *Hudson v. State*, 28 Tex. App. 323, 13 S. W. 888.

Upon the trial of an indictment for murder, it appeared that the person, for the killing of whom the defendant was on trial, was a deputy sheriff, who, with another, was, on the occasion when he was killed, endeavoring to effect the arrest of the defendant for unlawfully carrying a pistol. During the trial the state offered to prove by the record of the district court

monds, which is the characteristic odor of the cyanogen group of poisons, of which prussic acid is the base. He began to feel ill, and took whisky to counteract the effect of the powder. Dr. Hitchcock then took possession of the bromo seltzer bottle, the silver bottle holder, and the address. He and Cornish left the house together, and went to an undertaker. There they separated, the doctor returning to his home, and Cornish going down town to see Assistant District Attorney McIntyre, to notify him of Mrs. Adams' death. After seeing McIntyre, Cornish called upon a personal friend named Yocum, a chemist by profession, who noticed that Cornish looked ill, and prevailed upon him to take a drink of whisky, which he was not able to retain. Then Cornish proceeded

to the office of his cousin, Louis H. Cornish, who was also a cousin of Mrs. Rodgers, the daughter of Mrs. Adams, and informed him of the latter's death. From thence Cornish went to the Knickerbocker Athletic Club, where he lay down upon the bed in Yocum's room. During the whole of his trip down town and return Cornish had been ill, the journey being marked by frequent interruptions necessitated by the condition of his stomach and bowels. Soon after arriving at the clubhouse he sent for Dr. Phillips, who could not be found immediately, and Dr. Coffin, who happened to be in the clubhouse, was requested to see Cornish. He found Cornish in bed, belching gas from his stomach, and his bowels and stomach considerably distended. The

of another county that the defendant, at the time he killed deceased, was charged, by indictment in the district court of the last-mentioned county, with murder. The court, after holding that the bill of exception was incomplete in not showing that the record thus offered in evidence was read before the jury, said: "But here, again, were we to consider the bill sufficient, we would hold that said record was competent evidence. It established a circumstance which tended to show defendant's motive in committing the homicide; which tended to show that he was a fugitive from justice, who had resolved to evade and resist arrest for a capital crime at any and all hazards regardless of consequences, and regardless of whether his arrest should be attempted legally or illegally. It furthermore tended to explain the conduct and motives of the officers and posse that were seeking to arrest the defendant, and to throw light upon the whole transaction. It was, in fact, a part of the *res gestæ* of the homicide." *Jacobs v. State*, 28 Tex. App. 79, 12 S. W. 408.

Upon the trial of an indictment for assault with intent to murder, it is competent for the prosecution to prove a conviction for a prior assault on the same person. *Cress v. State*, 31 Tex. Crim. Rep. 312, 20 S. W. 579.

On the trial of three persons for arson in the burning of a courthouse (two as principals, and the other as accessory before the fact), evidence that there were indictments pending and on file in such courthouse, at the time it was burned, against two of the accused for another offense, is admissible against those two, as it exhibited a powerful motive for the perpetration of the act of arson charged against them, and proof of such motive would, in itself, be a circumstance tending to establish their guilt. *State v. Travis*, 30 La. Ann. 356, 1 So. 817.

On a trial for murder evidence of conversations had with defendants in jail after their arrest, and statements by them upon such occasion, bearing upon the alleged previous robbery of a bank for which their victim was attempting their arrest when killed, is admissible. *State v. Phillips (Iowa)* 92 N. W. 876.

Upon the trial of an indictment for murder, evidence showing that defendant had been confined in the penitentiary, and had made his escape therefrom, is not admissible, where it appeared that the deceased had acted in a very friendly manner to the defendant upon short ac-

quaintance, and invited him to dinner,—upon the theory that the defendant, without any reason therefor, suspected that deceased was a detective trying, by a ruse, to capture and return him to the penitentiary; as there was no such obvious connection between the crime for which the defendant was sent to the penitentiary and his subsequent escape therefrom, and the crime for which he was tried. *State v. Tabor*, 95 Mo. 585, 8 S. W. 744.

On a trial of persons charged as accessories before the fact to the burning of a church, evidence by the party who actually set fire to the church, as a witness for the state, to the effect that the defendants had previously burned a mill, and afterwards induced the witness to burn the church in order to cover their own previous crime of burning the mill, has no connection in any way with the crime of burning the church, and for its improper admission a judgment of conviction will be reversed. *State v. McCall*, 131 N. C. 798, 42 S. E. 894.

III. To show intent.

a. In general.

The second exception to the general rule, in the order in which they have been mentioned, is evidence tending to show intent. Intent, while entirely distinct from motive, is somewhat allied to malice (that is, if one can say what is malice,—or what malice is); and, in a comprehensive sense, imports guilty knowledge,—so much so that, in cases when evidence of it is material, the courts not infrequently use the terms interchangeably.

It is an essential ingredient of all common-law crimes, and of some, but not all, statutory offenses. It is not necessary, in all accusations of crime, to make proof of it in addition to, or beyond, the act constituting the crime itself. With regard to some crimes, however, it may be said that intent is not only an essential ingredient of the offense, but is of the very essence of it; and in such cases evidence of intent,—or, as it is sometimes termed, guilty knowledge,—in addition to the principal act, must be given to warrant a conviction. Being so essential, it follows that it creeps into some of the other exceptions to the general rule. For instance, there is an intimate relation between showing intent, or guilty knowledge, and repelling the defense of accident, mistake, or negligence.

patient's pulse was weak and intermittent. There was no odor which the doctor recognized. He diagnosed the case as one of gastric enteritis. He sent for stomach and rectal tubes, and, while waiting for them, Dr. Phillips arrived. The two doctors, Phillips and Coffin, treated Cornish. The latter was pale and ashen. He had the appearance of having passed through a long illness. The first police officer to arrive at the Adams house was Patrolman Palmer. This was in the afternoon of December 28, 1898. From there he went to Dr. Hitchcock and got the bromo seltzer bottle, the bottle holder, and the address taken from the wrapper. These he turned over to Dr. Weston, the coroner's physician. The latter visited the Adams house and viewed the body of Mrs. Adams.

The same may, in substance, be said of evidence disclosing a scheme, plan, or system, on the part of the accused, to perpetrate both the crime for which he is being tried and the evidential offense.

1. When there is other evidence or presumption of intent.

One of the questions upon which the courts do not seem to have agreed is whether, when there is other evidence of intent in the case, evidence of another crime may be given,—some of the authorities holding that, if the evidence is admissible at all, the fact that there is other evidence of intent will not render it incompetent; while others decide that the exception to the general rule forbidding the receipt of this kind of evidence is one of necessity, and the introduction of the evidence should only be permitted when the exigency of the particular case demands it. The cases here first given seem to assert the latter proposition.

The prisoner was indicted for feloniously threatening to accuse the prosecutor of an infamous crime, with intent to extort money from him. It was proved that the prisoner had gone up to the prosecutor and said to him: "If you do not give me a sovereign I will charge you with an indecent assault." The prosecution then proposed to call a witness who would prove that, two years before, the prisoner had made a similar charge against another person, and, when taken into custody, gave a false address; claiming that whenever the question was as to the intent with which an act was done it was also permissible to give in evidence other evidence of similar conduct; and citing *Reg. v. Cooper*, 3 Cox C. C. 547, in which the court allowed evidence of other transactions to be given. The court said: "I do not think that decision applicable to the present case. There the main question turned upon the intent with which the act was done, and evidence was adduced with respect to other transactions, to throw light upon that subject. But in this case, if the prosecutor is believed, the intent is quite manifest, and, therefore, it is unnecessary to call other witnesses for the purpose of confirming it. I do not think I ought to allow the evidence to be given." The evidence was accordingly rejected. *Reg. v. McDonnell*, 5 Cox C. C. 153.

Where the circumstances of the case are such
62 L. R. A.

On the following day, December 29, 1898, Captain McClusky, chief of the detective bureau of New York, took charge of the police investigation. On the same day Dr. Weston performed an autopsy on the body of Mrs. Adams, as a result of which he later concluded that the death of Mrs. Adams was due to poisoning which resulted from hydrocyanic acid, or one of its salts, which is produced by the combination of cyanide of mercury with the ingredients of bromo seltzer. On the following day, December 31, 1898, Prof. Withaus, an expert chemist, made an analysis of the contents of the bromo seltzer bottle, and later reported that it contained a mixture of bromo seltzer and cyanide of mercury. The same chemist also analyzed the sediment of the glass from

that guilty knowledge on the part of the accused must be shown, then, whether he had such knowledge is an issue in the case, and prior similar dealings, within reasonable limits, may tend to show such guilty knowledge; but where the charge is of false statements of facts within the knowledge of the accused; and where, from proof that they were false, the inevitable inference is that they were made for a fraudulent purpose,—evidence of the perpetration of other like offenses is not admissible; as such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before them, and, by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him. *Jackson v. People*, 18 Ill. App. 508.

Upon a trial for manslaughter in the commission of an abortion, the fact that an abortion had been committed was conclusively established; and, this being so, the guilty knowledge or intent of the person committing it was deducible from the crime itself, and evidence of another like crime for the alleged purpose of showing the intent, was irrelevant, and its admission reversible error. *People v. Lonsdale*, 122 Mich. 388, 81 N. W. 277.

But upon the trial of a prosecution for abortion, if the defendant admits that he committed the act resulting in the abortion, and undertakes to justify that act under the plea of necessity, then proof of other acts of like character will be admissible to prove intent. *Clark v. Com.* 23 Ky. L. Rep. 1029, 63 S. W. 740.

From these two cases it would seem that the testimony of other and distinct offenses is admissible in such cases only when the defendant raises the question as to whether he intended to commit the crime by attempting to show that he committed the act innocently and for an honest and lawful purpose.

Defendant was indicted for receiving from a firm a deposit into the bank of which he was at the time president, knowing at the time that the bank was insolvent or in failing circumstances. On the trial the court, over the objection of defendant, permitted two persons who were witnesses for the state to testify to deposits made by them in the bank five months before the time the deposit was made by the firm mentioned in the indictment, and in this it was

which the dose administered to Mrs. Adams, and tasted by Cornish, had been taken. This was found to contain cyanide of mercury. The organs of Mrs. Adams were also subjected to an analytical examination by Prof. Withaus, which demonstrated that Mrs. Adams had died from mercuric cyanide poisoning. A pathological examination of these organs by Dr. Ferguson disclosed the presence of corrosive poison, which he described as cyanogen, or prussic acid, which is a poison resulting from cyanide of mercury. The death of Mrs. Adams and its immediate cause were, therefore, clearly established.

The logical and orderly narration of this grewsome tragedy naturally leads, next, to a consideration of the facts and circumstances which are relied upon by the prose-

cution to connect the defendant with the death of Mrs. Adams. We will first address ourselves to those which have no relation to handwriting or to the commission of any other crime than the killing of Mrs. Adams. In 1898 the defendant was thirty-one years of age. He had not only a liberal general education, but sufficient knowledge in chemistry to be the superintendent in the business of Morris Hermann & Co., who were manufacturers of dry colors in Newark, New Jersey. He had been employed in this capacity since 1893, and before that had been in charge of color-making for the firm of C. T. Reynolds & Co., of which his father was a member. He had studied chemistry for two years at Cooper Union. He had a good chemical library and a well-equipped

insisted that error was committed. In reversing a judgment of conviction, the court said: "It is clear, we think, that each deposit, if received under circumstances prohibited by statute, was a separate and distinct offense, and, this being so, the evidence was inadmissible. It was not permissible for the purpose of showing guilty knowledge upon the part of the defendant, because different crimes, provided the bank was insolvent or in failing circumstances at the time, and defendant knew it, and the evidence did not tend to show these facts. Besides, the evidence was positive that defendant received the deposit described in the indictment in person, and, with respect thereto, no additional proof of guilty knowledge was necessary." *State v. Burlingame*, 146 Mo. 207, 48 S. W. 72.

On the trial of an indictment for obtaining money under false pretenses from the officers of a masonic lodge, the prosecution was permitted to prove that the defendant had previously, by similar false representations, obtained money from another masonic lodge. The judgment of conviction was reversed for the reason that the admission of this testimony was error, the court holding that the testimony tending to show that the defendant had at another place committed an offense similar to the one for which he was on trial was erroneously admitted; and the representations charged to have been made by the appellant, which were the subject of the indictment, were concerning matters peculiarly within the appellant's knowledge, and, when proved to have been made, and to have been falsely made, as the evidence fully tended to prove, the inevitable inference was that such representations were made with a criminal intent and for a fraudulent purpose; and that the intent, therefore, with which the appellant made the representations charged against him, was not an issue at the trial. *Strong v. State*, 86 Ind. 208, 44 Am. Rep. 292.

One of the judges in this case wrote a strong dissenting opinion, which, as will be seen, was, in *Crum v. State*, 148 Ind. 401, 47 N. E. 833, *infra*, approved by the same court, and the judgment in this case was stated to be overruled.

Upon the trial of an indictment for stealing various articles of jewelry from a certain store, where it appeared that several articles of jewelry were found in possession of the accused, or 62 L. R. A.

dropped by them on the street on their way to prison, the admission of other evidence tending to prove that on the same day, and near the same hour, at other stores in the vicinity of the one first mentioned, the defendants had feloniously taken other articles from other persons, was improper, as the offenses proved were separate and distinct, and the defendants might have been indicted for each and every one of them, and, though committed on the same day, and under circumstances of a similar character, they were not so blended or connected that the investigation of one involved an inquiry into the other; since the state, having the benefit of the usual presumption arising from the recent possession of the stolen property, was, therefore, not driven to the necessity of proving intent by proving other felonies committed about the same time. *State v. Goetz*, 34 Mo. 85.

On the other hand, what is very pertinently said in the cases here inserted is to the effect that, notwithstanding there may be other proof of intent in the case, rendering evidence of another crime unnecessary, yet the prosecution is not thereby debarred from making all the proof possible on the subject, and consequently, in such a case, may introduce evidence of the other crime.

In the two Indiana cases which follow, especially, the reasoning in favor of such theory is extremely forceful. The first, *Crum v. State*, 148 Ind. 401, 47 N. E. 833, expressly overrules *Strong v. State*, 86 Ind. 208, 44 Am. Rep. 292, *supra*, in which the opposite doctrine was held; and approves and virtually adopts the dissenting opinion in the latter case, as it "correctly expresses the law on this question."

In *Crum v. State*, 148 Ind. 401, 47 N. E. 833, the defendants were convicted of grand larceny in obtaining money by agreeing to give to the person from whom the money was obtained counterfeit money of five times the amount obtained, intending to steal it. Upon the trial, evidence of other similar offenses committed about the same time as the crime for which the defendant was on trial was admitted in evidence. It was held to be no error. In affirming the conviction, the court said: "In principle there can be no reason why in any case the intent with which an act was done may not be proved by competent and pertinent evidence, even though proof may thus incidentally be made of other offenses."

The other case, *Higgins v. State*, 157 Ind.

laboratory, which contained Prussian blue, chrome yellow, English vermilion, dry mercury, arsenic, and other chemicals, from which various poisons, including cyanide of mercury, could be produced. From these facts the prosecution argue that defendant had the knowledge, skill, and means to produce the poison which killed Mrs. Adams. Cornish was the athletic director in the Knickerbocker Athletic Club in 1898, and had held this position since January, 1896. At that time defendant was a member of the club and of its house committee. In January, 1896, difficulties arose between the defendant and Cornish over the conduct of one French, an athletic member of the club. This was followed in April, 1897, by trouble over an amateur circus which was given

under the auspices of the club. Molineux had charge of the arrangements, and complained because Cornish had ignored and disobeyed his instructions. Cornish had been superintendent of the club and manager of the club restaurant. Defendant complained that the restaurant and baths were not being properly conducted. Cornish's authority was thereafter reduced to the training of the club teams and the management of athletics. Then came the trouble over the "Weefers" letter written by Cornish in August, 1897, and in which the latter reflected upon Mr. Weeks, a director of another athletic club. The defendant, having come into possession of this letter, requested that the matter be brought to the attention of the house committee, and suggested that

57, 60 N. E. 685, is especially strong in asserting the doctrine that evidence of another crime, to prove intent, is not rendered inadmissible by either the fact that there is other sufficient proof of intent, or the fact that the accused admits the presence of it; and that, in the language of the court, "we do not think that the admission of any competent evidence can be rendered erroneous by statements or admissions of the accused, made to the court and jury during the trial."

In a prosecution against a member of the common council of a city for soliciting a bribe, it was held that evidence to the effect that defendant had, on a previous occasion, solicited a bribe, was properly admitted for the purpose of showing defendant's motive. A particular objection was made, that the language used by the defendant was not equivocal, and the jury had the right to infer therefrom the intent charged. It was held that, while this might be true, it did not render other proof of such intent or motive incompetent; that, when a fact is to be proved, the law requires the best evidence attainable, but it does not put any limit upon the amount of proof that may be adduced. The defendant further insisted, in support of his objection, however, that "he did not attempt to avoid criminal responsibility by relying upon the lack of intent or want of guilty knowledge," because he stated, when said evidence was offered as a part of the objection thereto, that he would "deny ever having had the conversation which was alleged to have taken place with the witness." It was held that, though it was true that appellant made the statement claimed as a part of his objection to said evidence when the same was offered, such statement did not relieve the state from the burden of proving the criminal intent charged in the indictment. That, even if appellant had admitted the criminal intent charged if the conversation occurred, or that he was guilty as charged if he had such conversation, the admission of the evidence complained of would not have been error. That the admission of any competent evidence cannot be rendered erroneous by statements or admissions of the accused made to the court and jury during the trial. *Ibid.*

This decision is of peculiar value, the opinion exhibiting great research among the authorities, and classifying instances in which other crimes, if they tend to prove certain facts, may 62 L. R. A.

be given in evidence, *viz.*: Prosecutions for uttering counterfeit money; uttering forged instruments; receiving stolen goods; conspiracy to extort money by threats; filing and collecting a false claim against the county; obtaining property by false pretenses; embezzlement; bribery; burglary; libel; larceny; frequenting a gambling house; wilfully placing an obstruction on a railroad track; assault with intent; arson; rape; abortion; sending obscene or indecent letters or pictures; incest; and murder.

In *Com. v. Miller*, 8 Cush. 243, the indictment contained six counts, in each of which the defendant was charged with uttering a promissory note purporting to be signed by S. F. Belknap. The indictment was for uttering but three notes, there being two counts on each note. The attorney for the commonwealth on the trial produced three notes purporting to be signed by S. F. Belknap, each for the same amount and of the same tenor and date, and offered evidence tending to show that they were forged, and forged in a particular manner, to wit, by taking a genuine note and tracing the signature on the alleged forged notes. The commonwealth afterwards offered thirty other similar notes, which had been uttered by the defendant, at or near the same time, with the notes in question, and which were also alleged to be forged. These notes were offered as tending to prove the guilty knowledge of the defendant that the notes which he was charged with uttering were forged notes. The defendant admitted that he passed the notes, and, if they were not genuine, that he knew that fact, and thereupon objected to the evidence. The evidence was admitted, and its admission is the ground of the exception. The court said: "It is very clear, we think, and, indeed, it is not contested, that this was competent evidence to prove the guilty knowledge with which the three notes in question were passed; or, rather, that it would have been so but for the admission, offered by the defendant, that, if the notes were forged, he knew that fact. We think it very clear that this admission did not supercede this evidence or render it incompetent. The offer was hypothetical, and was accompanied by an express denial of the forgery. Besides, it was competent for the prosecuting officer to prove and make out his case by proper and legal evidence, without being obliged to rely upon any admission of the defendant. The evidence, therefore, was rightly admitted for a

Cornish be reprimanded or discharged. This request was not complied with, and then, through defendant's efforts, a dinner was given to Mr. Weeks by Mr. Ballantine, a leading spirit and principal stockholder in the club, at which various club officials and the defendant were present, and apologies were tendered to Mr. Weeks. Early in 1897, Hughes, chairman of the house committee, told the defendant that Cornish had said that defendant had made his money as a rumrunner or by keeping a place of questionable repute. Defendant insisted that this matter, together with other grievances, be investigated by the club. Some investigation was made, but, as Cornish denied having made the statements attributed to him, no further action was taken. The defendant

continued to agitate the alleged shortcomings and misdeeds of Cornish until he finally told Adams, the secretary of the club, that if Cornish did not leave the club he would leave. Cornish was retained in the club, and on September 20, 1897, the defendant resigned. After his resignation, and on the same evening, the defendant and Cornish met on the stairs of the club house. Cornish called the defendant a vile name, and taunted him with his failure to procure Cornish's discharge. Defendant's resignation was followed by an explanatory letter from him to Secretary Adams, dated September 24, 1897. This was followed by a letter from defendant to a Dr. Austen, inclosing a copy of the "Weefers" letter and dwelling upon the conduct of Cornish. Aft-

legitimate and proper purpose; no exception can be taken to its admission." To the same effect, with regard to motive, see *Pontius v. People*, 82 N. Y. 330, *supra*, II. a, 2, (b).

On the trial of an indictment for larceny the state was permitted to show, over the objection of the defendant, that at the time of finding the articles mentioned in the indictment in the possession of the defendant there were also found in her possession other articles, which had been stolen from the prosecuting witness and others about the same time as those mentioned in the indictment. In this case the guilt of the defendant was admitted, but the complaint was that this evidence tending to show her guilty of other larcenies must have prejudiced the jury, and increased her punishment, and that such evidence is only permissible when the evidence of guilt is circumstantial. The court said that, in any view of the case, the evidence was admissible. *State v. Flynn*, 124 Mo. 480, 27 S. W. 1105.

In a prosecution for unlawfully and wilfully disturbing the peace and quiet of another and his family, offenses of a character similar to the one charged, committed by the defendant from one to three days prior to the commission of the offense charged, are admissible as showing that the acts committed by the defendant, which were claimed to constitute the offense charged, were not innocently or rightfully committed, as they were competent and relevant, though probably unnecessary. *State v. Burns*, 35 Kan. 387, 11 Pac. 161.

2. When intent is immaterial.

Upon the trial of an indictment for assaulting and beating an officer in the performance of his duty, where the defendants knew that the person beaten was an officer, there is no question of intent, and it is clearly wrong to permit proof of another distinct offense for which the defendants are not then on trial. *People v. Hopson*, 1 Denio, 574.

In a prosecution for the sale of liquor without a license the intent of the party selling is immaterial; it is, therefore, error to admit evidence of other sales to show the intent with which the sale in question was made. *Chipman v. People*, 24 Colo. 520, 52 Pac. 677.

The case immediately following is an application of the well-known rule that, when an act in general terms is made indictable, a criminal

intent need not be shown, unless, from the language or effect of the law, a purpose to require the existence of such intent can be discovered.

Upon the trial of an indictment for the violation of a statute making it unlawful for a person, not an officer, to mutilate or destroy any public record, the defendant during his cross-examination was required, against his protest, to admit before the jury that he had participated in the alteration of a record other than that charged in the indictment in this case. Upon reversing the conviction and ordering a new trial, the court said: "While it is true that in certain cases, like forgery and embezzlement, it is permissible to introduce evidence concerning other acts of the same nature, for the purpose of establishing a guilty intention, no such rule applies in cases of this kind, where the very ground upon which the prosecution relies for a conviction is, that a performance of the acts mentioned in the statute constitutes a crime, regardless of any fraudulent intention." *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45.

Upon the trial of an indictment for manslaughter for killing defendant's six-year-old son, evidence that the defendant struck his son with an axe heave about a year before, knocking him down, and also struck him with his fist, was improperly admitted, as, the indictment being for manslaughter, the question of intent was not involved. *Albright v. State*, 6 Wis. 74.

b. Common scheme, plan, or system.

1. In general.

Upon the trial of an indictment of a woman for the murder of a man evidence tending to connect her with the prior murder of the wife of the deceased in pursuance of a plan or scheme to secure to her own use the proceeds of an insurance on his life by first killing the wife, the original beneficiary, then inducing the husband to make her the beneficiary, and then killing him, was competent and admissible for the purpose of showing preparations for the commission of the crime charged. *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452.

In *PEOPLE v. MOLINEUX* the majority of the court held that the poisoning of Barnet from motives of jealousy had no such relation to the attempt to poison Cornish from those of hatred which resulted in the death of the deceased, as to bring it within any of the exceptions to the

er this, in October, 1898, the defendant met one Heiles at the New York Athletic Club, told him of the "Weefers" letter, and complained of the action of the board of governors of the Knickerbocker Athletic Club. On this occasion the defendant referred to Cornish as a low, vile, bad man, and spoke of the latter's assertion that defendant had kept a disreputable house. On November 9, 1898, the defendant wrote to his friend Sheffer, inclosing a copy of the "Weefers" letter, and referring to the fact that "Cornish is in" and he is out. These are the facts and circumstances narrated in mere outline that are relied upon by the prosecution as evidence of the motive which the defendant is said to have had against the life of Cornish, and of the intent with which

the poisoned bromo seltzer was sent to the latter. As further bearing upon defendant's connection with this murder, it was shown that the silver bottle holder which was contained in the package received by Cornish had been purchased on the 21st day of December, 1898, at Hartdegan & Co.'s store in Newark, New Jersey, which was only a short distance from the factory of Hermann & Co., where the defendant was employed. The defendant was seen in the vicinity of the Hartdegan store on that day, but the clerk who made the sale of the bottle holder said the defendant is not the man who bought it. The box which contained the bottle and bottle holder was a "Tiffany" box, and the envelope was such as are used at Tiffany's to inclose cards which are sent with gifts. The

general rule; while the theory of the dissenting judges was that the facts that in both instances death was effected by means of the same peculiar and unusual chemical compound, a poison of the most subtle character,—for the making of which the defendant was shown to have possessed both knowledge and facilities,—the sending of the poison to both intended victims through the mails, etc.,—made the evidence of the circumstances of the poisoning of Barnett competent to identify the defendant as the common perpetrator of both crimes.

The foregoing case of *Com. v. Robinson* would seem to be of interest and value in determining where the line is to be drawn; i. e., when the evidence of the other crime, showing it to have been committed in pursuance of a scheme or purpose common both to it and the crime for which the defendant is on trial, is admissible. Of course, the difficulty has been, is, and will be, as in *PEOPLE V. MOLINEUX*, to decide what facts and circumstances are sufficient to show that the scheme or purpose is common to both offenses.

It may be well to say, just here, that, as has been before stated in the first part of this note, one of the reasons generally laid down by courts and writers in a large class of cases for admitting evidence which would otherwise be under the ban of the general rule against the admission of evidence of independent crimes, and generally regarded as one of the exceptions to that rule, is that the evidence of the independent crime tends to show a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others. It was at first thought best to include this subject of scheme, plan, or system as one of the principal divisions of this note, but both reflection and experience have shown that to do so would be rather to confuse than otherwise, and the attempt to do so was relinquished as impracticable; as in many, if not most, cases where the subject is at all considered, or even hinted at, it is so mingled with intent, motive, or the commission of the offense charged, as to render a practical separation of this particular subject difficult, if not impossible. Cases, therefore, in which plan, scheme, or system is alluded to or considered by the court will be found generally as a part of the present subdivision and the four immediately following, and also of II. a. 1, *supra*, and V. b, *infra*, as the case may be.

62 L. R. A.

On a trial of a man for the murder of his wife by poison, where it appeared that after his marriage he went to live with his wife and mother-in-law, that his mother-in-law by her will had bequeathed to her daughter, defendant's wife, all her personal things and everything in the house; that she had, under the terms of her husband's will, a life estate only in the house wherein she lived, the remainder being vested in her daughter in fee; evidence of the death of the mother-in-law, and that she died by poison administered to her by defendant while she was residing in his house, a few days before the death of his wife; that the arsenic administered to her was of the same description as that found in the stomach of defendant's wife,—is competent and admissible to prove a design on his part to obtain their property, to show his purpose and intent, and the system by which that purpose was to be accomplished, and to connect the death of both women with that purpose and intent; and also to rebut the theory that the death of his wife was the result of accident or suicide, or of the negligent or ignorant use of, or administering of, arsenic by either his wife or by him. *Goersen v. Com.* 99 Pa. 388, Approved and Followed on the second review of the case, in 106 Pa. 477, 51 Am. Rep. 534.

Upon the trial of an indictment for larceny in obtaining of the complainants goods for the purpose of showing them to a customer to see which, if either, he would take, upon an agreement that, if he accepted either, the money for that, with the remainder of the articles, should be returned to the person sending them, but neither the articles nor the money for either of them being at any time returned, it is proper to allow the people to show that the defendant, on the same day and the day following, procured other articles of the same character from other persons, and appropriated them to his own use; as such cases are proper to be shown in order to enable the jury to determine what was the intention of the prisoner in the particular act which was the subject of the indictment, and that the several acts were combined in one felonious plan, each of which was but a portion of its execution. *Weyman v. People*, 4 Hun, 511, Affirmed in 62 N. Y. 623.

On a trial for larceny in stealing a horse the state proved by a witness that there was a conspiracy, entered into by and between defendant and witness and others, to engage in the

defendant had an account at Tiffany's, and made a purchase there in December, 1898. There are no particulars regarding this purchase, except that it was in the stationery department. The so-called poison package was mailed at the general postoffice on the afternoon of December 23, 1898, at an hour when it was customary for the defendant to be in the postoffice district on his return from Newark to New York.

At this point it will be observed that, if the case had been tried upon the theory that the only crime which the defendant had committed was the killing of Mrs. Adams in the attempt to poison Cornish, the next and final step in the case of the prosecution would have been to prove the defendant's connection with the handwriting of the address up-

on the poison package. But, as a part of the theory or theories upon which the prosecution sought to connect the defendant with the killing of Mrs. Adams, evidence was offered and received to show that the defendant was responsible for the previous killing of one Henry C. Barnet, who came to his death at the Knickerbocker Athletic Club house on the 10th day of November, 1898. The facts and circumstances upon this branch of the case, as established at the trial, which relate directly to the death of Barnet, are substantially as follows: Barnet had been a member of the Knickerbocker Athletic Club for a number of years, and in 1898 was living at the clubhouse. Barnet was taken ill on the 28th day of October, 1898. He was first attended by Dr. Phil-

business of horse stealing generally; and that, before defendant entered into this compact, and afterwards, members of this thieving firm had stolen a number of horses from that vicinity; to all of which the defendant objected. It was held that, while such evidence disclosed an intention to steal the horse in question, it did not do so with any greater degree of certainty than to steal every horse within range of the operations of this band of thieves. It was held, further, that, though this proof, standing alone, would not be sufficient to convict, yet it was competent and admissible. *Hinds v. State*, 11 Tex. App. 238. (This case is of little value, as it was reversed because the witness who gave this evidence was an accomplice, and was not corroborated.)

In *People v. Smith*, 37 App. Div. 280, 55 N. Y. Supp. 932, which was a trial for arson, the attorney for the prosecution in opening the case used this language: "We shall show you, if permitted, that before this fire, which occurred at the boulevard, in which some seven buildings owned by the mother and family of this defendant, were burned, many other buildings which this defendant had assisted in erecting, or in which he was interested, were destroyed in a similar manner, within less than a year before the fire on the boulevard." Before this statement was completed, the counsel for the defendant raised the objection that it was improper. This objection was, however, overruled by the court, to which ruling an exception was taken; whereupon the prosecuting attorney remarked: "If counsel insists upon it, I will not go into the matter at this time." The indictment charged the defendant and his father with the crime of arson, pure and simple, in the first count, and in the second count charged the defendant with the crime of having conspired with his father to cheat and defraud certain insurance companies by setting fire to, and occasioning the destruction of, various buildings upon which they had previously obtained insurance from those companies. On appeal from a judgment of conviction the appellate division of the supreme court, in affirming the conviction, said that, in order to convict the defendant of the crime set out in the second count, it was of the utmost importance that a fraudulent motive or intent upon his part should be established; and, to that end, it was competent for the people to show that, shortly previous to the commission of this particular act, the defend-

ant had been guilty of similar acts under like circumstances, although one effect of such evidence might be to prove other crimes than the one charged in the indictment. That there was abundant evidence tending to show that the defendant, with his father, conspired to defraud certain insurance companies, by obtaining from them insurance upon buildings to an amount far in excess of the value of the property insured, and that they thereafter set fire to and destroyed the property. That, having made this proof, it was difficult to see why the people would not have been entitled to follow it with evidence of similar transactions occurring at other times within the same year, for the purpose of establishing the fraudulent intent of the defendant. And that, if so, the prosecuting attorney transgressed no rule of propriety in stating to the jury that he expected to make proof of those facts; nor did the learned trial judge commit any error in refusing to sustain the objection to such statement, for, although he gave no reason for his ruling, it may be safely assumed that, had evidence of this character been offered, the jury would have been instructed as to the purpose, and the only purpose, for which it was received and the judgment was affirmed. This decision was made by a bare majority, two of the judges dissenting, and holding that the evidence was improper, and that the trial judge, instead of having sustained the irregular course adopted in the opening, should have promptly checked it, or, when the objection was raised, sustained it, and thereby indicated to the jury that that part of the opening which was objected to was improper; and that, under the circumstances, the judge, having overruled the objection, impliedly said in the presence of the jury that the statement made by counsel was proper, and the impression left upon the jury by the opening and by the ruling may have been prejudicial to the rights of the defendant.

In *Hutcherson v. State* (Tex. Crim. App.) 35 S. W. 375, the court said: "Appellant was convicted of swindling, . . . and prosecutes this appeal. Appellant excepted to the action of the court in allowing the state to introduce in evidence another note than that assigned in the indictment as a part of the scheme on which the swindle was predicated. Said note was admissible for the purpose of showing the intent of the defendant in the transaction alleged against him, and it appears to have been a part

lips, the same physician who subsequently attended Cornish. Dr. Phillips only attended Barnet on the first day of his illness, and Dr. Douglass then took charge of the patient, and attended him until his death on November 10, 1898. In the death certificate issued by Dr. Douglass "cardiac asthma, caused by diphtheria," was assigned as the cause of Barnet's death. Dr. Douglass was given a box which was found in Barnet's room and purported to contain "Kutnow" powder, and the latter told the former that he had received it by mail, had taken a dose of it, and he thought that was the cause of his trouble. Barnet also told Dr. Phillips that he had taken a dose of "Kutnow" powders, and ascribed his trouble to that. Dr. Douglass took possession of

this box on November 4, 1898, and gave it to Guy P. Ellison, a chemist, who made a qualitative analysis, and concluded that the "Kutnow" powder contained cyanide of mercury. The box was returned to Dr. Douglass with the chemist's report as to its contents, and thereupon the nurse in charge of Barnet was directed to search for the wrapper. No wrapper was ever found. On the 3d day of January, 1899, Dr. Douglass delivered to Capt. McClusky the box taken from Barnet's room. On the 4th day of January, 1899, Capt. McClusky delivered it to Prof. Withaus. The latter made an analysis of its contents, and found it to contain "Kutnow" powder and cyanide of mercury. On the 28th day of February, 1899, the body of Barnet was exhumed at Green-

of the general scheme concocted by the appellant for the purpose of swindling. The record shows that he attempted to convey distinct portions of the lands in the alleged tract in Kaufman county—to which he had no title—to three several parties. The wording of the deed shows that one half of the purchase money had been paid, and vendor's lien notes taken on each tract for the remainder of the purchase money; and he then operated his swindling schemes on these several vendor's lien notes. The evidence showed a common plan and scheme, and was admissible testimony."

An indictment for grand larceny alleged a conspiracy formed by the defendant and others to cheat the prosecutrix out of her property, and that the defendant and another made false representations to her by which she was induced to deliver up to them her deed and title to certain property in return for a worthless mortgage. Upon appeal from a judgment of conviction, it was held, in affirming the same, that, where a conspiracy has been alleged, evidence of other wrongs practised upon other persons than the prosecutrix, by the same parties, is competent and admissible, as bearing upon the question of the intent of the defendant in the transaction under consideration; and no error is committed where the trial court limits the effect of such evidence to the question as to such intent. *People v. Wicks*, 11 App. Div. 539, 42 N. Y. Supp. 630.

In *Wallace v. State*, 41 Fla. 547, 26 So. 713, the defendant had been convicted of maliciously threatening to accuse a person of keeping a bawdy house with intent to extort money. Upon the trial the state had introduced evidence tending to show that the defendant had made like threats to other persons, and extorted money from such other persons. The court said: "But such evidence is not admissible for the purpose of proving that defendant committed the crime charged against him, but to show his purpose, plan, intent, or knowledge, or to show that the acts charged against him were not the result of accident, mistake, or inadvertence, or to rebut a defense which would otherwise be open to the accused." The opinion cites a large number of the leading authorities on the subject, both American and English, and is valuable in that respect.

Upon the trial of an indictment for larceny, where the evidence showed that the defendant had formed a common design with another to

commit a number of larcenies in the county, and that it was impossible to follow the course of the parties in the commission of the offense charged in the indictment without also detailing the commission of other independent offenses of like character, it was held that such testimony is material and competent where it tends to prove the motive and intent of the defendant in the commission of the act, although, as a general rule, on a prosecution for one crime it is not proper to admit testimony against the defendant showing that he had committed other disconnected offenses. *Beberstein v. Territory*, 8 Okla. 467, 58 Pac. 641.

Two persons were jointly indicted for kidnapping a colored boy at Worcester. It was held that evidence that one of the defendants went to another place and endeavored to obtain another colored boy, saying that he wished to procure one to live in his father's family, was competent evidence against that defendant as tending to show that he was engaged in kidnapping. The court said that the intent and purpose of the defendant, in obtaining the possession and custody of the individual alleged to be unlawfully taken, were to be inferred from a great variety of circumstances, and necessarily opened a wide door for the introduction of evidence of the acts of the party accused, having any reasonable degree of connection with the particular act complained of. That it was with the view of fixing the character of this last act that evidence was received of the conduct and declarations of the defendant on the day previous, and at another place, and in reference to another individual, about whom overtures were made, with a view of obtaining possession of his person. And that with reference to such purpose, and thus limited, it was properly admitted. *Com. v. Turner*, 3 Met. 19.

In a prosecution for violating the local option law, it is competent for the state to prove other transactions, as showing system on the part of the accused, and as bearing on his intent to violate the law. *Wilson v. State* (Tex. Crim. App.) 55 S. W. 68.

But in *Walker v. State* (Tex. Crim. App.) 72 S. W. 401, it was held that, where a conviction for selling intoxicating liquors in violation of a local option law can be predicated upon one of several transactions, evidence of the others is incompetent, and cannot be introduced under

wood Cemetery in the presence of Dr. Douglass, Prof. Withaus, Dr. Weston, and others. Prof. Withaus made an analysis of the liver, kidneys, and other organs in the body, and found cyanide of mercury. Dr. Loomis, a pathologist, made a post mortem examination, and expressed the opinion that Barnet died from poisoning by mercury. Dr. Smith, who consulted with Dr. Douglass on the day of Barnet's death, was of the same opinion. Dr. Ferguson testified that the cause of this death was cyanide of mercury, and Dr. Potter concurred in that opinion. The discrepancy between the cause of death assigned in the death certificate of Dr. Douglass and the conclusions which followed the analyses of the deceased Barnet's organs and the contents of the "Kutnow" powder box is

sought to be accounted for by the explanation that mercuric poisoning at certain stages develops the symptoms of diphtheria, and by various other matters which are not essential to this statement. The death of Barnet, was therefore, clearly established, and the alleged cause thereof was proved by evidence which, if competent, would warrant the conclusion that it was due to mercuric cyanide poison.

As to the motive which the defendant is said to have harbored for the killing of Barnet, the prosecution gave evidence which, it was claimed, tended to show that the defendant was jealous of Barnet's attentions to the woman with whom the defendant was in love. In that behalf the facts, as presented by the prosecution and in part sus-

the rule in regard to system, developing the *res gestæ*, or proving intent.

Defendants were indicted for an unlawful conspiracy to falsely represent to certain members of an association that the association was insolvent, for the purpose of getting nine or more members to join in a petition praying for the appointment of a receiver for the association, and with the fraudulent and malicious intent to thus injure the business and property of the association, the association not then and there being insolvent. Upon the trial testimony was admitted, over the objection of the defendants, tending to show that, at a time preceding the alleged offense, one of the defendants had prepared a petition seeking the appointment of a receiver for the property of another similar association upon the ground, set up in the petition, that it was insolvent; and that, in consideration of the payment of a sum of money by officers of that association, the defendant had desisted from filing the petition. The counsel for the state contended that this evidence was competent to show the intent. The court said: "We are of opinion that the evidence was incompetent for any purpose, and that it was error to admit it. It is true that the rule which excludes, upon trial for one offense, evidence of other and distinct offenses, recognizes an exception in cases where it is necessary to show such other and distinct offenses for the purpose of proving knowledge or intent in the committing of the offense for which trial is had. Thus, it is frequently permitted in practice, and sanctioned, to show, upon indictment for uttering forgeries and counterfeits, that like acts have been committed by the accused, and for the purpose of establishing the guilty knowledge and intent in the instance under investigation. [Implied.] So, too, this exception to the general rule has been extended, though less frequently, to other cases, such as arson, robbery, and conspiracy. But the general rule is salutary, and departure from it is perilous; and hence, courts are reluctant to extend the exception to the rule beyond well-established lines. While the decisions of different jurisdictions vary somewhat as to the application of this exception to the rule, yet they are all in substantial accord upon the proposition that, unless there be some apparent logical connection between the two offenses, either by reason of both being of the *res gestæ*, or both being part of one system, or the one tending to

show a *scienter* in the other, the general rule governs; and the exception to it does not apply." *Towne v. People*, 89 Ill. App. 258.

Leeper v. State, 29 Tex. App. 63, 14 S. W. 398, *infra*, XVI. a, 1, and *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778, *infra*, VI. d, are also cases to the effect that evidence of the other crime is competent as proving a common scheme, plan, or system, and thereby intent.

2. False pretenses; fraud.

The following cases hold that evidence of another crime is competent to prove intent or guilty knowledge in the making of false pretenses or representations, or otherwise perpetrating a fraud by means of, or pursuant to, a common scheme, plan, or system.

Rex v. Roberts, 1 Campb. 300, 2 Leach C. L. 987, note, was an indictment against the defendants, which charged that, being persons of evil fame and in low and indigent circumstances, they conspired together to cause themselves to be reputed persons of considerable property and in opulent circumstances, for the purpose of defrauding another, evidence having been given of their having hired a house in a fashionable street, and represented themselves to one tradesman employed to furnish it as people of large fortune; a witness was called to prove that, at a different time, they had made similar representation to another tradesman. This evidence was objected to on the ground that it was not competent to the prosecutor to give evidence of various acts of this sort, and that he was bound to select and confine himself to one. In overruling the objection, Lord Ellenborough said: "This is an indictment for a conspiracy to carry on the business of common cheats, and cumulative instances are necessary to prove the offense."

Upon the trial of an indictment for procuring goods by false pretense in January, 1876, evidence of similar representations to others in March, 1876, was offered to prove the falsity, and was excluded for that purpose, but was admitted to show the knowledge of falsity in January. It was held error. The prisoner was convicted, but, the conviction having been reversed at the general term, such reversal was affirmed by the court of appeals, where it was held that the prisoner's knowledge of the falsity of the representations could be proved only by circumstances having a legitimate tendency to establish that fact. That dealings with other

tained by the evidence, are substantially as follows: In the summer of 1897 the defendant met Miss Cheeseborough at Portland, Maine. His attentions to her, which were immediate and marked, continued during their visit in Portland, and were renewed after the return of Miss Cheeseborough to New York city. The defendant and Barnet were both members of the Knickerbocker Athletic Club, and apparently good friends. In the fall of 1897 the defendant presented Barnet to Miss Cheeseborough at the Metropolitan Opera House. At this time the latter lived in apartments in the "Marie Antoinette" in New York city, but in a few weeks she took a room in the house of Mrs. Bell, at No. 251 West 75th street, New York city, where she remained until January,

1898. At this point in the chronology of the relations between the defendant and Miss Cheeseborough certain evidence was introduced by the prosecution which was afterwards ordered stricken from the record by the court, but for the purpose of preserving the continuity of the narrative of this branch of the case, and because certain questions have been raised concerning this evidence, it will be inserted here as though it had remained in the record. One Rachel Green, a colored woman who was employed at No. 251 West 75th street, from November 2, 1897, to May 1, 1898, testified that when she went to this house in November, 1897, Miss Cheeseborough and a man whom she thought she was able to identify as the defendant occupied the same room under the

parties tending to show a fraudulent scheme to obtain property by similar devices might be proved to show the fraudulent intent, but they must appear to be part of the same scheme. That the necessary proximity in points of time depends upon the circumstances; but that the evidence was not offered to show intent. That the representations in March were not identical with those in January, but general or different. That other witnesses testified to subsequent sales without any representations. That this evidence could not prove the falsity of the representations in January. That the knowledge of the falsity was fundamental, to be proved before the question of intent was reached, and incompetent evidence on that point was error, although it might have been proper on the other branch. *People v. Spielman* (N. Y.) 20 Alb. L. J. 96; *Shulman v. People*, 14 Hun, 516, Affirmed by divided court in 76 N. Y. 624.

Where, upon the trial of an indictment for obtaining goods on credit, by means of false representations, on the part of the prisoner, as to his responsibility, the representations charged, their falsity, and the knowledge of the accused that they were false, is established, the allegation that they were made with intent to defraud may be supported by proof of dealings of the prisoner with parties other than the complainant, such as purchases made upon the faith of similar representations, which tend to show a fraudulent scheme to obtain property by devices similar to those practised upon him, provided the dealings are sufficiently connected in point of time and character to authorize an inference that the purchase from the complainant was made in pursuance of the same general purpose.

So, also, similar representations made by the prisoner to creditors from whom goods had been previously purchased by him, although no goods were obtained by means of the representations, may be proved when evidence has been given tending to show that he was at the time making fraudulent disposition of the goods purchased. Such evidence is relevant, not as bearing upon the question whether the prisoner made the representations charged, but as tending to show a motive in pursuance of the general fraudulent scheme, to quiet the creditors and obtain control of the goods, so as to continue the fraudulent disposition of them. *Mayer v. People*, 80 N. Y. 364.
62 L. R. A.

To the same effect, and reported as a note to the above case, is *People v. Shulman*, 80 N. Y. 373; and also *People v. Peckens*, 153 N. Y. 576, 47 N. E. 883; *State v. Wilson*, 143 Mo. 334, 44 S. W. 722.

In a prosecution for obtaining, by false pretenses, the indorsement of a promissory note, evidence that the defendant had obtained from the indorser other sums of money prior to the offense charged, by false pretenses similar to those alleged in the information, was held to be admissible to show a purpose or scheme on the part of the accused to obtain the money or indorsement of the prosecuting witness; and that, from his success in making similar false representations on previous occasions, he had reason to believe the representations which were made in the present instance would mislead and deceive, and enable him to obtain the indorsement. *People v. Henssler*, 48 Mich. 40, 11 N. W. 804.

Upon trial of an indictment for obtaining money by false pretenses, where the offense was committed on a railway train, evidence which tended to show the system on which similar operations had been conducted by defendant and his accomplices, for some days previous, and up to and including the time when the offense charged was committed, was competent for the purpose of showing the intent with which the defendant remained on the train with his victim after he had obtained his money and after his accomplices had left the train. The witness by whom this testimony was given, who was one of the accomplices, testified that when a man was beat of his money, the third men was to see that he went away all right,—see what he had to say afterwards; and that the defendant was the third man. *State v. Beauchleugh*, 92 Mo. 490, 4 S. W. 666.

While the general rule that, in a prosecution of this sort, acts of a defendant similar to the one for which he is being tried are admissible for the purpose of showing the intent with which the act charged was done, was not denied, it was insisted that the transaction detailed by this witness was not similar to the one for which defendant was being tried, in that the former amounted to robbery, while the latter, if any crime at all, amounted to an attempt to obtain money by false pretenses and a confidence game. But the court said that, while the witness called the act in his case robbery, it did not think that defendant could

names of Mr. and Mrs. Cheeseborough, and that the only time she ever heard the name of Molineux mentioned there was on an occasion when a parcel came from a drug store addressed to that name. This witness further testified that in January, 1898, the "Cheeseboroughs" left the house of Mrs. Bell together. William Williams, who washed windows and took care of the furnace at the house of Mrs. Bell in 75th street from the autumn of 1897 to May, 1898, pointed from the witness stand to the defendant as a man whom he had seen at Mrs. Bell's on several occasions. He gave further and more explicit testimony upon the subject, but that was stricken out as hearsay. Minnie Betts, another colored woman, testified that she lived with Mrs. Bellinger at

257 West End avenue, and that in January, 1898, Miss Cheeseborough came to live there, and remained until June, when she went away for the summer and returned in the fall. This witness testified that the first time she ever heard the name of Molineux was about a week before the defendant and Miss Cheeseborough were married, in November, 1898. This witness also described a man, not the defendant, who frequently called on Miss Cheeseborough at Mrs. Bellinger's house. During her examination this witness was shown a visiting card and a photograph which were used in connection with the name of Barnet in such a way as to leave no doubt in the minds of the jury that the caller whom she had been trying to describe was in fact Barnet. The defendant

have been convicted of that crime on the witness's testimony, that the act constituted the crime of obtaining money by false pretenses and a confidence game, as defined by statute, and that the two transactions, however differing in detail, were similar in general outline; and, for the purpose of showing the intent of defendant and his confederates in their dealings with the prosecutor, the state had a right to prove the former transaction. *State v. Jackson*, 112 Mo. 585, 20 S. W. 674.

On the trial of an indictment for obtaining eggs by false pretenses, where it appeared that the defendant, in advertising for eggs in the newspapers, in which he gave no name, but only an address, "Norfolk Dairy Farm," and it was proved that he had no right to the title "Norfolk Dairy Farm," evidence by two witnesses other than the prosecutor, to prove that the defendant had obtained eggs of them also, under precisely similar conditions as those sent by the prosecutor, and that both of such transactions were subsequent to the transaction with the prosecutor, was admissible, since it showed part of his scheme to defraud persons by the pretense of carrying on an honest and bona fide business, and that the means by which the fraud was perpetrated was by advertisements, which the prosecutor and the two witnesses mentioned alike saw, and alike acted upon, and the transactions in all three cases were, therefore, connected by the advertisement, which formed part of the scheme. *Queen v. Rhodes* [1899] 1 Q. B. 77, 68 L. J. Q. B. N. S. 83, 79 L. T. N. S. 300, 47 Week. Rep. 121, 62 J. P. 774, 19 Cox C. C. 182.

In a prosecution of a defendant under U. S. Rev. Stat. § 5480 (U. S. Comp. Stat. 1901, p. 3696), on an indictment charging him with having devised a scheme to defraud, to be effected by the use of the postoffice department of the United States, the question of fraudulent intent being the principal issue, other similar business transactions, conducted by defendant a year prior to those charged in the indictment, are not so remote in time that the court may not, in its discretion, permit them to be proved. *Packer v. United States*, 46 C. C. A. 35, 106 Fed. 906.

In the Federal courts the common-law rule is adhered to, but the decision on the trial court will not be reversed in any event but for the abuse of discretion. 62 L. R. A.

Defendant was indicted for obtaining goods by the false pretense that he had a sum of money to his credit in a certain bank. A letter in his handwriting was found in his possession addressed to the president of the bank, asking for a certificate that there was a sum to his credit, and written below the letter was what purported to be a statement, signed by the cashier of the bank, that the money was on deposit there. The cashier testified that he had not received the letter, and had not written the certificate. The letter and the certificate were not used in obtaining the goods for which the defendant was indicted. It was held that the letter was admissible in evidence to prove defendant's felonious intent; and, secondly, that the letter was also admissible for the purpose of showing that the defendant had devised a scheme to obtain goods wherever he could by falsely representing that he had money on deposit in that bank. *Carnell v. State*, 85 Md. 1, 36 Atl. 117.

As to common scheme, plan, or system in false pretenses, see *Com. v. Blood*, 141 Mass. 571, 6 N. E. 769, *infra*, VIII. d.

8. Forgery.

The following are cases to the effect that evidence is admissible in trials for forgery of a certain character to show a common scheme, plan, or system to defraud.

In an indictment against several persons for forgery of a bank check, evidence tending to prove an agreement between the respondents to procure money from banks by forged paper without reference to any particular bank is admissible. *State v. Morton*, 27 Vt. 310, 65 Am. Dec. 201.

Where it appeared upon a criminal trial that certain land held in trust for defendant was sold to a person, and his three notes, payable in one, two, and three years to a trustee, were executed by the purchaser and subsequently transferred to defendant; and the state's evidence further tended to show that thereafter defendant forged and uttered other notes similar in terms to such genuine notes, the charge being for uttering one of said last-mentioned forged notes,—evidence of a number of transactions similar to that involved in the prosecution,—that is, some of them genuine sales of land with genuine notes, and then the forging of notes similar to said genuine notes and the

himself testified, at the coroner's inquest upon the death of Mrs. Adams, that Barnet called upon Miss Cheeseborough, took her to dinners, theaters, and other places of amusement, and sent her flowers. On one occasion she went to an entertainment given by the Knickerbocker Athletic Club as the guest of Barnet, and while there was one of a number who visited Barnet's room and drank wine. The defendant says that on the occasion referred to Barnet escorted Miss Cheeseborough at his request. The defendant admitted that he had proposed marriage to Miss Cheeseborough in the winter of 1897, and that his offer had been declined. Three or four days before Barnet's death Miss Cheeseborough wrote him a letter expressing her solicitude over his illness.

This letter was couched in language from which it could easily be inferred that there existed between Miss Cheeseborough and Barnet an attachment stronger than mere platonic friendship. The defendant, in testifying before the coroner, stated that when he learned of Barnet's illness he communicated the fact to Miss Cheeseborough, and it was agreed between them that the latter should send Barnet some flowers. The defendant also asserted that he bought the flowers himself, and, although he assumed that a card or letter would be sent with them, he never knew of the letter above referred to. Barnet died November 10, 1898. About two weeks later the defendant wrote to a friend with whom he had expected to take tea on the following Sunday evening, asking to be

negotiation of the same and that these notes were all based on land transactions, one set of notes being executed shortly before the execution of the notes in the case, and the remainder of said notes executed and negotiated subsequently,—was competent, not because it was contemporaneous, nor because it was a part of the same transaction, but because it showed, or tended to show, that defendant had adopted the same plan of uttering forged instruments in other cases as was insisted upon by the state that he had pursued in this case. *McGlasson v. State*, 37 Tex. Crim. Rep. 820, 40 S. W. 503.

Upon the trial of an indictment for uttering a forged draft, where the evidence showed that defendant and another were engaged in the common purpose of raiding the banks by forged drafts in two towns, and in all probability in other towns, and that they had succeeded in passing a forged check on one bank in one of the towns, but failed in an attempt to pass one for the same amount on another bank in that town; and there was further evidence that they then took the train for the other town, and there attempted to pass a forged check, and failed and were arrested,—this is admissible, as the several acts were connected as part of a systematic plan; and, where such is the case, evidence of any of them is legitimate to show guilty knowledge, and the time when the collateral inculpatory acts occurred is immaterial, provided they are close enough to indicate that they are part of a system. *Mason v. State*, 31 Tex. Crim. Rep. 308, 20 S. W. 564, 32 Tex. Crim. Rep. 95, 22 S. W. 144, 408.

Upon the trial of an information for uttering a forged contract evidence that the defendants and another were engaged in carrying out an extensive scheme of fraud, in furtherance of which the other person traveled about the country and, by various tricks and devices, fraudulent in their character, obtained signatures to orders similar to the one set out in the information, while the signers supposed they were subscribing for something different, and perhaps, in some instances, forging the signatures himself; and that the defendants followed him with the forged papers, and, by threats of legal proceedings, succeeded in many cases in obtaining money in settlement,—is admissible to show the general scheme of fraud to which the defendants and the other person were parties, since the specific acts were done by them severally in pursuance of their con-
62 L. R. A.

spiracy; and the evidence, therefore, tended to show their knowledge that the instrument purporting to be signed by the defrauded party was forged, and thereby fixed upon them the criminal intent. *Carver v. People*, 39 Mich. 786.

Upon the trial of an indictment for forging certain receipted bills for hides, etc., and for uttering the same, evidence tending to show that the defendant fabricated certain other unreceipted bills of a like character, and uttered them to the same persons by a continuous series of transactions, extending some months later than the last forgery of which the defendant was convicted, is admissible whether such unreceipted bills were technically forgeries or not, since, being fabricated instruments similar to those in issue in every respect, except in regard to signature, their tendency to show knowledge and a fraudulent scheme on the defendant's part was not affected by the degree or kind of fraud committed in their manufacture or use. *Com. v. White*, 145 Mass. 392, 14 N. E. 611.

Upon the trial of an information charging defendant with forgery, and with uttering an order for money knowing it to be forged, with intent to defraud, the court permitted the prosecutor to introduce testimony which tended to prove that the respondent had forged and uttered other checks at or prior to the time of the forgery alleged in the information, for the purpose of showing the fraudulent character of the act of respondent in passing the papers alleged to have been forged. The court held that such other papers were a similar kind to those in question, and were a part of the transaction relating to the business carried on here, and consisted of what was claimed to be false invoices of lumber for which checks were sent to defendant to be delivered to the persons named in the invoices; and that, as the testimony tended to show the scheme of respondent and his intent to defraud, it was admissible for that purpose as part of the *res gesta*. *People v. Kemp*, 76 Mich. 410, 43 N. W. 439.

4. Counterfeiting.

In the two following cases the evidence of the other crime was admitted to prove guilty intent, and as developing a common scheme, plan, or system.

Upon the trial of an information for putting
15

excused because of his sudden and romantic engagement to be married on the succeeding Tuesday. On the 29th day of November, 1898, nineteen days after Barnet's death, the defendant and Miss Cheeseborough were married. From this evidence bearing upon the alleged relations of the defendant and Barnet to Miss Cheeseborough it is contended by the prosecution that the defendant was jealous of Barnet because of the apparent favor with which the latter's attentions had been received by Miss Cheeseborough, and that this was the mainspring of the motive which prompted the killing of Barnet.

The foregoing outline of the facts which conclusively establish the death of Barnet and Mrs. Adams, respectively, and which tend to prove the cause thereof, and of the

circumstances which are relied upon to connect the defendant therewith, naturally leads us, next, to a consideration of the other related facts and circumstances which are said to bear upon the handwriting of the poison-package address and upon defendant's connection with the murder of both Barnet and Mrs. Adams.

We will first consider the Barnet letter box and its correspondence. One Nicholas Heckmann testified, in substance, that in May, 1898, he kept private letter boxes for rent at No. 257 West 42d street, New York city. On Friday, May 27, 1898, shortly after 6 o'clock, the defendant came to his place and rented a letter box in the name of H. C. Barnet. Defendant was given a ticket for box 217. Defendant called about twenty

off a counterfeit bank bill, knowing it to be counterfeit, the state, after proving that the defendant and another had entered into a conspiracy to put off counterfeit bills similar to the bill described in the information, for the purpose of showing that the defendant knew the bill in question to be counterfeit, offered to prove that the defendant's coconspirator had passed other bills at two different places a day or two previous to the alleged offense. The evidence was admitted over the defendant's objection, and the court charged the jury that, if they were satisfied that the coconspirator of the defendant passed said bills in pursuance of the combination between him and the defendant, the defendant was chargeable as, if he had personally passed them, and it would be evidence tending to show his knowledge that the bill in question was counterfeit, in the same manner as if he, himself, had personally passed said bills. *State v. Spaulding*, 19 Conn. 233, 48 Am. Dec. 158.

Where it is shown that a party indicted for uttering forged paper upon a bank has, within a short period of time, passed other forged paper on the same bank, it is plain that such repeated utterings show a plan to defraud the bank; and in such case each uttering is admissible in evidence as tending to prove the intent with which such uttering is committed. *Bell v. State*, 57 Md. 108.

5. Embezzlement.

Defendant was indicted for embezzling, as a clerk, the sum of \$.50. On the trial evidence was offered by the state, and received, to the effect that, as such clerk, he sold eggs to the amount of \$2.00, also \$2.00 worth of coffee and \$.50 worth of tea, and that, instead of putting the amount thereof, \$4.50, in the drawer of a cash register kept for the purpose, he registered only \$1.00 and put it in the drawer, and put the other \$3.50 in his pocket. The \$.50 for embezzling which defendant was on trial was taken from this register, and the court held that the testimony in regard to the \$.50 purchase was evidence showing how defendant used the register and made false registrations, and tended to show the system pursued by him in embezzling the \$.50. *Gallardo v. State* (Tex. Crim. App.) 40 S. W. 974.

In *People v. Bidleman*, 104 Cal. 608, 38 Pac. 502, where the defendant was charged with embezzlement in taking money paid for goods of 62 L. R. A.

his employers, and which was not in any manner accounted for or paid over to the employers, the court said: "But, if we concede that any particular sum which is shown by the evidence to have been received by the defendant, and not entered upon the books, or accounted for, was received at a period remote from the date named in the information, or not included in the sum specified, it may still be competent evidence tending to show a system adopted by the defendant to conceal the conversion of the money, and the intent with which the money mentioned in the information was appropriated by him to his own use, and thus tend to prove the defendant guilty of the offense charged."

On a prosecution for wrongfully receiving money of a city, where a conspiracy between the defendant and his partner, who was the city treasurer, had been proved, evidence that the treasurer, after the conspiracy was formed, misappropriated other city funds, and used them in the partnership business, was properly admitted to prove intent and guilty knowledge of the defendant, where the instructions limited the use of the evidence to this purpose, and stated that it could not be used to prove that the money mentioned in the indictment was in fact taken from the city treasury, and used in the partnership business. *People v. Lyon*, 1 N. Y. Crim. Rep. 400. In explaining that the admission of this evidence was an exception to the general rule against proof of other offenses, the court stated that the offense charged in the indictment was one of a series of acts of a similar nature, constituting part of one continuous transaction; and that all the money misappropriated by the city treasurer, and used in the partnership business, was thus used with defendant's knowledge, consent, and approbation, and in pursuance of a scheme and conspiracy by the partners.

That other offenses may be proved as tending to show scheme, plan, or system, see *Reeves v. State*, 95 Ala. 31, 11 So. 158, *supra*, III. c. 15.

On the trial of an indictment or information for embezzlement, evidence is admissible which tends to prove other previous acts of embezzlement similar to the one charged in the indictment or information, to show the criminal intent with which the act charged was committed. *People v. Neyce*, 86 Cal. 393, 24 Pac. 1091; *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520; *Jackson v. State*, 78 Ga. 531; *People v. Hawk-*

times after that, and the witness delivered to him the mail addressed to H. C. Barnet, the general nature of which was patent medicine of various kinds. One package was described as being marked "Kutnow powder," and another "Von Mohl's calthos." The witness identified a box which came to box 217 some time in June, 1898, but was never called for, and was delivered to the district attorney, who procured it to be analyzed. Late in the summer of that year the real H. C. Barnet received through the mail, at his office in the produce exchange, a box marked "calthos" containing a number of pink capsules. The medicine bearing this name was advertised as a remedy for impotence. A similar package was found in Barnet's desk after his death. Some of the

mail addressed to this box 217 was never called for. Part of it consisted of four letters, the envelopes of three of which bore the postoffice box number of Von Mohl & Co., of Detroit, and the fourth of which bore the postoffice box number of Dr. Fowler, of Moodus, Connecticut. These were marked 58, 61, 62, and 63 in the so-called "prime series." Nine letters and communications were written in the name of H. C. Barnet. These, together with five Barnet envelopes, comprise the so-called "Barnet" series, and are marked B, B' C, F, H, I, J, K, M, N, O, P, Q, and R, respectively. "B" is an order for Dr. Rudolphe's specific for impotence, received by Dr. Fowler June 1, 1898, and "B" is the envelope in which it was mailed. "C" is a letter to the Marston Remedy Co., dated

ins, 106 Mich. 470, 64 N. W. 736; Goodwyn v. State (Tex. Crim. App.) 64 S. W. 251.

c. In particular instances.

As has been stated, intent is an essential ingredient of all crimes at the common law. In some offenses, the creatures of statute, it is not. Again, in some instances the act by which the crime charged is committed is, in and of itself, evidence of a guilty knowledge or intent, or malice; while in others such act may, of itself, be innocent or justifiable, or guilty; and to show the latter it is necessary to prove that such act was done with guilty knowledge or intent.

It is in proof of crimes of the latter character that the exception to the rule inhibiting evidence of independent crimes is most liberally extended. These, in general, are, false pretenses or fraud; forgery; counterfeiting; embezzlement; and receiving stolen property.

It should not be thought, however, that evidence to prove intent is confined to the class of cases just mentioned, but in those cases first spoken of, where the commission of the act is of itself evidence of intent, the actual existence of intent, like that of motive, may be shown, to amplify and intensify the theory and position of the prosecution.

1. Murder.

On the trial of an indictment of a husband for the murder of his wife, evidence that the defendant frequently mistreated his wife, at one time driving her from the house and shooting at her; at another time striking her with a poker; at another cutting her with a knife; together with evidence of a threat that he would kill her,—is admissible. *State v. Nugent*, 71 Mo. 136.

Upon the trial of an indictment for causing the death of the person killed by beating her with a stick and with a whip, and by starving her, and by hanging her with a rope, no objection being made to the indictment on account of duplicity, proof by the state of the beating by defendant of deceased with other similar instruments and at other times; and also that defendant may have shot at deceased on a former occasion, and attempted to cut her with a knife,—is admissible as evidence tending to show motive or intent on the part of defendant, when limited by instructions to that effect. *Medina v. State* (Tex. Crim. App.) 49 S. W. 380.

32 L. R. A.

Upon the trial of a husband for the murder of his wife, committed when the two were alone in the kitchen of the defendant's house, claimed by the prosecution to have been committed by setting fire to the wife's clothing, from the effect of which she died, the only direct proof of which was the dying declarations of the wife admitted in evidence, it is competent, for the purpose of showing the feelings of the defendant towards his wife, for the prosecution to prove that, three or four months prior to the day the latter was burned to death, the defendant got up from the dinner table and lit his pipe, and, just about the time he got behind his wife, touched the flame of the paper with which he had lit his pipe to the back of her dress and afterwards carried the paper out doors, and that his daughter, as soon as she saw it, ran to her mother and put out the fire, and said to her father: "What do you mean?" and that he replied that "the paper had slipped out of his hand." *Com. v. Birriolo*, 197 Pa. 371, 47 Atl. 355.

This case illustrates the truth of what is said in VI. d, *infra*, that presence of intent involves the absence of accident or mistake, and *vice versa*.

Upon the trial of a prisoner for the murder of her infant boy by suffocation in bed, it was held that evidence tendered to prove the previous death of her other children at early ages was admissible, although such evidence did not show the causes from which those children died. *Reg. v. Roden*, 12 Cox C. C. 630.

On the trial of an indictment for murder, by the defendant, of the husband of his wife's sister, evidence that, previous to the shooting of the deceased, the defendant, at a place 5 miles distant from the scene of the murder, shot at his wife and her mother, saying at the time that he had come to break up the family, is admissible as connected with the main charge,—that is the killing of the deceased,—as it was a part of what the defendant was engaged in, as evidenced by the threat that he had come to break up the family; and what he did when he shot at his wife and her mother showed the purpose and intention of, and preparation for, the act of shooting deceased, and connected him with the act at the time he shot him; and all that took place at the place where he shot his wife and her mother and the place where he shot at deceased and his wife, and killed deceased, was

May 31, 1898, writing for one month's treatment for the same trouble. "F" is a letter to Cameron & Co., received by them June 1, 1898, asking for "book," and "J" is the envelope in which it was mailed. "H" is a letter to Marston & Co., received by them June 6, 1898, asking for marriage guide, and "K" is the envelope in which it was mailed. "I" is the so-called "diagnosis blank" sent by Marston & Co. in answer to the request for marriage guide, and returned to Marston & Co. on the 4th or 5th of June, 1898, in the name of Barnet, but filled with answers which are said to accurately describe the defendant and not Barnet. "M" is a letter to Von Mohl & Co., received by them June 1, 1898, requesting "five days' treatment," and "N" is the envelope in which it was mailed.

"O" is a letter to the "Sterling Remedy Co.," received by them June 6, 1898, asking for "book." "P" is a letter to G. B. Wright, Marshall, Michigan, written about June 1, 1898, asking for prescription, and "R" is the envelope in which it was mailed. It may be noted in passing that none of these Barnet letters contain any reference to any powder or substance which was used, or, so far as appears, could be used, in mixing with, or in the administration of, the poison by which Barnet and Mrs. Adams are alleged to have been killed.

We now come to the Cornish letter box and the correspondence written in the name of Cornish. One J. J. Koch testified that in December, 1898, he had for five years conducted a letter box agency at 1620 Broad-

really one transaction. *State v. Eastwood*, 73 Vt. 205, 50 Atl. 1077.

On a trial for murder, where it appeared that the deceased was an officer engaged in making an arrest to which resistance had been offered, in which defendant did not participate; and thereafter a second resistance occurred in which the defendant was engaged,—the circumstances and conduct attending the first resistance are admissible in evidence; as the defendant, although he took no part therein, shared with some who did in the work of making the second, and, while so engaged, committed the homicide. *Pritchett v. State*, 92 Ga. 65, 18 S. E. 536.

2. Assault with intent to murder.

Evidence of assaults and threats by the prisoner, against the prosecutor, on the same evening and prior to the assault for which the prisoner is indicted, is admissible in behalf of the state to show with what intent the last assault was made. *Ross v. State*, 62 Ala. 224.

Upon the trial of an indictment for stabbing, etc., with intent to commit the crime of murder, after proof has been received that the accused cut the throat of the prosecutrix, evidence that the accused had on a previous occasion attempted to administer laudanum to prosecutrix in wine, for the purpose of poisoning her, as evidence of a distinct offense not laid in the indictment, may be given when it becomes material to show the intent with which the act charged was done. *State v. Patza*, 3 La. Ann. 513.

Upon an indictment for assault with intent to murder, a previous assault and threats by the defendant against the particular person whom he is charged with having subsequently assaulted have reference to the commission of the offense, and are admissible to show the intent with which the last assault was made. *Lawrence v. State*, 84 Ala. 424, 5 So. 33. There is no statement in the case to show whether the objection was taken specifically that the evidence thus admitted tended to show another and different crime.

In a prosecution for an assault with intent to murder, evidence that, previous to the shooting of the prosecutor by the defendant charged in the indictment, and for which a conviction was claimed, the defendant went to the house where the prosecutor was, found him in bed, and had an altercation with him, in which he attempted to cut him with a knife, is proper and admissible, since it tends to show defendant's purpose. 62 L. R. A.

in returning; and, whether proved before or after the testimony of the shooting was given, its tendency, in connection with alleged threats, was to prove malice, or formed design. *Crawford v. State*, 86 Ala. 16, 5 So. 651.

Where the defendants were indicted for, and had been convicted of, assault upon a young girl, their adopted daughter, with intent to kill, by means of burning her with a hot iron, the court, for reasons not material to state, reversed the judgment, and sent the case back for a new trial, and in doing so said: "Upon another trial we shall assume that the defendants will not be required to defend against the second count in the indictment. Therefore, the only material question to be determined is whether evidence of successive burnings, about one week apart, is admissible under the first count, which charges but a single offense, and that is an attempt to commit murder, which, however, since the finding of the jury, must be regarded as having been reduced to an intent to commit manslaughter. The state must establish the requisite intent, and, therefore, may, and is entitled to, introduce evidence of distinct and different burnings, although they may constitute distinct crimes." *State v. Merkley*, 74 Iowa, 695, 39 N. E. 111.

On the trial of an indictment for an assault with intent to kill a policeman, where one of the defenses was that the accused was not aware of the official character of the person assaulted, evidence to show that the defendant was engaged in a prior difficulty in the same saloon where the alleged assault took place, with a stranger on the same evening, and that the policeman, for assaulting whom the defendant was being tried, had interfered and quelled the disturbance, was properly admitted. *State v. Emery*, 76 Mo. 348.

On a trial for assault with intent to murder, evidence of prior assaults by defendant on the prosecutrix, in which he beat her unmercifully,—once with the window stick; another time stabbed her with a knife,—is admissible to illustrate his motive, malice, and intent in committing the assault for which he is being tried. *Hamilton v. State* (Tex. Crim. App.) 56 S. W. 926.

3. Assault with intent to commit rape.

On a trial for an assault with intent to rape, where indecent acts of defendant towards other girls, and sexual intercourse with one of them,

way under the name of the Commercial Company. He was also the proprietor of the "Studio Publishing Company," under which name an advertising agency was conducted at the same place. Under date of December 31, 1897, the defendant, through his secretary, Mr. Allen, wrote upon the business stationery of Morris Hermann & Co. to the Studio Publishing Company for a sample copy of the paper. In July, 1898, Koch sent to defendant a printed circular upon which attention was called to the private letter box agency which was being conducted at No. 1620 Broadway, in connection with the advertising business. During the week of December 12, 1898, the defendant made inquiry of Koch about renting a private letter box for a friend. No box was rented

on that day. On December 21, 1898, a box was rented to a man, not the defendant, under the name of H. Cornish. Four pieces of mail were received at this box addressed to "H. Cornish." One was a sample box of "Kutnow" powder. The second was a circular letter from Von Mohl & Co. The third was a sample box of "calthos," manufactured by Von Mohl & Co. Koch testified that by mistake all of these were placed in a different box than that assigned to H. Cornish, and remained in the wrong box where they had been placed until January 14, 1899, when Koch delivered them to Captain McClusky. The fourth was a letter bearing the name of Frederick Stearns & Co., Detroit, Michigan, upon the envelope. This was seen by Koch and placed in the Cornish box.

at about the same time, though separate and distinct from each other, were parts of a single transaction, proof of them all is admissible to show the intent with which the defendant acted. *State v. Desmond*, 109 Iowa, 72, 80 N. W. 214.

Under an indictment for assault with intent to commit rape, evidence of previous assaults upon the prosecutrix is admissible to show the intent with which the act charged was committed. *State v. Walters*, 45 Iowa, 389.

But under an indictment for assault with intent to commit rape, evidence that the defendant had repeatedly assaulted another female with intent to commit rape is incompetent, and, because of its admission in evidence, a judgment of conviction will be reversed. *Ibid.*

Defendant was charged in the information for assaulting a female child of the age of six years with the felonious intent to carnally know and abuse her with her consent, on the 11th day of July. The prosecution was permitted to prove by a witness, over the objection of the defendant, that the accused, on the Friday preceding that day, committed an assault upon the same child with the intent to ravish her. The testimony of the acts committed on July 11 was the last introduced on the trial, and was received without any objection being interposed thereto by the plaintiff in error. It was held that, had the acts occurring on July 11 been first proved, possibly the state would have been required to confine its evidence to the transaction occurring on that day; at least, the defendant would have been in a position to raise the question whether or not the evidence of what took place on Friday was admissible. Where an information charges a single crime, and on the trial the state, for the purpose of proving the act charged, introduces evidence tending to establish similar, but separate and distinct, offenses, the proper practice is for the defendant to move the court to require the prosecutor to elect on which transaction he will claim a verdict. *Palin v. State*, 38 Neb. 862, 57 N. W. 743. The court appears not to have decided whether the evidence of the other crime was admissible, but stated that the courts of Nebraska had been inclined to adhere rather strictly to the general rule precluding the introduction of other crimes in evidence, and cited the cases holding to that effect. The court however, said that undoubtedly what is laid down in the cases it cited was the general rule, but, whether the principle should be applied in a prosecution for rape, or 62 L. R. A.

an assault with intent to commit that crime, was not so clear. The court then proceeded to cite numerous decisions made by the courts of other states, holding that it is competent in cases like the one at bar to admit evidence of other assaults for the purpose of showing the intent with which the assault charged was committed.

4. Abortion and attempt to procure.

On a trial for attempting to procure a miscarriage and an abortion of the prosecuting witness by furnishing her with drugs and medicines for that purpose, and persuading her to take them, evidence tending to prove that, subsequently to the particular act charged in the indictment, the traverser sought to induce the witness to submit to an operation to produce the abortion, is admissible. Such evidence is admissible to show with what purpose and intent he made the attempt charged in the indictment, as well as to corroborate the evidence of the first attempt. *Lamb v. State*, 66 Md. 285, 7 Atl. 399.

So, at the trial of an indictment for unlawfully using a certain instrument with intent to cause the miscarriage of a woman, evidence that, in addition to using the instrument, the defendant also administered other unlawful treatment for the same purpose, and that he used the same treatment on the same woman upon two other occasions than that named in the indictment, and but a few days previous thereto, is competent to show his intent, and his knowledge of the pregnant condition of the woman. *Com. v. Corkin*, 136 Mass. 429. In this case the court said: "The evidence objected to was clearly competent for the purpose for which it was admitted. Whether it was of acts which formed part of the principal transaction, or of acts of the defendant at other times, it tended to prove attempts of the defendant to procure the identical result, the intent to procure which constituted the gist of the offense charged,—that is to prove the intent which was charged in the indictment. Being competent to prove the crime charged, it is no objection that it also tended to prove other crimes."

Upon the trial of an indictment under 24 & 25 Vict. chap. 100, § 58, for "feloniously and unlawfully using a certain instrument, to wit, a quill, with intent to procure a miscarriage," it is relevant, in order to prove the intent, to show that at other times, both before and after

It was not there on January 14, 1899, when the others above referred to were delivered to Captain McClusky. It was called for by some unknown person in the absence of Koch. The discovery of this Cornish mail led to investigations, as the result of which exhibits D, E, and G, written in the name of "Cornish," came into the hands of the police authorities. Exhibit D is a letter signed "H. Cornish," addressed to Frederick Stearns & Co., Detroit, Michigan, and received by that firm December 24, 1898, stating, in substance, that one A. A. Harpster had applied to the writer for a position as collector, and requesting a line in reply to be sent to 1620 Broadway, New York city. At this point it may be stated that Harpster was a man who had formerly been in

the employment of Stearns & Co., and had subsequently been employed at the Knickerbocker Athletic Club, where he was very friendly to Cornish, and had incurred the ill-will of the defendant because of his adherence to Cornish in the difficulties between the latter and the defendant. At the time the Cornish letter was written to Stearns & Co., Harpster was employed by Ballantine & Co., and had not applied to anyone for the position of collector. Upon this feature of the case it also appeared that in October, 1898, the defendant met one Heiles, who had been employed at the Knickerbocker Athletic Club at the time when Barnett, Cornish, Harpster, and the defendant were all connected with it. At that time the defendant requested Heiles to arrange to have a letter

the offense charged, the prisoner had caused miscarriages by similar means on other and different women. *Reg. v. Dale*, 16 Cox C. C. 703.

On the trial of one for an attempt to produce an abortion on a pregnant woman, proof of three attempts, at different times, was admitted without objection. It was held that the proof was competent, as the several acts were parts of but one attempt to produce the same abortion. Acts of the defendant tending to show his knowledge of the woman's pregnancy and his intention to commit the offense may be shown, whether they were prior or subsequent to the particular act charged in the indictment. *Scott v. People*, 141 Ill. 195, 30 N. E. 328.

On the trial of an indictment for procuring an abortion, the prosecution, after having given evidence of the administration of drugs on a certain day, may, for the purpose of showing intent, prove the administration of similar drugs on subsequent days; but may not give evidence of other drugs on other days as part of the offense. *Reg. v. Calder*, 1 Cox C. C. 348.

5. Slander and libel.

On a criminal trial for slander consisting of imputing want of chastity to the plaintiff, proof of other slanderous statements by defendant concerning the prosecutrix, on other occasions, is admissible, for the purpose of showing defendant's intent in uttering the slanderous words charged against him in the information. *Collins v. State*, 39 Tex. Crim. Rep. 30, 44 S. W. 346.

Upon an indictment for a seditious libel, it is not competent for the prosecution, for the purpose of proving the intent of the defendant in publishing the libel charged in the indictment, to give in evidence any papers subsequently published by the defendant, or found in his possession, unpublished by him, which would be libels, and might be substantive subjects of public prosecution, if published. *United States v. Crandell*, 4 Cranch C. C. 683, Fed. Cas. No. 14,885.

6. Violation of liquor law.

On a trial for violating local option, where an issue in the case was whether the compound sold was an intoxicant, and defendant had testified he had no reason to believe that it was an intoxicant, evidence showing that he had sold

the same compound to other parties by the drink, and that it intoxicated them, is admissible to show the intent of defendant. *Dane v. State*, 36 Tex. Crim. Rep. 84, 35 S. W. 661.

On a trial for violation of local option, evidence as to other sales by defendant than the one charged is admissible on the question of intent. *Pike v. State*, 40 Tex. Crim. Rep. 613, 51 S. W. 395.

Upon the trial of an indictment for engaging in or carrying on business without a license where the license must be obtained annually, evidence of sales made previous to twelve months before the date on which the indictment was found is admissible as tending to show the intent with which they and the ones complained of were done. *Dentler v. State*, 112 Ala. 70, 20 So. 592.

Upon the trial of an indictment for unlawfully selling liquors and suffering the same to be drunk on or about the defendant's premises, the state, after proving the sale to the party named in the indictment, was permitted by the court to introduce evidence of other sales, to another person, at other and different times, not to convict for them, but to show knowledge by defendant that the liquor sold to the person to whom it was charged in the indictment to have been sold was drunk about the premises, and to illustrate the character of the sale to the latter person. It was held that, under the particular circumstances of the case, the evidence was admissible for the purpose stated. *Pearce v. State*, 40 Ala. 720.

Where, on the trial of a charge for the violation of the prohibitory law, it is claimed that the liquor alleged to have been sold was not intoxicating, it is then competent to show sales other than those upon which the state elects to try the defendant, for the purpose of showing purposes for which said liquor was sold and purchased. *State v. Coulter*, 40 Kan. 87, 19 Pac. 368.

Where, in a prosecution under the prohibitory law of a state for selling intoxicating liquor for an unlawful purpose, the state elects to rely on a sale made on a certain day, evidence of other sales, on other days, may be given to the jury for the purpose of showing that the liquor was not needed for medical purposes, but was wanted to use as a beverage, and that the defendant knew, or had good reason to know, that the applicant wanted the liquor for use as a beverage; and in such a case the applications

written to Stearns & Co. asking for information regarding Harpster. The defendant explained to Heiles that the purpose for which he wished to use this letter was to procure Harpster's discharge if the reply from Stearns & Co. should be suitable for that purpose. Heiles did arrange to have such a letter written about October, 1898, and a reply was received which was given to Heiles, who showed it to the defendant. The defendant said he was too busy to look at it then, and told Heiles to keep it. Heiles kept the letter until after the arrest of the defendant, when he destroyed it. Exhibit E is a letter signed "H. Cornish," received by "Kutnow Bros." December 22, 1898, and requesting that a sample of salts be sent to 1620 Broadway, New York city. Exhibit G

is a letter signed "H. Cornish," received by "Von Mohl & Co.," the manufacturers of "calthos," requesting said firm to send "five days' trial" to 1620 Broadway, New York city. This letter was received from Von Mohl & Co. by Witte, assistant chief of police in Cincinnati, and by him turned over to Captain McClusky. Each of these three letters, exhibits D, E, and G, was written upon a peculiar paper of "egg-blue" tint, bearing a "tri-crescent emblem." The same kind of paper was used for the so-called "Burns" letter (exhibit 2), which was received June 1, 1898, by one Agnes Evans, acting for Dr. James Burns, who was requested to "send remedy" to Roland Molineux, Jersey street, Newark, New Jersey. The defendant admits having written the

on which the sales were made may be used in evidence for such purpose. *State v. Elliott*, 45 Kan. 528, 26 Pac. 55.

At the trial of a complaint for an unlawful sale of intoxicating liquors, evidence of other sales, made by the defendant on the same occasion as that charged in the complaint, is admissible. The court said: "The evidence of other sales, made on the same occasion as that when the facts testified to occurred, tending to show a sale to a person unknown, was admissible. Proof of such sales might aid in showing that the transaction relied on by the prosecution was a sale, by proving the business then and there conducted." *Com. v. Sinclair*, 138 Mass. 493.

At the trial of an indictment for keeping intoxicating liquors with intent to sell the same unlawfully, it appeared that the defendant was found in a certain town, in which he had no license to sell intoxicating liquors, with a horse and wagon; that the wagon contained liquors, some of which were intoxicating and some not. It was held that evidence tending to show sales of intoxicating liquors in that town from the same wagon, by defendant, three or four days before the occasion in question, was admissible. *Com. v. Cotton*, 138 Mass. 500.

Where an indictment charged an illegal sale of cider, the state was permitted to prove sales to other parties in the year next preceding the first day of the term when the indictment was found. It was held that it was competent to prove that the respondent kept cider for sale, that he was in the business, and the evidence tended to show it. *State v. Welch*, 64 N. H. 525, 15 Atl. 146.

Upon the trial of one charged with having in his possession intoxicating liquors with intent to sell the same in violation of the law, the record of his previous conviction for a similar offense is admissible in evidence upon the question of intent. *State v. Plunkett*, 64 Me. 534; *State v. Neagle*, 65 Me. 468.

Where upon the trial of an indictment for selling whisky without license, the proof showed that the sale was accomplished by the sale of cigarettes worth a little more than a cent apiece for 10 cents, and then the giving by the defendant to the person who made the purchase a drink of whisky, testimony that on other occasions than that mentioned in the indictment, and about the same time, the prosecuting witness, and others, had bought cigarettes in the defend-

ant's shop for 10 cents each, and that on each occasion each one who got a cigarette got also a drink of whisky by invitation of the defendant, was admissible, as it tended to show that the particular transaction for which the defendant was indicted was, in fact, a sale of whisky, and intended by him to be so. *Archer v. State*, 45 Md. 33.

Upon the trial in the superior court, on appeal from the district court, of a complaint for keeping the liquor on Sunday with intent to sell the same contrary to law, sales may be proved in the superior court not proved in the lower court, as, in such case, the sales are not the offense, but only evidence of the intent with which the liquor was kept. *Com. v. Coughlin*, 182 Mass. 558, 66 N. E. 207.

See *Wilson v. State* (Tex. Crim. App.) 55 S. W. 98; *Walker v. State* (Tex. Crim. App.) 72 S. W. 401,—*supra*, III. b, 1.

7. Larceny.

Upon the trial of an indictment for stealing from a certain mine, coal, the property of the owner of the mine, where the prisoner was charged in the same count with stealing from the mines of thirty other proprietors other coal, the property of each of said proprietors, and the prosecution is limited by the court to the trial for the taking of the property of one of the proprietors, evidence in regard to the taking of the property of each and all of the others is admissible to show that, when the prisoner took the coal of that owner, he knew he was out of his boundary. *Reg. v. Bleasdale*, 2 Car. & K. 765.

It is competent for the state, in a trial for theft, to prove the theft of other property at the same time and place as the property in question, to show the intent with which the accused acted with respect to the property for the theft of which he is on trial. *Conley v. State*, 21 Tex. App. 495, 1 S. W. 454.

In *Camerson v. State*, 9 Tex. App. 332, the court reversed the judgment on the ground that the trial court had refused to receive the evidence tending to show that the defendant took the animal, for the theft of which he was charged, under an honest claim of right. This was the only real question in the case necessary to be decided, but, for some reason, the court asserted the rule that, when the *scienter* or *quo animo* is requisite to, and constitutes, a necessary and essential part of the crime with

"Burns" letter. In this connection it is proper to refer to the evidence of Mary Melando the forewoman at Hermann & Co.'s factory in Newark, New Jersey. She took care of the defendant's rooms. Upon the trial she was shown people's exhibits D, G, and E, and exhibit 2. She said she had seen paper like that in the drawer of the sideboard in the defendant's room at the Newark factory. She saw about a half dozen sheets as late as October, 1898. The witness took three sheets of this paper for her own use, and left about three sheets of it in the drawer of the sideboard. It also appears in the case that paper like this was on sale at four of the large department stores in New York city and at two stores in Newark, New Jersey, at one of which, that of Plumb

& Co., the firm of Hermann & Co. had an account. The foregoing writings, called the "Barnet" letters and the "Cornish" letters, were used in the case for the avowed purpose of connecting the defendant with the murder of Mrs. Adams. As a part of the theory or theories upon which these writings were admitted in evidence certain genuine and proved or conceded writings of the defendant, of the "real" Barnet and of the "real" Cornish were received in evidence.

This brings us to a statement of that branch of the evidence by which the prosecution claims to have established the culminating proof that the defendant was the writer of the address (exhibit A) upon the poison package received by Cornish. The evidence upon the subject of handwriting proceeds

which the person is charged, and proof of such guilty knowledge or malicious intention is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct, or declarations of the accused as tend to establish such knowledge or intent is competent, notwithstanding they may constitute, in law, a distinct crime.

But where defendant was convicted for the theft of a horse, and, on his appeal from such conviction, he complained, in a bill of exceptions, that the court permitted the state to prove contemporaneous theft of a saddle, which was recovered from him at the same time and place that the horse, with the theft of which he was charged, was recovered; and the trial court appended to the exception this explanation: "That in the opinion of the court the facts were all shown in connection with the horse and saddle and time."—It was held that this explanation did not bear out defendant's contention that the taking of the saddle and horse was not contemporaneous. It was held, further, that the fact that extraneous crime is not exactly contemporaneous would not make the testimony inadmissible (citing *Ware v. State*, 36 Tex. Crim. Rep. 597, 38 S. W. 198); and that, the admission of the evidence having been limited by the court to be considered by the jury to the question of intent, there was no error in its admission. *Brown v. State* (Tex. Crim. App.) 59 S. W. 1118.

It is suggested that *Ware v. State*, 36 Tex. Crim. Rep. 597, 38 S. W. 198, *infra*, cited in the foregoing case, does not decide that the fact that extraneous crime is not exactly contemporaneous would not make the testimony inadmissible.

In a prosecution for stealing a horse, where a saddle was stolen at the same time, evidence concerning the stealing of the saddle is admissible as showing the intent with which the horse may have been taken. *Robinson v. State* (Tex. Crim. App.) 48 S. W. 176.

And yet, in *McIver v. State* (Tex. Crim. App.) 60 S. W. 50, it was held that, where two offenses have been committed about the same time, and a person is being tried for one, the commission of the other is not admissible, unless, as stated, it either shows system, or the offenses are contemporaneous, and show the intent with which the defendant acted in the commission of the offense for which he is being tried. So, on the trial for theft of a horse it is not competent to admit evidence of the theft

of a saddle, where it was not shown that the saddle and horse were stolen at the same time and place.

On a trial for the larceny of a horse, evidence of the stealing of a saddle from another party soon afterward, to equip the horse for riding, is not admissible to prove the intent in taking the horse; nor can the jury consider it, if admitted, as a circumstance in making up their verdict as to the larceny of the horse. It is a distinct offense, and one theft cannot be proved by the evidence of another. *Endally v. State*, 39 Ark. 278.

On the trial of an indictment for stealing a horse, it is error to admit evidence going to show that the defendant had committed a larceny the night previous to the day on which he was charged with committing the offense laid in the indictment. The court said: "It is never admissible to prove that a person has previously committed a crime of a similar character, to show that he committed the criminal act for which he is on trial; and, although the court, in this instance, says that the evidence was only admitted for the purpose of showing the intent with which the defendant got possession of the property, yet we do not see any connection between the two transactions, that would enable any legitimate conclusion to be drawn as to that fact." *Barton v. State*, 18 Ohio 221.

Where the charge against the defendant was that he feloniously stole, took, and carried away one small hog; and on the trial the state's attorney offered, and was allowed, to prove that the defendant had altered the mark of a hog found in his possession, this was objected to on the ground that, inasmuch as such an act, if established, would constitute an offense distinct from that alleged in the indictment, the proof was not admissible, and should have been excluded. It was held that the evidence was admissible, as it tended to show the intent with which the act charged was done. *State v. Thomas*, 30 La. Ann. 600.

In *Housh v. People*, 24 Colo. 262, 50 Pac. 1036, after proof had been made in regard to the main charge against the defendant of larceny in obtaining the possession of a number of sheep with the felonious intent to deprive the owner of the property, two witnesses were permitted, over the objection of the defendant, to testify to a similar transaction had by defendant with one of them at the same time. The testimony was allowed for the purpose of showing the in-

along several distinct lines, and the history of each will be stated separately. On the 20th day of December, 1898, the day after Mrs. Adams' death, one of the newspapers in New York city published what was called a fac simile of the poison-package address. It is known in the case as defendant's "exhibit 12." This was seen by John D. Adams, the secretary, and Andre Bustanoby, the superintendent of the Knickerbocker Athletic Club. After seeing this Mr. Adams found some letters in the handwriting of the defendant, which were on the files of the club. These were shown to Bustanoby. Both men were familiar with the defendant's handwriting, and were struck with the resemblance between exhibit A, the poison-package address, and exhibit 12, the news-

paper copy. On December 30, 1898, Adams showed Cornish exhibit 12 and a number of the defendant's letters with the signatures turned down. Among the latter were exhibits 20, 21, 22, and 24, which are part of the series of defendant's conceded handwritings. As a result of this interview Cornish telephoned to Captain McClusky. Adams and Bustanoby testified that exhibit A was in the handwriting of the defendant. One Martin, who had been teller of the Essex County National Bank of Newark, New Jersey, where the defendant had an account, said he had known the latter's signature for four years, and, from his knowledge thereof, as well as his experience in comparing and scrutinizing handwritings, he concluded that the writing on exhibit A was that of the de-

tendant with which defendant obtained possession of the sheep in question, and the jury were instructed that it was introduced for that purpose alone, and that they should not consider it for any other purpose whatever. It was held that, as thus limited, the testimony was admissible, as it tended to throw light on the *quo animo* of the transaction under investigation.

Upon a trial for the theft of a heifer, the evidence on the part of the prosecution tended to show that the defendant was implicated in the theft of other animals besides the one described in the indictment, and the general proof as to the circumstances of the transaction involved them all alike. The trial court stated to the jury that, in so far as the evidence tended to prove that the other animals were stolen, it was excluded, but declined an instruction not to consider any evidence relating to any of the animals except the one in question. It was held no error; and further, that it was not certain that any of the testimony relating to the theft of the other cattle than the animal charged in the indictment was not admissible and proper, as bearing on the question of guilty knowledge and intent on the part of the defendant with regard to the particular animal of the theft of which he was accused. *Brown v. State*, 9 Tex. App. 81.

On a trial for the theft of a cow, the state was permitted to prove that, when the cow was taken, she had a yearling with her, which the defendant penned with the cow, and which was branded by the defendant. It was held that such evidence was admissible as tending to prove the intent with which the cow was taken. *McCall v. State*, 14 Tex. App. 353.

Where it appeared upon a trial for larceny that the defendant, on the night of May 11, stole from the pasture of the prosecuting witness two cows, which he drove to the city, and, on the morning next following, sold to a firm, evidence that, about April 21, defendant stole from another person, in the same neighborhood, three milch cows, and disposed of them to the same parties, was properly admitted as tending to show that the defendant took the cows of the prosecuting witness with a criminal intent, and that he did not buy them from another person, as claimed by him. *State v. Phillips*, 160 Mo. 503, 60 S. W. 1050.

The prisoner was indicted for stealing a gun. On the trial it appeared that the prisoner applied to the prosecutor for the loan of his gun

to go hunting. He had frequently borrowed it for the same purpose. The prosecutor delivered the gun to prisoner. On the next morning the prisoner procured a horse from a person in the same village, as he said, to ride down to the place named, to be returned the evening of the same day, or the next, if, as he said, he should get into a spree. He did not go to the place named, but went in an opposite direction, sold the horse, and did not return at all, until he was brought back as a prisoner. The statement of facts did not show what was done with the gun; there was no proof that the prisoner had converted it to his own use. It was held that there was no objection to the admissibility of the evidence in relation to the taking of the horse; that it was a circumstance showing and explaining the intention of the prisoner when he obtained possession of the gun, under pretense of a loan to go hunting. But the judgment was reversed upon the ground that there was no proof of any kind of the subsequent conversion of the gun by the defendant, for the stealing of which he was upon trial. And, this being so, the suggestion comes whether what was said as to the admissibility of the testimony in regard to the horse was not *obiter*. *White v. State*, 11 Tex. 769.

The respondent was indicted for stealing two lap robes. The only direct evidence of the larceny was that of an accomplice, who testified that he and the respondent were out together with a horse and wagon belonging to the accomplice; that the respondent remained in the wagon and held the horse while he went in, brought out the robes, and placed them in the wagon. It was held that the state might show, both by the accomplice, and by other testimony, that upon this same expedition, in the same locality, both before and after the taking of the robes, the respondent stole various articles, which were placed in the same wagon, as tending to show that he knew the taking of the lap robes to be felonious, and participated in it. *State v. Kelley*, 65 Vt. 531, 27 Atl. 203.

But it was held, further, that the state could not show that after this expedition was finished the accomplice and respondent upon the same night went in another direction, and committed another larceny. *Ibid*.

Defendant was convicted of the theft of \$5 in money, taken from the pocketbook of the principal witness while taking a key from the pocket in which the pocketbook was. The witness

fendant. These three are the only witnesses who testified to a belief that the defendant was the writer of the address of the poison package, based upon a personal knowledge of defendant's handwriting.

We now come to the testimony of the experts in handwriting. This fills so large a space in the record, and the conclusions arrived at are based upon so many different, and even divergent, points and theories, that it would be practically impossible to refer to this branch of the case in detail. It is, moreover, unnecessary for our purposes to do more than to refer to the methods upon which the conclusions of the handwriting experts are based, in order to decide whether error was committed upon this branch of the case. There were 14 experts, of whom 9

were men who had made the study of handwriting a profession, and the remaining 5 held various positions in banks which required an expert knowledge of signatures. They were all agreed that the defendant wrote the address upon the wrapper of the poison package. For the purpose of arriving at these conclusions they were permitted to use and rely upon all of the several writings which have been referred to in the foregoing statement. These writings may be classified as follows: (1) Exhibit A, known as the "poison-package address." (2) The so-called "Barnet" letters written in the name of H. C. Barnet. (3) The so-called "Cornish" letters written in the name of H. Cornish. All of these together consist of exhibits A to R inclusive, and are known

and had missed money taken from his pocketbook in his pocket, and he marked several bills, which disappeared. After the bill in question was marked, defendant, as he had been in the habit of doing, got the key from the witness's pocket to get a drink, and when the witness examined his pocketbook afterwards the bill was gone. The defendant objected to the evidence of the witness, offered by the state, that he had lost, about the same time, and under similar circumstances, several other marked national bank bills besides the one charged in the indictment. The court admitted the testimony regarding the loss of said other marked bills. It was held that such evidence was admissible, if for no other purpose, under the circumstances of the case, to show with what intent the defendant may have taken the bill in question. *Hurley v. State*, 36 Tex. Crim. Rep. 73, 35 S. W. 371.

Where an indictment charged the prisoner with stealing 1,000 cubic feet of gas on a particular day, and the evidence connected the prisoner with the abstraction, for several years, of gas from the main of the prosecutors by a pipe which had been used for the purpose of partly lighting a factory by gas without its passing through the meter,—it was held that the circumstances attending the abstraction of gas by that means for the whole of that time were rightly given in evidence, and that the prosecutors were not called upon to elect to proceed on one particular act of taking, or on any three acts committed within the space of six months from the first to the last of such acts, for the whole of the acts constituted one continuous taking, and did not show separate takings at different times. *Semble*,—that if the facts had amounted to proof of separate and distinct takings from time to time, though the prosecution might have been called upon to elect upon which taking or takings they would proceed, the evidence would have been equally admissible as tending to show the felonious nature of the one taking selected. *Reg. v. Firth*, 38 L. J. M. C. N. S. 54, 11 Cox C. C. 234, L. R. 1 C. C. 172, 19 L. T. N. S. 746, 17 Week. Rep. 327.

It is not error to permit a witness for the state, in a prosecution for larceny from an express office, to testify that prior to the commission of that crime the defendant and his co-defendant had proposed to him that they rob a train, but that nothing was said about it being an express train, when it was shown by other witnesses that such train was an express train, 62 L. R. A.

and that defendant and his codefendant had intended to rob the express company at that time. *State v. Savage*, 36 Or. 191, 60 Pac. 610, 61 Pac. 1128.

Where a person had been convicted of larceny, but acquitted of receiving stolen goods, it appeared that on the trial the people proved the finding at the house of the prisoner of other goods than those named in the indictment; and there was testimony tending to prove that those other goods had also been stolen, and received with guilty knowledge. The prisoner offered to show, by his own testimony, that he purchased a part of those goods, and that he asked the persons of whom he bought them to go and look at them and identify them. The offer was rejected and exception taken. It was held that, if the proof on the part of the people was competent and relevant, the offer of the prisoner should not have been rejected. That it was, therefore, needed, then, to seek whether the people had the right to prove the finding of other goods. That, as a general rule, on the trial for one offense, proof is not admissible that the accused has committed another, though it be of the same kind. That there are exceptions when guilty knowledge is a part of the crime; as where all the property made the subject of the proof has been stolen from the same person, and delivered to the receiver by the same thief, though at different times, and there is such a connection of circumstances as furnishes a natural inference that, if he knew that one piece of it was stolen, he must have known that every piece was. That if the proof as to the other property came up to this requirement, it was competent; and that then the prisoner had a right to repel it, by testimony tending to show that he came by the property honestly. The court said, further: "We do not analyze the testimony given by the people to see whether it came up to that requirement, as what we had said gives the rule for the new trial which we shall order." *People v. Dowling*, 84 N. Y. 479.

In *Kilrow v. Com.* 80 Pa. 480, to establish the fact of guilty knowledge, evidence was admitted tending to show that the defendant was personally implicated in three instances where larceny was attempted or committed, and that he took immediate action to conceal certain goods upon information conveyed to him in relation to a fourth attempt or commission of larceny; that a person had aided him in the perpetration of each crime, and there was proof that, between

as the lettered exhibits. (4) The conceded handwritings of the defendant, which are known as the numbered exhibits, and consist of exhibits 1 to 63 inclusive. These numbered exhibits include the so-called "request writings" of the defendant and letters conceded to have been written by him. The history of the "request writings," briefly stated, is that on the 17th day of February, 1899, the defendant, at the request of the police department, wrote in the office of the district attorney, in the presence of Assistant District Attorney Osborne, Mr. Weeks, defendant's counsel, Police Sergeant McCafferty, and the experts Kinsley and Carvalho. It had been planned to have these writings consist of copies of the poison-package address (exhibit A) and other papers in the

case, which were to have been made from typewritten memoranda prepared by Kinsley and by him sent to Mr. Osborne. The latter having mislaid the same, Kinsley dictated from memory, and the defendant wrote. The result was not satisfactory to Mr. Kinsley, and at his request the defendant, with his counsel, Mr. Weeks, called at the office of Kinsley on the 20th day of February, 1899, and there wrote the "request writings," exhibits 3, 4, 6, 7, 8, 9, and 10. For the sake of brevity we have omitted from the foregoing statement many details of fact and evidence, besides those relating to the subject of handwriting, because they are not essential to the proper disposition of the principal legal questions in the case. For the same reason we will refrain from

him and the defendant, the intercourse was constant and confidential. It was held that these transactions were not so remote from each other as to be totally distinct, and it was not error for the court to admit evidence of them as tending to show guilty knowledge in defendant.

Upon the trial of an indictment for stealing a watch two witnesses testified that other property,—in one case an overcoat and in another silverware,—found in the defendant's room, had been stolen from them. The court held that one of the questions involved by the evidence was whether the possession of the stolen watch was a guilty or an innocent possession, and, this being so, there was no error in the admission of the testimony of the two witnesses as to the stealing of the overcoat and silverware. *Johnson v. State*, 148 Ind. 522, 47 N. E. 926.

On the trial of an indictment for grand larceny, where it appeared from the evidence that the complainant, in answer to an advertisement by defendant in a newspaper, and upon representations made to him by the defendant, entered into the employ of the defendant, and agreed to, and did, deliver to him money as security, which the defendant converted to his own use, evidence that the defendant had obtained money from others by like means is admissible as tending to show that, about the time the crime was charged to have been committed, he was engaged in the commission of similar offenses, and as bearing upon the question with what intent the defendant obtained the money from complainant. *People v. Evans*, 69 Hun, 222, 23 N. Y. Supp. 717.

Upon the trial of an indictment for larceny, where it appeared that the complainant called upon the defendant in answer to an advertisement by the latter, and was told by him that he was in the produce business and wanted a partner with a certain amount of money, which the complainant then drew from the bank, and, relying upon certain false statements and representations made by defendant to him, gave the money to him, evidence in regard to similar frauds which had been perpetrated by the defendant upon other persons whom he had succeeded in making his victims was entirely competent upon the question of intent, which was a necessary ingredient of the crime with which he was charged. *People v. Hughes*, 91 Hun, 354, 36 N. Y. Supp. 493.

The distinction between larceny and false pretenses is fully stated in 91 Hun, on page 358, 62 L. R. A.

36 N. Y. Supp. on page 497. See Introduction to III. c. 12, *infra*.

On the trial of an indictment for larceny, it appeared that complainant was a dealer in country produce, having a store in the city of New York. On that day defendant negotiated with him for the goods in question, and concluded to buy. The terms were cash. He was asked "if he would wait and have a bill made out and pay for them." He replied that he "would send an expressman for the goods; that they could be sent C. O. D., and he would pay the expressman." Soon after a man came with a horse and wagon, stated he was an expressman, and called for the goods. They were given to him with a bill and instructions to collect the money on delivery. Defendant took from this person the goods and sent him with a check to complainant's store, which was left there in the absence of the latter. The check was worthless. Complainant sought out defendant and demanded of him the goods or the money, the demand was refused. The man to whom the goods were delivered was in fact in the employ of defendant, and the horse and wagon were his. Evidence, against the objection of the prisoner, was given of a similar transaction by him with another person, at about the same time. It was held that this evidence was properly received as bearing upon the question of intent. *Shipply v. People*, 86 N. Y. 375, 40 Am. Rep. 551.

Upon the trial of an indictment for larceny, committed in part by means of certain false writings called time checks, evidence tending to prove that the defendant issued numerous other time checks of the same tenor as those by means of which he had committed the crime charged, and that the defendant admitted, in substance, that they were false and fraudulent, and that he knew the fact, is competent as manifesting criminal intent or guilty knowledge, notwithstanding it may establish the commission of another offense not charged. *State v. Southall*, 77 Minn. 296, 79 N. W. 1007.

Upon the trial of a person for petty larceny alleged to have been committed on the 20th of January, it is error to admit evidence on the part of the people, tending to prove that the defendant committed, or attempted to commit, the like crime of larceny of the property of another person on the 29th of February, where no connection whatever was shown between the transactions, since the offenses were distinct and independent of each other, and the most that the

discussing many of the minor grounds of error assigned by the defendant, which are so numerous and diversified that a consideration of them, *seriatim*, would only serve to becloud the larger and more comprehensive questions which, according to our views, are decisive of the case.

First in order, if not in importance, is the question whether any evidence was admissible concerning the alleged killing of Barnett. This question may be considered without referring to the specific objections or exceptions of the defense because it was raised so often and in so many ways that it would involve profitless reiteration and prolixity to dwell upon each objection and exception.

As has been disclosed by the foregoing statement of facts, evidence was received

upon the trial tending to connect the defendant with the felonious killing of Barnett, for the purpose of proving his guilt of the crime of poisoning Mrs. Adams, which was the offense charged in the indictment. The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged. 1 Bishop, New Crim. Proc. § 1120. This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta. It is the

second tended to prove was a propensity in the prisoner to commit the crime of larceny. *People ex rel. Willis v. Special Sessions Justices*, 10 Hun, 158. In this case the court distinguished *Bielschowsky v. People*, 8 Hun, 40, III. c. 12 (b), *infra*, and *Weyman v. People*, 4 Hun, 511, III. b. 1, *supra*, saying that they were cases in which the other transactions admitted in evidence were connected more or less directly with the particular transaction charged against the accused. That they were intimately related, both in point of time, and in matter of fact, and were, therefore, held to fall within the rule which permits evidence of other offenses for the purpose of establishing intent.

Upon the trial of a person indicted for stealing rope from a vessel named in the indictment, a witness was allowed to testify that another rope, found with that charged in the indictment to have been stolen, had been stolen from another vessel. No evidence was given as to the time this rope was stolen, or which tended to show that it had ever been in the prisoner's possession. It was held that the evidence was improperly admitted. *Boland v. People*, 19 Hun, 80.

On a trial for the larceny of jewelry which had been intrusted to defendant, a broker, for the purpose of selling the same, evidence that three years before the transaction in question he had pawned other jewelry, not shown to have been stolen, is not admissible to show a felonious intent in procuring the goods in question. In this case the judge who delivered the opinion, after stating the foregoing, said: "But if by any stretch of the legal imagination the converse could be held [that is, that the property had been stolen], then the circumstance is too remote." *People v. Keepers*, 8 N. Y. Crim. Rep. 146, 14 N. Y. Supp. 66.

On the trial of an indictment for grand larceny in receiving and collecting principal and interest on a bond and mortgage and failing to turn the same over to the true owner, evidence that the defendant at some other times had committed other crimes of a similar character to the one charged in the indictment is inadmissible for the purpose of showing criminal intent in appropriating the moneys named in the indictment to his own use. *People v. Hurlburt*, 92 Hun, 46, 36 N. Y. Supp. 867.

On a trial for stealing a horse, evidence that the defendant, on the same night, and contemporaneous with the theft of the animal in 62 L. R. A.

question, took the two horses of the prosecutor, and, about a mile from the first theft, took three horses belonging to another, and carried all of these horses together to another place, where he and another person arrived early on the following morning, and there disposed of all of the horses—is admissible to show the intent with which the accused acted with respect to the horses for the theft of which he was on trial. *Glover v. State* (Tex. Crim. App.) 76 S. W. 463.

8. Burglary and attempts to commit.

Upon the trial of a defendant for a burglary and larceny, it was proved that a double-barrel shotgun, the property of a person other than the owner of the property mentioned in the indictment, had disappeared from his house some time within twelve days previous to the burglary, and was subsequently found in defendants' house, after the burglary, between the laths and the rafters. It was held that this evidence was competent as showing the guilty intent of the defendant. *State v. Franke*, 159 Mo. 535, 60 S. W. 1053.

At the trial of an indictment alleging the possession by defendant of certain tools and implements named, designed and intended to be used by him for burglarious purposes, evidence that the defendant had twice used the same or similar tools and implements in the commission of burglaries, once ten days and once about five months before the time of the offense alleged in the indictment, is admissible to show the knowledge and purpose alleged in the indictment and necessary to be proved. *Com. v. Day*, 138 Mass. 186.

Upon a trial for being in possession of burglarious implements commonly used by burglars for entering houses and other places in order to take therefrom money or property, knowing them to be burglar's tools, the gist of the offense is such possession coupled with the general intent to so use them. And the salient point is the fact of the possession of burglar's tools knowing them to be such, with the general intent to use them burglariously. And upon such trial evidence tending to show possession by the accused of other burglarious tools not named in the indictment, at another time and place, is admissible as tending to show the character of his possession and his knowledge of the tools and implements described in the indictment, and of his intent in having them in his

product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proved guilty beyond a reasonable doubt. This rule, and the reasons upon which it rests, are so familiar to every student of our law that they need be referred to for no other purpose than to point out the exceptions thereto. The rule itself has been stated and discussed in this court in a number of cases, but we will cite only a few. In *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, it was said: "The general rule is that when a man is put upon trial for one offense he is to be convicted, if at all, by evidence which shows

that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded." In *Coleman v. People*, 55 N. Y. 81, it is laid down as follows: "The general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts

possession; but such evidence can only be considered for such purposes. *State v. Hahn*, 8 Ohio N. P. 101.

Upon the trial of a person indicted for burglary in breaking and entering a grocery, when it appeared that the entrance to the grocery was effected by the prisoner and his associates by first entering the shoe store, passing through the same into the common passageway, and from thence through a window into the grocery, the entry into the store and grocery must be regarded as one connected transaction; and, therefore, proof of any facts and circumstances tending to show the prisoner guilty of larceny in the shoe store on that occasion was proper evidence to go to the jury to characterize the intent with which the prisoner broke and entered the grocery, for which he stood indicted. *Osborne v. People*, 2 Park. Crim. Rep. 583.

Appellant was on trial for effecting an entrance into a dwelling with the intention of stealing. Previously a store had been broken into and goods stolen, and the manner in which the entrance into the house was effected gave strong evidence that the appellant was concerned in the prior breaking into the store. Evidence of the first breaking was admitted to show the appellant's intention to steal in entering the house. It was held that, in admitting such evidence of the first breaking, the court did not assume that the appellant was guilty of that crime; but the evidence was such as to warrant the court in allowing it to go to the jury, not as evidence that the appellant broke into the store,—for that was abundantly proved without,—but as evidence of his intention; and such evidence was properly admitted for that purpose. *Thomas v. Com.* 1 Ky. L. Rep. 122.

Upon a trial for burglary, where the evidence tended to show that the respondent and two others went with respondent's team and stole certain sugar from the dwelling of a certain person; that the respondent remained with the team while the other two entered the house and took the sugar,—evidence that, before going to that house, and while on their way there, the three stole sugar at another place, was properly admitted. *State v. Valwell*, 66 Vt. 538, 29 Atl. 1018.

On the trial of a person for wilfully and maliciously entering a store with the intent to commit a felony therein, after it had been shown that oats had been missed from said store at various times, and that on a certain night the

defendant had entered the same, in his underclothing, through a transom over a doorway opening from said store into the stable of the defendant, evidence is admissible to show that grain was taken from this store by the defendant on a previous occasion, through this transom, for the purpose of showing intention; as in this case the gist of the offense with which the defendant stood charged was the intent with which he entered the store, and it was incumbent upon the commonwealth, in order to secure a conviction, to prove that he entered with intent to commit a felony. *Com. v. Shepherd*, 2 Pa. Dist. R. 345.

But in *State v. Johnson*, 38 La. Ann. 686, the court held that the prosecution is not entitled to prove, in support of a charge of burglary of a house, and the larceny of a pocket-knife therein by the accused, another burglary at a different time and place, and the larceny of a gold watch, to interpret the intent of the accused in the commission of the former.

Defendants were jointly indicted for the crime of burglary in entering the dwelling house of one A with intent to steal. Upon the trial one of the defendants, on behalf of the state, was allowed to testify that, a few days before the commission of the burglary, he and the other defendants agreed to commit a robbery on the person of A; that they did not rob him because the witness said he had nothing to be robbed of; that the other defendants were watching A on the street for that purpose. It was held that the evidence was admissible and relevant, as it tended to prove the intent of defendants at the time of the entry into the dwelling house. *State v. Cowell*, 12 Nev. 337.

On a trial for burglary, evidence that defendant had stolen two pigs from one person; that he burglarized the carriage house of another, at which time he committed the theft of a harness; that he also stole a set of harness from another, some hay from another, and a silver cup from still another person, none of whom were named in the indictment; and that, a few days after the defendant's arrest, a policeman went with a search warrant to the defendant's house and found a silver cup in his trunk,—is inadmissible. *Ware v. State*, 36 Tex. Crim. Rep. 597, 38 S. W. 198.

So, on the trial of an indictment for committing a burglary in a schoolhouse, evidence that the defendant, in a wagon, stopped in front of a new church which was being erected about

in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one." In *People v. Shea*, 147 N. Y. 78, 41 N. E. 505, the rule is thus stated: "The impropriety of giving evidence showing that the accused had been guilty of other crimes, merely for the purpose of thereby inferring his guilt of the crime for which he is on trial, may be said to have been assumed and consistently maintained by the English courts ever since the common law has itself been in existence. Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favors this kind of evidence in order that the tribunal which is engaged in the trial of the accused may

have the benefit of the light to be derived from a record of his whole past life, his tendencies, his nature, his associates, his practices, and in fine all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such a course is pursued than where it is omitted. The common law of England, however, has adopted another, and, so far as the party accused is concerned, a much more merciful, doctrine. By that law the criminal is to be presumed innocent until his guilt is made to appear beyond a reasonable doubt to a jury of 12 men. In order to prove his guilt it is not permitted to show his former character or to prove his guilt of other crimes, merely for

40 feet distant, and that a noise was heard by a witness as if someone was loading shingles, is incompetent to show the intention of defendant. *Ilunt v. State* (Tex. Crim. App.) 60 S. W. 965.

And on the trial of an indictment for burglary the court permitted a witness to testify that he missed some wire and a cotton planter, which property he found at the house of defendant's mother, where defendant and his two brothers lived. It was held that evidence of the thefts of other articles of property with which defendant was not connected, from other and different places, no specific time as to when such other property was actually taken from possession of the witness being stated, was not admissible for the purpose of showing intent. *Ibid.*

9. Arson.

Upon the trial of an indictment for arson, where it appeared that the fire was on the 22d of June, proof that, about a month before the fire, conversations were had between three persons of whom the defendant was one in which the latter desired to get the others to burn the property between the 1st and 10th of June, and consulted as to the best way of burning,—was admissible as tending to show a purpose to burn the property, existing not very long before the fire, and bearing on the probabilities. *Melster v. People*, 31 Mich. 99.

Upon appeal from a conviction of setting fire to a house the fourth bill of exception was to the admission of evidence that another and different firing of the premises of defendants had taken place three or four weeks previously to the firing charged in the indictment, and under "circumstances tending to throw suspicion on defendants of having committed the same crime for which they were here and at this time indicted and charged, and of which testimony had already been offered to the jury." It was held that the admission of the evidence was correct, upon the authority of *State v. Patza*, 3 La. Ann. 513, *supra*, III. c. 2; *State v. Rohfricht*, 12 La. Ann. 382.

The defendant was indicted for the malicious burning of a building. The indictment contained three counts, charging the same offense to have been committed on August 24, September 6, September 10, respectively, of the same year. Before the trial began, the government elected to proceed only on the count charging the offense to have been committed on Sep-

tember 10. The government offered evidence that the defendant, on August 24 and September 6, set fire to a shed 10 feet distant from the building, and connected therewith by a flight of stairs. It was held that this evidence was competent on the question of the intent with which he burned the same building on September 10, for which offense he was tried. *Com. v. McCarthy*, 119 Mass. 354.

On the trial of an indictment for the malicious burning of a building on a certain day, evidence tending to show that, three days before, the defendant set the same building on fire, which fire was extinguished, is admissible on the question of the intent with which the defendant subsequently burned the building, being carefully limited to the single purpose for which it was competent; that the unsuccessful attempt to do the same thing, a few days before, was evidence that the burning was wilful and intentional, and not the result of accident or negligence on the part of the defendant. *Com. v. Bradford*, 126 Mass. 42.

Defendant was convicted upon an information in the trial court for arson; and, after denying a motion to set aside a verdict and grant a new trial, the judge of that court reported the cause to the supreme court upon questions of law, one of which was: Did the court err in admitting testimony to show that the defendant had been guilty of forgery and larceny? Upon this question the supreme court said: "There may have been other evidence than that which appears in the report, showing the intimate relation between the crimes of larceny and forgery, confessed or proved, and the crime of arson in the information, as to their common design, purpose, and intent; for it is not certified that the report contains all of the evidence. It is not perceived, however, from the evidence which is reported, how these crimes have any such relation to each other. The object of such testimony, when admissible, is not to prove the act, but the purpose and intent with which the act is done; and therefore other crimes of like purpose and intent may be proved as being in such intimate relation with each other and the crime charged as to show a common purpose and intent in the commission of all of them, and a continuity of purpose investigating the whole series of like offenses. . . . It would require strong evidence to prove that crimes so dissimilar in purpose and intent were committed with a common purpose and intent,

the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question." The highest court in Massachusetts has said: "The objections to the admission of evidence as to other transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it, and, by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him." *Com. v. Jackson*, 132 Mass. 16, 44 Am. Rep. 299, note. The court of last resort in Pennsylvania

thus states the rule: "It is a general rule that a distinct crime unconnected with that laid in the indictment cannot be given in evidence against a prisoner. It is not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely he would commit another. Logically, the commission of an independent offense is not proof in itself of the commission of another crime. Yet it cannot be said to be without influence on the mind, for certainly if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which he is charged. It therefore predisposes the mind of the juror to believe the prisoner guilty." *Shaffner v.*

and, therefore, bore such relation to each other that proof of one would be proof of the intent of the others, and bring the case within the rule that offenses of like nature and intent may be given in evidence to convict of a subsequent crime, or to prove the intent of such crime, or as tending to prove such intent. . . . We do not decide that it may not be shown, by testimony sufficiently strong, that even a previous larceny or forgery had the common purpose and design of a subsequent malicious burning, and bore such a relation to the arson, in this respect, that proof of the former might affect the question of intent in the commission of the latter crime; but such evidence is entirely wanting in this case, as reported, and may have been given on the trial. The answer to the question must, therefore, be given hypothetically in the affirmative." *State v. Miller*, 47 Wis. 530, 3 N. W. 31.

Some of the cases in the note show conclusively that evidence of larceny is competent as showing a motive for committing the crime of arson, as where the burning is done to conceal the larceny by creating the idea that the property stolen from the burned building was consumed therein.

Defendant was indicted for burning a house occupied by him as lessee, on the 5th of March, 1896. The state also offered evidence tending to show that on May 8th, 1895, the defendant occupied a rented cottage, the property of another person, and that, after defendant had insured his effects, said cottage and contents were burned on May 20th, 1895. This evidence was admitted to show the similarity of the offenses, and defendant excepted. The court held that the exception to the admission of this evidence was well taken. That evidence of a distinct, substantive offense, cannot be admitted in support of another offense, as a general rule. That it is when the transactions are so connected or contemporaneous as to form a continuing action that evidence of the collateral offense will be heard to prove the intent of the offense charged, and that there was error in admitting the evidence. *State v. Graham*, 121 N. C. 623, 28 S. E. 409.

10. Killing and injuring animals.

Upon the trial of an indictment for administering sulphuric acid to eight horses, with intent to kill them, the prosecutor may give evidence

of administering at different times, to show intent. *Rex v. Mogg*, 4 Car. & P. 366.

On the trial of an indictment charging the defendant with wilfully and unlawfully exposing certain poisons in or about the feed trough of a certain horse, naming her, the intent then and there being that the said horse should take the poisonous substance contrary, etc., evidence of the number of horses in different barns on the night of the poisoning, the condition the horses were in at the time; the number of horses, and kinds and arrangements of the stall in the barn in which the horse named in the indictment was kept; the number of boxes in that barn in which poison was found; the number of separate barns in which horses were poisoned; and the number of boxes shown to a druggist for examination,—is admissible, since it tends to explain the premeditated malicious character of the act which caused the death of the horse named in the indictment. *State v. Lightfoot*, 107 Iowa, 344, 78 N. W. 41.

The judgment of conviction was reversed, however, on the ground that the demurrer to the indictment should have been sustained.

Upon the trial of an indictment for violation of a statute prohibiting the malicious killing or destruction of animals, after the state has been permitted to introduce testimony tending to prove that the animal, for injuring which the defendant stood indicted, was afflicted with a swelling on each side, immediately back of the shoulders, and that the center of the swollen parts had been punctured with a sharp-pointed instrument, such as the use of a hypodermic syringe would occasion, testimony is admissible tending to show that at or about the same time, in the same village, a number of other horses were afflicted and injured in substantially the same manner as the mare mentioned in the indictment, as the evidence tended to show a purpose prompting the commission of the offense charged, and, being competent for that purpose, could not be excluded on the ground that it tended to prove the commission of other and distinct offenses. *Brown v. State*, 26 Ohio St. 176.

11. Sending obscene, threatening, etc., letters.

Where a person was indicted for sending an obscene letter through the mail, proof that another letter of the same character was in the handwriting of the defendant, and the admission of such letter in evidence upon his trial, were

Com. 72 Pa. 60, 13 Am. Rep. 649. The exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial. *Wharton, Crim. Ev.* 9th ed. § 48; *Underhill, Ev.* § 58; *Abbott, Trial Brief, Crim. Trials*, § 598.

Let us now endeavor to apply to the case at bar each of these exceptions to the general rule:

held to be proper, if not for the purpose of showing that the accused deposited the letter for the sending of which he was charged in the indictment, for the purpose of showing, or tending to show, that, if he did deposit it, he did so with a guilty knowledge. The objection to the proof of the letter and its receipt in evidence was on the ground that, inasmuch as it was a lewd and obscene letter, the sending of it was a crime under the statute for which the accused might be punished if he wrote and sent it, and that, therefore, it should not have been admitted and read in evidence. *Thomas v. State*, 103 Ind. 419, 2 N. E. 808.

Upon the trial of an indictment charging the prisoner with having unlawfully and feloniously sent a certain letter without any name subscribed thereto, to the prosecutor, demanding of him a certain valuable thing, *viz.*, a bank note, it was held that both previous and subsequent letters might be received in evidence as explanatory of the letter set forth in the indictment. *Robinson's Case*, 2 East P. C. 1110, 2 Leach C. L. 749. It does not appear in this case whether the previous and subsequent letters were criminal in their nature.

But where the prisoner was indicted for feloniously sending a threatening letter, and there were two more counts in the indictment, each charging the sending of other threatening letters, the counsel for the prosecution, in opening the case, was stopped by the judge, who called his attention to the fact that there were three felonies charged in the indictment, to which the counsel for the prosecution replied that that was so, but the intention was to show malice. The court said other letters might be given in evidence, but the sending of these was a felony, and was charged in the indictment. Counsel for the prosecution claimed to use them as in a charge of feloniously uttering a forged document, where other utterings of the prisoner are admissible. The court said: "That is quite an exception to the general rule. There it is admissible to show guilty knowledge. In this case there is nothing analogous to that. Any correspondence leading up to, or explaining, the letter is admissible; but you must proceed upon only one count, so make your election." *Reg. v. Ward*, 10 Cox C. C. 42.

On the trial of an indictment for blackmail and malicious annoyance, evidence of the sending, by the defendant, of a letter similar to that upon which the indictment is based, under 62 L. R. A.

First. As to motive: It is obvious that in every criminal trial, when proof of motive is an essential ingredient of the evidence against a defendant, the motive to be established is the one which induced the commission of the crime charged. This is too simple for discussion. To hold otherwise would be to sanction the violation of the general rule under the guise of an exception to it. What was the motive assigned for the defendant's alleged attempt to kill Cornish? Hatred, engendered by quarrels between them, in which Barnett took no part, and of which, so far as the record shows, he had no knowledge. What was the motive which is said to have moved the defendant to kill Barnett? Jealousy caused by the latter's intervention in the love affair of the

like circumstances and at or about the same time, is admissible upon the question of intent, though such letter was sent to a person other than the prosecutor, and was in no way connected with the crime charged. *People v. Haver*, 4 N. Y. Crim. Rep. 171.

12. *False pretenses; fraud.*

(a) *In general.*

One of the crimes, upon the trial of the accusation of which, evidence of other offenses of a like nature may be introduced for the purpose of proving intent, is what is generally known in criminal jurisprudence as false pretenses.

This crime, with others which follow and will be mentioned, differs from most others in this: That the act constituting the crime does not,—at least not necessarily,—of itself, make *prima facie* evidence of intent,—the chief essential of the crime. It is very nearly akin to larceny, the distinction being that, if the owner of property, by trick or device, has been induced to part with the possession of his property, intending to transfer an interest therein or the title thereto, then a criminal appropriation of such property will not be a common-law larceny, but the crime of obtaining goods by false pretenses; but if a person obtains possession of the property from the owner for a special purpose, by some trick, device, artifice, fraud, or false pretense, intending to appropriate it to his own use, and not to the special purpose for which he received it, he is guilty of larceny; and so it has been repeatedly held, the distinction between the two cases being that the owner of the property stolen, in the case last cited, did not part with the possession of it with the intent of conferring title to the property upon the party charged with the larceny. In the first case the intent of the owner was to clothe the party with the title; in the second, the owner only gave him possession, not intending to clothe him with the title, but to use for a specific purpose.

(b) *Acquirement of money.*

Upon the trial of an indictment for an attempt, by trick and fraud, to obtain from another the sum of \$1, under a pretense of the defendant that he had changed his mind in regard to money that had been given him in change for a bill tendered by him for a small purchase, proof that he had stated that he and

former. The mere statement of these two motives suffices to show that they have no relation to each other, and that the evidence which tends to prove the killing of Barnet throws no light upon the motive which actuated the attempt upon the life of Cornish. So apparent, indeed, is this diversity of motive in the two cases, that the learned counsel for the people upon the argument herein abandoned the claim that there was anything in common between them, and ingeniously sought to create a single motive out of the alleged forgeries by the defendant of the names of Barnet and Cornish. Of course, no inferences can be drawn from these alleged forgeries without assuming that the Barnet and Cornish letters were all properly received in evidence, and proved to

have been written by the defendant. We will therefore assume that all of these letters were properly in evidence, that they were written by the defendant, and that he was therefore guilty of the crime of forgery in the use of each of these names. Is there anything in any of the Barnet letters which sheds a ray of light upon the question of motive for the attempt to kill Cornish? Not a word. We are at a loss to understand what probative force there is in the Barnet letters which does not also inhere in the Cornish letters. If the Barnet letters were forged, so were the Cornish letters. If the latter bore no intrinsic evidence of motive against the life of Cornish, this was equally true of the former. It will thus be seen that under no hypothesis, upon no assump-

another had attempted the same trick on other persons, and that he had "knocked them down for a one,"—alluding to the house which he had just left; and that his partner had done the town for \$10, and they were getting drunk on the money or over it. Is admissible under the circumstances for the purpose of showing the defendant's intention in the attempt upon the person named in the indictment. *State v. Myers*, 82 Mo. 502, 52 Am. Rep. 389. The case is quite voluminous, and goes to a considerable length, and cites a large number of cases, both American and English, illustrating when the exceptions to the general rule, that evidence of a distinct crime for which the party might be separately proceeded against cannot be given in evidence against the prisoner on trial for a single offense, will be allowed.

In a trial for obtaining money under false pretenses, testimony is admissible to show that the defendant, who was accused of obtaining money under a false pretense of credit with a particular firm, had drawn other drafts on the same firm which had not been paid, as tending to show that he had no credit with the firm, and must have known that the draft in question would not be honored. *People v. Wasservogel*, 77 Cal. 173, 19 Pac. 270.

In a prosecution for obtaining money by means of a false and fraudulent representation, acts of the defendant similar to the one for which he is being tried, committed about the same time and in the same city, are admissible against him for the purpose of showing the intent with which the act charged was done. *State v. Bayne*, 88 Mo. 604.

In *Waight v. United States*, 1 Hayw. & H. 180, Fed. Cas. No. 17,042, the court held that, upon the trial of an indictment for obtaining money under false pretenses, it was competent to show that the prisoner had made previous false representations to others for the purpose of obtaining money from them; but that it was not competent to allow evidence to go to the jury that he had previously obtained money by means of other false representations.

Upon the trial of an indictment against defendant for obtaining money from the county by means of false and fraudulent bills to be rendered for work done by another, where the charge related to work done on a particular building belonging to the county, evidence of obtaining money by means of false and fraudulent bills to be rendered for work done by the same

person on other buildings belonging to the county was held to be admissible in evidence. *McDonald v. People*, 25 Ill. App. 350.

One who advertised to give an exhibition as a mesmerist, and distributed hand bills giving notice of his proposed exhibition, rented a hall, and, at the appointed time, stood in the ticket office, sold tickets of admission, and collected the money for them until the time when the entertainment was to begin, when he absconded, is guilty of obtaining money by false pretenses; and in the prosecution therefor acts of the defendant similar to the one for which he is being tried, committed about the same time and in the same city, are admissible for the purpose of showing the intent with which the act charged was done. *State v. Sarony*, 95 Mo. 349, 8 S. W. 407.

Upon the trial of an indictment for obtaining money by means of false pretenses and representations, evidence showing that the accused, together with one of his coindictes, practised the same fraud on another person a day or two prior to the commission of the offense charged in the indictment, in which the prisoner acted the same part played by another of the parties on the occasion of obtaining the money mentioned in the indictment, is admissible, as such evidence of the previous like transactions of the accused was given to show the *quo animo*, or intent, of the accused in the particular offense charged, and also as tending to show the known falsity of the pretenses upon which the money stated in the indictment was obtained. *Bielschowsky v. People*, 3 Hun, 40, 5 Thomp. & C. 277, Affirmed in 60 N. Y. 616.

On the trial of an indictment for obtaining money under false pretenses the charge was that the defendant did falsely, etc., pretend to the county treasurer that a certain paper writing was a true and genuine order for the payment of money, as it purported to be, and that, by means of said false pretense, the defendant obtained the money from the treasurer. The defense was the absence of any intent to defraud. It was held that evidence that the defendant had presented other false papers to the treasurer, and obtained money upon the same, and upon the discovery thereof had refunded the money, was admissible to prove the intent and design to defraud; there could not be more direct evidence of such intent than this. *State v. Walton*, 114 N. C. 783, 18 S. E. 945.

Where the defendant was indicted for an at-

tion, can the Barnet letters be held to contain any evidence as to the motive for the attempt to kill Cornish that is not also to be found in the Cornish letters. What has been said about the Barnet letters is true of all the evidence relating to the alleged killing of Barnet. Even if it be admitted that it proves the commission of an independent crime, with an adequate motive behind it, it contributes nothing to the subject of motive in the case at bar. Although it seems unnecessary to cite authorities in support of the statement that, whenever motive is to be established, it must be the motive which underlies the crime charged, we will briefly refer to a few cases which illustrate the rule. In *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524, the defendant was

charged with the murder of one W. The alleged motive was defendant's desire to possess the wife of the deceased. On the trial evidence was received to show that, eleven days after the death of W., the defendant and the wife of the deceased appeared before a clergyman in Michigan to be married. Defendant there took an oath that there was no legal objection to the marriage. Although this evidence tended to prove the commission by the defendant of another crime than that for which he was on trial, this court said: "This evidence tended to prove that the motive which operated upon the prisoner was the desire to possess W.'s wife; that his passion for her was so absorbing that he was determined to overcome all obstacles standing in his way." In *Stout v.*

tempt to obtain money from a person by the false pretense that a ring was a diamond ring and also for an attempt to obtain money from another person by a similar false pretense; and it appeared that on a day stated he came to the shop of a pawnbroker and asked for an advance of £15 on pledge of a hoop ring, which he represented to be a diamond ring, a silver watch, and a gold chain, which advance was refused, and the statement made to him that it was not a diamond ring; and he then proceeded to the shop of another pawnbroker in the same street and asked an advance of £13 on the same property,—evidence that he had shortly before offered other false articles to other pawnbrokers is admissible, as, after the fact of the defendant having done the thing charged is proved, the only remaining question is whether, at the time he did it, he had guilty knowledge of the quality of his act, or acted under a mistake; and such evidence tends to show that he had been pursuing a similar course, and thereby it raises a presumption that he was acting on that plan still. That it is not conclusive, for a man may be many times under a similar mistake, or he may be many times the dupe of another. But it is less likely that he should be so oftener than once, and every circumstance which shows that he is not under a mistake, on any one of these occasions, strengthens the presumption that he was not, on the last. *Reg. v. Francis*, L. R. 2 C. C. 128, 12 Cox C. C. 612, 43 L. J. M. C. N. S. 97, 30 L. T. N. S. 503, 22 Week. Rep. 663. The reason here given is probably the correct one for the extension of the rule in this class of cases.

Upon the trial of an indictment for fraudulently obtaining money by falsely pretending that a chain was a silver chain, evidence that the prisoner, a few days after the commission of the above offense, offered a similar chain in pledge to a pawnbroker; and that 26 similar chains were found upon the person of the prisoner when he was apprehended is competent. *Queen v. Roebuck*, 25 L. J. M. C. N. S. 101, *Dears. & B. C. C.* 24, 2 Jur. N. S. 597, 4 Week. Rep. 514, 7 Cox C. C. 126.

Upon the trial of an indictment for cheating by false pretenses in obtaining money as a loan, and by falsely pretending that a forged certificate of stock was a good, valid, and genuine certificate of stock, evidence of the possession and use of other altered and false certificates by the defendant, about the same time, whether before

or afterwards, is competent to show that his possession of those, for the use of which he was indicted, was not casual or accidental. They were all between the dates of the transactions charged in the two counts. They were admitted and allowed to be used only to show guilty knowledge. For this purpose the evidence was admissible. *Com. v. Coe*, 115 Mass. 481.

In *Rafferty v. State*, 91 Tenn. 655, 16 S. W. 728, the defendant was convicted of false pretenses in defrauding an insurance company by presenting proof of loss of property claimed to be burned, but which was not, and which she had in her possession at the time she made the proofs of loss. The case had been tried before, and on the first trial, while on the witness stand testifying in her own behalf, the defendant admitted, on cross-examination, that she had had thirteen different fires in as many different cities within a period of about three years, and under different names. On the second trial the state was allowed to prove her admission made on the first trial. The state was also allowed, over the objection of defendant, to introduce as evidence written documents showing that defendant had been insured at many of said places, and had made proofs of loss and schedule of property, and received insurance money in full in some instances, and in part, by compromise, in others; and that the articles enumerated and represented as destroyed in each case were largely the same as those enumerated and represented as destroyed in this case. It was held that such evidence was admissible to establish unlawful intent, or bring guilty knowledge home to the defendant.

Defendant was indicted for obtaining, as was charged, a loan of money by false pretenses, and was tried and acquitted in the court below. On the trial the state offered to prove by several witnesses that, not long prior to the making of the representations complained of, the defendant made similar representations to a third person, and afterwards admitted their falsity, as tending to prove the untruth of the statements charged. This evidence was rejected by the trial court, and from the judgment of acquittal the state, under a certain section of a statute of Indiana permitting it, appealed. The appeal was sustained on the ground that the trial court committed an error in rejecting the evidence. *State v. Long*, 103 Ind. 485, 3 N. E. 169.

Upon the trial of an indictment against three persons, one a member of a partnership having

People, 4 Park. Crim. Rep. 132, the crime charged was murder. On the trial evidence was received of an incestuous connection between the defendant and his sister, the wife of the deceased. This was held to be competent, even if it did prove the commission of another crime, for it tended to disclose the motive which prompted the defendant to get rid of the deceased. In *Hawes v. State*, 88 Ala. 37, 7 So. 302, the defendant was on trial for the murder of one of his children. Two other indictments were then pending against him for the murder of his wife and another child. Evidence was received to support the theory that the motive for the killing of all was to open the way for a second marriage, which was consummated a few days after the last death.

a claim of \$49.11 against a city, and the other two defendants being employees in the public departments of the city, one a clerk in the city auditor's office, and the other an employee in the department of public works, evidence was offered to show that the three had entered into a conspiracy to obtain from the city, in payment of the property sold, \$249.11 instead of \$49.11, the agreed price, and the bill as raised from \$49.11 to \$249.11, was presented to the proper officials of the city, allowed, and paid. Forty-nine dollars and eleven cents were paid to the firm of which one defendant was a member, and the remainder, \$200, was divided between the three defendants. The court also permitted evidence to be offered, over the objection of the defendants, of other transactions than the one described in the indictment. The trial court, in charging the jury, stated, among other things, that this evidence—that is, the evidence of other transactions—was offered for the purpose of proving knowledge, on the part of the defendants, that the particular bill set out in the indictment was a false and fraudulent bill; and that, in conformity with the holdings of the courts, where it is important to show guilty knowledge, evidence of other transactions may be offered as bearing upon the question, and that only. It was held that the admission of the testimony for the purposes for which it was admitted was no error. *Davis v. State*, 20 Ohio C. C. 430.

On the trial of an indictment against the defendant and others, charging that he, jointly with them, by making certain false and fraudulent statements concerning the speed, pedigree, breeding, performance, and ownership of horses, which they were attempting to sell the prosecutor, feloniously obtained from him his check for a sum of money, evidence to show that the accused, and those jointly indicted with him, had shortly before perpetrated the like offense in another place, is admissible for the purpose, among other things, of showing the knowledge of the falsity of the representations at the time when made. *Tarbox v. State*, 38 Ohio St. 581.

On the trial of an indictment for obtaining money under false pretenses in writing, by selling pills falsely labeled, evidence of other sales of the same pills to other persons than the prosecutor, at various times prior to the finding of the indictment, is admissible for the purpose of showing guilty knowledge on the part of the

This was held proper, because the motive was the same in each case. In *People v. Harris*, 136 N. Y. 443, 33 N. E. 65, the defendant was accused of the murder of his wife. The marriage had been secretly performed. Evidence of abortions performed upon his wife by the defendant were held to be admissible to show defendant's efforts to keep the marriage a secret, and as tending to show a motive for the poisoning of the wife when secrecy was no longer possible or the alliance had become burdensome. So, on the trial of a husband for the murder of his wife, evidence of criminal proceedings against the defendant for failure to support his family, made ten months before the murder, was properly held admissible upon the question of motive. *People v. Otto*, 4 N. Y.

defendant. *State v. Letourneau* (R. I.) 51 Atl. 1048.

Upon the trial of a person which resulted in his conviction of the crime of obtaining money under false pretenses, the state was permitted to introduce testimony to show that the accused had in two other cases, entirely distinct and separate from that under consideration, obtained goods under false pretenses. It was held that this was entirely unauthorized, and could not fall to be prejudicial to the accused. That, except in cases where it is necessary to show guilty knowledge, it is not admissible to prove that at another time and place the accused committed, or attempted to commit, a crime similar to that with which he stands charged; as it cannot be expected that the accused will be prepared to disprove collateral attacks of this character. The law, therefore, excludes such evidence. *Cowan v. State*, 22 Neb. 519, 35 N. W. 405.

The above case would seem not to be in line with others upon this subject in regard to the doctrine applicable in cases of false pretenses or fraud. In such cases, as in forgery, counterfeiting, embezzlement, receiving stolen goods, etc., the exception to the general rule is liberally extended; and the reason for this would seem to lie in the fact that in such cases the criminal intent, or, as it is sometimes termed, guilty knowledge, is an essential ingredient of the offense, although not patent from the act constituting it. The court cited *Smith v. State*, 17 Neb. 358, 22 N. W. 780, *supra*, II. a, 2, (d); but, while the judge who delivered the opinion in that case used language similar to that which concludes the foregoing decision, it is no authority whatever for the decision, as it was made in a case of larceny.

In *Berghoff v. State*, 25 Neb. 213, 41 N. W. 136, after citing and quoting from the opinion of Chief Justice Maxwell in *Cowan v. State*, 22 Neb. 519, 35 N. W. 405, *supra*, the court said: "In arriving at this opinion, the court considered most, if not all, the cases wherein the point before us has been discussed, both in England and America, especially those cited by counsel in the brief of either side; as well, also, the standard text-writers. It had not escaped our attention that these cases present a conflict of authority and many irreconcilable propositions. Neither had it been unobserved that the exigencies of many cases had induced courts from time to time to add to the exceptions to the general rule, which confines the prosecution to

Crim. Rep. 149. In another case the defendant was charged with the murder of his brother's wife. The brother, his wife, and two children were poisoned with arsenic. The brother and his wife died, but the attempt upon the lives of the children failed. Thereupon the defendant procured himself to be appointed the guardian of his brother's children, and then commenced to create and utter various false and forged claims against his brother's estate. The theory of the prosecution was that the defendant coveted his brother's estate, and, in order to gain possession of it, conceived the plan to murder those who stood in his way; that, failing in the attempt to kill the children, he attempted to accomplish his object by forgery. It was held that evidence was

properly received of all the crimes involved in this theory, as it was relevant upon the existence of motive for the commission of the crime charged. *People v. Wood*, 3 Park. Crim. Rep. 681. Cases of this character might be multiplied indefinitely, but enough have been cited to show that, when evidence of extraneous crimes has been held competent upon the existence of motive, it has been either the specific motive which underlay the particular crime charged, or a motive common to all of the crimes sought to be proved.

Second. As to intent: In the popular mind intent and motive are not infrequently regarded as one and the same thing. In law there is a clear distinction between them. Motive is the moving power which

the proof of the necessary facts to establish the distinct fact charged in the indictment or information. And, being substantially without precedent of our own, we conceive it to be the safer course to follow those cases which seem to adhere closest to the principles of the law, and were most conservative of fair and stable practice in the administration of criminal jurisprudence."

On the trial of a prisoner for having obtained, by false representations, the indorsement of a person to a draft, the state was permitted to show that the prisoner, a short time before, by similar false representations, obtained the indorsement of another person to a similar draft. It was held, (1) that the evidence was not *res gestæ*; (2) that it did not tend to prove the intent with which the prisoner made the false representations to the person named in the information; (3) that its admission was reversible error. *Morgan v. State*, 56 Neb. 696, 77 N. W. 64.

These three cases indicate that the supreme court of Nebraska differs from the other ultimate courts in their extension of the exception to the general rule in the cases of false pretenses; and practically decide that, in the application of the general rule and the exception thereto, that court will make no distinction between crimes of this class, and those wherein the commission of the act constituting the crime charged is, in and of itself, evidence of intent.

Todd v. State, 31 Ind. 514, was an indictment for false pretense, on the trial of which the state was allowed, over the defendant's objection, to put in evidence representations of the defendant, similar to those charged in the indictment, made to other persons than the person therein alleged to be defrauded, not in his presence, and not at the time the representations were made to him. In reversing a conviction the court said: "We do not think that these items of evidence were admissible. That false representations were made to one does not tend to prove that similar statements were, at a different time and place, made to another. To prove a prisoner guilty of a particular crime, it is not admissible to show that on another occasion and at another place he committed, or attempted to commit, a similar crime; for the reason that the two facts bear no certain or probable relation to each other, but are wholly disconnected. Such evidence may create a bad opinion of the general integrity of the accused, 62 L. R. A.

and thus incline the mind of the jury to a readiness to believe him guilty as charged in the cause on trial. But this the law will not allow."

Upon the trial of an indictment for a conspiracy, which charged that defendant conspired with other persons unknown, to cheat and defraud a certain person and others, and by means of false pretenses to such person did obtain a quantity of goods of the said person and others with intent to defraud such person and others, it was held that the word "others" must have the same meaning in the earlier part of the count as in the latter part of it; and, with respect to the property in the goods, it must mean that they were the goods of such person and his partners, and that, on the trial of the indictment, evidence was not admissible to show that the defendant attempted to defraud other persons wholly unconnected with the person named in the indictment; and for the admission of such evidence the judges, after considering the case, held a conviction wrong. *Reg. v. Steel* Car. & M. 337, 2 Moody, C. C. 246.

The prisoner was charged with obtaining moneys from the prosecutor by false pretenses. He was employed by his master to take orders for goods, but was not authorized to receive the money. Eleven days after he was so employed he obtained the money mentioned in the indictment from the prosecutor by falsely representing that he was authorized by his employer to receive it. For the purpose of proving the intent of the prisoner, evidence was admitted of his having on a day not specified, but within a week from the time when the moneys were obtained from the prosecutor, obtained another sum of money from another person by a similar false pretense, such obtaining not being charged in the indictment. It was held that the evidence was not admissible, and that the conviction must be quashed. *Reg. v. Holt*, Bell C. C. 280, 9 Week. Rep. 74, 8 Cox C. C. 411, 30 L. J. M. C. N. S. 11, 6 Jur. N. S. 1121, 3 L. T. N. S. 310.

(c) *Acquiescent of property.*

Upon the trial of a person indicted for obtaining personal property by fraud and fraudulent pretenses, evidence of other efforts upon the part of the defendant, made about the same time, to obtain goods from other merchants upon the same character of statements and representations, is admissible for the purpose of

impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. When a crime is clearly proved to have been committed by a person charged therewith, the question of motive may be of little or no importance. But criminal intent is always essential to the commission of crime. There are cases in which the intent may be inferred from the nature of the act. There are others where wilful intent or guilty knowledge must be proved before a conviction can be had. Familiar illustrations of the latter rule are to be found in cases of passing counterfeit money, forgery, receiving stolen property, and obtaining money under false pretenses. An innocent man may in a single instance pass a counterfeit coin or bill.

showing the intent of the defendant. *State v. Turley*, 142 Mo. 408, 44 S. W. 267.

On the trial of an indictment for obtaining goods of a mercantile firm by false pretenses, after proof has been made of the principal transaction, evidence that the accused had on the same day made to various other merchants statements similar in all respects to that made to the firm named in the indictment, with reference to the condition and circumstances of the firm of which defendant was a member, and of one of the members individually, is admissible. *Trogdon v. Com.* 31 Gratt. 882. The court stated that the question was one of the very first impression in Virginia and thereupon proceeded at great length to give the views of different courts on the question in hand, citing and commenting upon many decisions, both American and English.

After proof of the offense charged has been made upon the trial of an indictment for obtaining goods under false pretenses, evidence that the defendant obtained goods from other persons by the same pretenses as those by which he obtained the goods from the prosecutor, and what he said in doing so, is admissible as bearing upon the question of intent with which he obtained the goods mentioned in the indictment. *Com. v. Lubinsky*, 182 Mass. 142, 64 N. E. 986.

Upon the trial of an indictment for using the mail to defraud by ordering goods with the intention of not paying for them, under the false pretense that the persons mailing the orders were merchants, evidence of the mailing of similar letters not set forth in the bill of indictment is admissible on the question of intent. *United States v. Watson*, 35 Fed. 358.

Upon the trial of an indictment for obtaining property under false pretenses after proof has been made that the defendant represented himself to be the owner of certain personal property, evidence of the purchases of goods from others, and of the lease of a farm procured on precisely the same representations as those made to the complainants, is admissible if the jury are instructed that like transactions to that charged in the indictment shall not be considered as bearing on the intent unless found to be crimes. *State v. Dexter*, 115 Iowa, 678, 87 N. W. 417.

While pecuniary embarrassment cannot ordinarily be shown as substantive evidence of guilt, yet, where a defendant in a criminal prosecution had, by false representations, procured

Therefore intent is of the essence of the crime, and previous offenses of a similar character by the same person may be proved to show intent. *Com. v. Jackson*, 132 Mass. 16, 44 Am. Rep. 299, note; *Com. v. Bigelow*, 8 Met. 235; *Com. v. Stone*, 4 Met. 43; *Helm's Case*, 1 N. Y. City Hall Rec. 46; *Smith's Case*, 1 N. Y. City Hall Rec. 49; *Coffey's Case*, 4 N. Y. City Hall Rec. 52; *Dougherty's Case*, 4 N. Y. City Hall Rec. 166. So, in a case where the defendant is charged with having received stolen property, guilty knowledge is the gravamen of the offense, and *scienter* may be proved by other previous similar acts. *Com. v. Johnson*, 133 Pa. 293, 19 Atl. 402; *Coleman v. People*, 58 N. Y. 555; *Copperman v. People*, 56 N. Y. 591; *People v. McClure*, 148 N. Y. 95, 42 N.

possession of many thousand dollars worth of goods, and immediately afterwards became a voluntary insolvent, the admission of the latter fact in evidence is proper, since in no case is evidence to be excluded of any fact or circumstance connected with the principal transaction, from which an inference as to the truth of a disputed fact can reasonably be made. The court said that it was upon this ground that evidence that a party has recently committed another offense similar to the one with which he stands charged is held to be admissible in the trial of indictments for uttering forged instruments, passing counterfeit money, and receiving stolen goods. Notwithstanding it might seem to be a violation of the cardinal principle that proof of the commission of one crime cannot be offered to support a charge of another offense by the same person, it is, nevertheless, deemed to be competent from the necessity of the case, for the purpose of showing a guilty knowledge and intention. *Com. v. Jeffries*, 7 Allen, 548, 83 Am. Dec. 712.

Upon the trial of an indictment for conspiracy to obtain from a person certain goods by fraudulent means, the prosecution offered evidence, in addition to the acts of the defendants in the particular transaction alluded to in the indictment, to show that other dealings with several other individuals had been accompanied by circumstances indicative of a criminal collusion, which was objected to by the defendants on the ground that, to inquire into particular crimes other than those charged in the indictment was repugnant to the general principles and established rules of evidence. That, for such offenses, the defendants are liable to future indictments; and, when specific charges are regularly and legally prepared, they could be met. That the defendants could not possibly be expected to come before the court prepared to vindicate every transaction of their lives, or to explain at the moment the occurrences of remote periods. And that an unjust and cruel surprise must be the necessary and inevitable consequence of the course which the district attorney proposed to adopt. The court held that the evidence was admissible on the ground that it is competent in cases of conspiracy, as in those of forgery, libel, and uttering base coin or forged notes, to show by other acts the *quo animo* or *scienter* of the defendants. *People v. Bleeker*, 2 Wheeler C. C. 256.

Defendants were indicted for conspiring to de-

E. 523. In cases of alleged forgery of checks, etc., evidence is admissible to show that, at or near the same time that the instrument described in the indictment was forged or uttered, the defendant had passed or had in his possession similar forged instruments, as it tends to prove intent. *Com. v. Russell*, 156 Mass. 196, 30 N. E. 763; *People v. Everhardt*, 104 N. Y. 591, 11 N. E. 62; *Reg. v. Colclough*, 15 Cox C. C. 92. On the trial of an indictment for obtaining goods by false representations, similar representations made by the defendant to creditors from whom goods had been previously purchased by him were held admissible to prove intent. *Mayer v. People*, 80 N. Y. 364. It will be seen that the crimes referred to under this head constitute distinct

classes in which the intent is not to be inferred from the commission of the act, and in which proof of intent is often unobtainable except by evidence of successive repetitions of the act. The intent ascribed to the defendant in the alleged killing of Mrs. Adams was to kill Cornish. This is precisely the same as though he had succeeded in committing the particular crime he had planned. If A undertakes to kill B, and in the attempt kills C, the crime committed is no less a murder than it would have been if B had been killed. The agency employed to encompass the death of Cornish was cyanide of mercury,—a poison so rare and deadly that it is not kept on sale in places where strychnine, arsenic, and other poisons are sold. It was disguised in an effervescent salt called

fraud the prosecuting witness of his goods; and the prosecutor, for the purpose of showing the *quo animo*, offered to prove that the defendants obtained the goods of three other persons separately by similar means to those laid in the indictment. It was held that such testimony was proper. *Hitchcock's Case*, 6 N. Y. City Hall Rec. 43.

Upon the trial of an indictment which charged fifteen acts of conspiracy to cheat and defraud as many different individuals and firms named in the indictment, by which the defendants confederated and agreed among themselves unlawfully and fraudulently to acquire and get into their hands and possession the goods, wares, and merchandise of—mentioning the particular person in each instance—evidence of other purchases of goods than those charged in the indictment, made by the defendants from other persons under similar circumstances with the transactions charged in the indictment, is admissible for the limited purpose of showing a criminal intent in the doing of the act charged in the indictment. *Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596.

On a trial for the offense of being a common cheat and swindler, alleged to have been committed by making false and fraudulent representations concerning the wealth and commercial respectability of the accused, and thus obtaining the goods of the prosecutor, it is competent for the state to prove that the accused, at or about the same time, made similar representations to another for the purpose of fraudulently obtaining his goods. Evidence of this character is admissible as tending to show a fraudulent intent and scheme on the part of the accused to obtain the property of others without paying for the same, and as warranting an inference that the transaction with the prosecutor in the case on trial was made in pursuance of the same general purpose. *Farmer v. State*, 100 Ga. 41, 28 S. E. 26.

On the trial of an information for false representation, and pretenses in drawing a check upon a bank, by defendant, when he knew he had no funds with the bank with which to pay such check, the court permitted the state to introduce in evidence, over the objection of the defendant, several checks drawn by him, prior to the date of the one in question, and to prove that they had been presented to the bank by the various persons to whom they were given, and were not paid because the defendant had no

funds on deposit, and that defendant knew that payment thereof had been refused. It was held that such evidence was incompetent for any purpose, as there was no connection whatever between the several transactions which were permitted to be shown and that for which he was being tried; that the evidence here admitted did not come within any of the exceptions to the general rule that it is not competent to show the commission of another distinct crime by the defendant for the purpose of proving that he is guilty of the crime charged. The reasoning of the court was that the evidence was not competent to prove the intent of the defendant in the particular transaction mentioned in the information, for the reason that it would not logically or legitimately follow that he intended to defraud the prosecutor herein because he had defrauded other parties at various times previously. That it was not competent for the purpose of showing defendant's motive, for that, as well as his intent, would be inferred from his acts. That the question of mistake was not involved in the case, and the previous transactions of the defendant, which were permitted to be shown, no more formed a part of a single scheme than the several larcenies of a thief,—citing *State v. Kelley*, 65 Vt. 531, 27 Atl. 203; and that it certainly would not be competent in order to show that one had stolen certain property to prove that he committed larceny at a previous time. That the evidence as to these checks, which were not mentioned in the information, must have been greatly prejudicial to the defendant, for it in effect compelled him, without previous notice, to acquit himself of at least seven distinct offenses in addition to the one with which he was directly charged. The court then proceeded to declare that all its reasoning was practically obiter by saying, further: "Moreover, in this instance, the question of criminal intent, or guilty knowledge, was not in issue, for at the very threshold of the trial the defendant admitted that he signed the check in controversy; that he delivered it to Sharick [the prosecutor], and got from him the pitcher, and that he then had no money in bank to meet it; and, at the same time, he gave notice to the prosecution, through his counsel, that he expected to prove that he never made the pretenses and representations alleged in the information, but, on the contrary, expressly stated to the prosecuting witness, Sharick, when he delivered the check, that he then had no money in the bank but would

"bromo seltzer," which is a much used remedy for headache and other trifling human ills. The bottle containing this mixture was carefully prepared to create the impression that it contained nothing but the harmless bromo seltzer. It was accompanied by a silver bottle holder into which the bottle fitted. Both of these articles were inclosed in a box of the kind used in the sending of gifts. An empty card envelope was added to create the impression that it was a gift, and that the sender had forgotten to inclose his card. It was sent by mail on the eve of Christmas, when, according to the universal custom of this country, gifts are exchanged in this manner, and when even the most cautious and prudent person might have taken counsel of his generosity, rather than his

suspicious. Could such a foul and cunningly devised act have been innocently done? Could proof of any number of repetitions of this act add anything to the conclusive inference of criminal intent which proof of the act itself affords? Can it be possible that, in the face of such irrefragable indicia of murderous intent, it is still necessary or proper to prove the commission of other similar crimes to establish intent? These questions carry their own answers. If intent may not be inferred from such an act as this, then there is no such thing as inference of intent from the character of the act. Let us suppose this to be a case in which evidence of felonious intent could properly be derived from proof of the commission by the defendant of other similar crimes. The

have soon, and that the check would then be paid; and he so testified in his own behalf, and his testimony was corroborated by other witnesses. There was, therefore, really but one question for the court to determine, and that was whether the defendant did or did not make the statements imputed to him; and hence, all of the evidence in regard to the giving of other checks was absolutely foreign to the case, and therefore inadmissible upon any theory or rule of evidence." *State v. Boklen*, 14 Wash. 403, 44 Pac. 889.

This case would seem to be at variance with the class of cases alluded to in the introduction to this subdivision, and which hold generally that in false pretenses whenever there is any evidence made of the false pretense sufficient to carry the case to the jury, other evidence of transactions similar in nature to the one for which the defendant is being tried is admissible for the purpose of showing intent. The theory of the court in this case, that false pretenses can be likened to larceny in this respect, is hardly supported by the general trend of judicial authority. In the former, the commission of the act, as has been stated, does not of itself make out the crime, but lacks the element of what the courts term intent or guilty knowledge, while in larceny the proof of the fact of which the offense consists carries with it the presumption of intent. And if the idea of the court in its concluding remarks, that, although the prosecution had given evidence of the making of the alleged false pretense and representation, yet, because the defendant had testified to the contrary in his own behalf, and was corroborated in that by other witnesses, evidence of other like instances of false pretenses could not be introduced to show intent or guilty knowledge, be correct, there would be very few instances where convictions could be had for false pretenses. There is no statement of facts by the reporter, and the statement by the judge, who delivered the opinion, does not show how long prior to the giving of the check in relation to which the false pretense was alleged the other instances took place; but it is fair to presume that, if they had occurred very long before, the judge would have so stated, as it would have greatly fortified his position; and his omission to do so would seem to indicate that the other transactions, although prior to the one in question, occurred at about the same time. And this comment upon the 62 L. R. A.

case is made upon the theory that such was probably the fact.

On a trial for obtaining goods under false pretenses it appeared that there were five other bills of indictment against the prisoner for the same offense,—cheating and defrauding other persons out of their property. The commonwealth called a witness, and proposed to prove by him and numerous other merchants that the accused, at the same period, when he was in the city purchasing goods, made false representations as to his means of payment and ability to pay, and obtained a large amount of property from those persons on false and fraudulent statements. To this evidence the counsel for the prisoner objected. The court sustained the objection, and, in doing so, after alluding to the exception to the general rule which permits, in prosecutions for passing forged and counterfeit bank notes, knowing them to be counterfeit, proof that the accused had other counterfeit paper in his possession, and that he had passed to other persons notes which were counterfeit, for the purpose of establishing the *scienter*, said: "But, because a man has purchased goods of one in consequence of making representations which were false, and has obtained a credit on such representation, it does not necessarily follow that he obtained a credit from others upon any such false statements. Other persons might have given a credit to him on information derived from third persons, or from their general acquaintance with the accused and his means of payment, and not upon any representations made at the time, as to his circumstances. Now, to suffer the issues joined in a number of other bills of indictment to be presented to this jury, in my opinion would be subverting all the rules of evidence. It would give to the prosecution a decided advantage over the accused. He is called upon to explain transactions which, perhaps, are perfectly within his power to do, showing them to be honest, had he been previously apprised that he would be called upon to answer them on this trial. It has been, and must be, conceded that this raises a new issue, and is a departure from the general rules of evidence; and it seems to me the position is not sustained by reason or authority. It does not form an exception to the rule; nor is it a part of the rule itself. As well might it be contended that when one was charged with beating a man, the commonwealth should be permitted to prove that the accused had as

supposition necessarily implies the establishment of the extraneous crime by legal and competent evidence before it can be referred to in support of the theory that it proves the guilty intent with which the crime charged was committed. We shall have occasion to show further on that this cardinal essential is lacking in the the evidence which relates to the death of Barnet, and that there is no competent evidence in the case which connects the defendant with the sending of the poison to Barnet. But assuming, for present purposes, that there is competent evidence which tends to show that the defendant was the sender of the poison in both instances, how does the sending of poison to Barnet prove the intent with which the poison was sent to Cornish?

saulted various other persons, and from that fact, with others, induce the jury to believe the defendant had committed the offense with which he is charged. Such evidence as is now offered is not admissible, from the necessity of the case; nor is it relevant to establish the present issue. Therefore, for these and other reasons, the court feels compelled to reject it." *Com. v. Daniels*, 2 Para. Sel. Eq. Cas. 332.

This case is worse than the *Boklen Case*. It is enough to say that the principles enunciated are opposed to almost all the cases on the subject of the admission of like transactions, although constituting separate and distinct offenses, to prove intent in false pretenses; and the idea of likening a case of assault, which cannot possibly exist without intent being presumed, to that of false pretenses, is a much wider departure from the course of true reasoning than the likening of larceny in the *Boklen Case*.

(d) Other instances.

On the trial of a person indicted for cheating by false pretenses by representing that a bill of an insolvent bank was worth its nominal value, and passing it at that value. It is competent, for the purpose of establishing a *scienter*, to prove that the defendant had in his possession, and passed, other similar bills. *Com. v. Stone*, 4 Met. 43.

In *State v. Jamison*, 74 Iowa, 613, 38 N. W. 509, after a conviction on an indictment for cheating by false pretenses, the court, in affirming the conviction, said: "The gist of the crime charged in the indictment is the intent to defraud, and the settled rule seems to be that, when the *scienter* or *quo animo* is requisite to and constitutes a necessary and essential part of, the crime with which the person is charged, and proof of such guilty knowledge or malicious intention is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct, or declarations of the accused as tend to establish such knowledge or intent is competent, notwithstanding they may constitute a distinct crime."

It is competent, upon a prosecution for obtaining a promissory note by the false pretense that it was a contract binding the makers to pay only upon the sale of certain machines for which they were to be given the exclusive agency in a certain territory, to show, as illustrating the purpose or intent, that the respondent

It is to be remembered that we are now dealing solely with the subject of intent, and not with the rebuttal of possible mistake or accident. In this connection it is also to be borne in mind that the practice of receiving evidence of other offenses to prove intent in cases of passing counterfeit money, etc., is a departure from the usual rules of criminal evidence, justified and necessitated by the peculiar nature of these crimes. A man may innocently pass counterfeit money. For this reason evidence of other similar acts by the same person, although not conclusive, may be received to establish intent. It is true that a person may innocently poison another, but that possibility will be discussed under the appropriate head of accident and mistake. Eliminating these latter

ents, at about the same time, were engaged in like transactions with other parties, and had already sold to others the right which they represented they were conveying to the makers of the note. *People v. Summers*, 115 Mich. 537, 73 N. W. 818.

In *State v. Carter*, 112 Iowa, 15, 83 N. W. 715, on the trial of an indictment for the crime of obtaining the signature to an instrument by false and fraudulent representations the state offered evidence to show that defendant made somewhat similar representations to another person, and procured a sum of money from him by reason thereof, which he had never repaid; but there was no proof whatever that such representations were false. It was held that the defendant's motion to exclude this evidence should have been sustained; that, although the representations made to such third person were sufficiently connected in point of time to be admissible under the rule that, for the purpose of proving the intent, evidence of similar pretenses, made about the same time and in the same neighborhood to other persons, to the pretenses alleged in the indictment, may be introduced, yet, as it had not been shown that they were false, defendant's motion to exclude should have been sustained.

On the trial of an indictment for falsely pretending and asserting that a certain horse was sound and kind, with the knowledge that the assertion was false, and with the intent to defraud the purchaser, and for actually so defrauding him, evidence as to three other distinct fraudulent sales by the defendant, wherein he made similar representations, each of which was false, is inadmissible. *Com. v. Jackson*, 132 Mass. 16, 44 Am. Rep. 299, note. The statement is made in the opinion that the transactions formed no part of a single scheme or plan, any more than the various robberies of a thief. That they were entered upon as from time to time he might succeed in entrapping credulous or unwary persons. That, even if they were transactions of the same general character, they differed in all their detail, and the defendant was compelled to defend himself against three distinct charges in addition to the one for which, alone, he was indicted.

On the trial of an indictment for the violation of a statute providing that "every person who shall obtain, or attempt to obtain, from any other person or persons, any money or property, by means or by use of any false or bogus

factors from the inquiry, there can be no such thing as innocent poisoning. We have, then, two cases of poisoning as separate and distinct as two cases of shooting. Could it be successfully urged that the shooting of one person by another could be proved to show the intent with which the latter shot a third person at a different time and for a distinct cause? Certainly not, unless it were also established that the two shootings were so connected in time, place, and circumstance as to make them part of one common plan or design. The latter subject will also be further discussed under its appropriate head. Throughout the length and breadth of the testimony relating to the death of Barnett there is not a suggestion or a fact which throws any light upon the in-

tent with which the poison was sent to Cornish, or which serves to support or strengthen the inferences as to intent which may be drawn from the evidence tending to show that the defendant sent the poison to Cornish.

Third. As to the possibility of mistake or accident, or doubt as to the cause of death: There are cases in which the possible or probable defense of accident or mistake may be rebutted upon the direct case of the prosecution, or in which the doubtful cause of the particular death may be established by other previous similar deaths. As most of these are poisoning cases, they are of special interest and importance here. The fact that the earlier English Reports are more prolific in such illustrations than all of our

checks, or by any other means, instrument, or devise, commonly called the confidence game, shall be imprisoned in the penitentiary not less than one year nor more than ten years," where it appeared that the crime charged consisted in the defendant acting in collusion with the person who was included in the indictment against him, by representing to the prosecutrix that certain stock was of a certain value, and informing her that the person with whom he was in collusion had stock which he would sell at a low figure, and he then took her to his accomplice, who pretended to be ill and willing to sell his stock at a sacrifice, which stock proved entirely worthless, whereby the prosecutrix was swindled out of \$3,000,—evidence of another transaction of the same character, in which the parts taken by the defendant and his accomplice were reversed, is admissible to show the guilty knowledge of the defendant of the confidence game. *Du Bois v. People*, 200 Ill. 157, 65 N. E. 658.

The following are other cases where evidence of the other offense has been admitted to prove intent or guilty knowledge in trials for false pretenses: *Com. v. Coe*, 115 Mass. 481; *People v. Wakely*, 62 Mich. 297, 28 N. W. 871; *People v. Jefferey*, 82 Hun, 409, 31 N. Y. Supp. 267; *Niles v. People* (N. Y.), 4 Am. L. J. N. S. 507, as cited in 14 Am. Dig. Cent. ed. p. 1475; *State v. Finney*, 1 Ohio L. J. 30.

As to evidence of other offenses showing common scheme, plan, or system in cases of false pretenses, see *supra*, III. b, 2.

13. Forgery.

(a) In general.

Forgery is another of the class of crimes mentioned where proof of actual intent, or, as it is frequently termed, guilty knowledge, is necessary. The cases which follow are of that class of crimes in which such fraudulent intent, or guilty knowledge, is a material and essential ingredient.

(b) Making.

Upon the trial of an indictment for fraudulently altering a school order for the payment of money, evidence that the defendant had fraudulently altered another school order issued at the same time as the order first mentioned, is admissible, as it would afford legitimate evidence tending to prove a fraudulent intent in altering, 62 L. R. A.

if he did, the order upon which the indictment was based; and a fraudulent intent is a material and essential ingredient in the crime of forgery. *Smith v. State*, 29 Fla. 408, 10 So. 894.

Upon the trial of an indictment against the defendant for forgery of a promissory note, thirteen promissory notes other than the one set out in the indictment, purporting to have been executed by different persons, but all payable, apparently, to the same person named as payee in the note set out in the indictment, were received in evidence over the objection of the defendant. It was claimed that the admission of these notes in evidence was erroneous, as the only object that could be accomplished by it was to prove that the defendant had been guilty of numerous other forgeries. It was held that the trial court did not err in the admission of such other notes in evidence, although they were shown to have been forged by the defendant. *Card v. State*, 109 Ind. 415, 9 N. E. 591.

In *State v. Minton*, 116 Mo. 605, 22 S. W. 808, it was held that on a trial for forging a deed there was no error in admitting in evidence deeds other than the one described in the indictment. That, while such deed had a tendency to show that defendants were guilty of other crimes than the one with which they stood charged and were upon trial, they were not, for that reason alone, inadmissible, but they were admissible for the purpose of showing the intent with which the act was done, being, as they were of similar character, executed not only in the same place, but purporting to be signed and acknowledged by the same party, and several of them purporting to have been acknowledged before the same notary.

On the trial of a person charged with having incited and instigated another to commit the crime of forgery, it is competent, for the purpose of proving the criminal intent of the person committing the forgery, to show that such person had, but a short time before, forged another deed purporting to convey the same property. *Burlingim v. State*, 61 Neb. 276, 85 N. W. 76. In this case it was also held that a fraudulent intent was an essential element of the crime for which the defendant was tried, and that the latter deed was evidence of such an intent.

Upon the trial of an indictment for forging the name of another as maker of a promissory note, it was in testimony that at the time the note specified in the indictment was made out

modern Reports is probably explained by the great progress in medical science, which has not only materially reduced the number of deaths from poisoning by mistake or accident, but has practically annihilated the possibility of death from poisons so subtle and obscure as to baffle investigation. In *Reg. v. Garner*, 3 Fost. & F. 681, the prisoner, Garner, had been previously married, and his former wife had died in March, 1861. Prior to that date his second wife had been a servant in the house. The prisoner's mother resided with him after the second marriage. The mother's death occurred in December, 1861, and it was clearly proved that she died from arsenical poisoning. Garner, who dealt in milk, also sold arsenic for agricultural purposes.

and indorsed other notes were also made out in a similar manner, and either then, or at a subsequent time, given to the party, who filled them out for the purpose of negotiating them, at the instance, and for the benefit, of the defendant. (The defendant had produced the notes before the person who, at her suggestion, filled them out, in blank, with the forged signature to them, and stated to such person that they were signed by the person whose name she had forged. This was true of the note mentioned in the indictment, and also of the others.) Some of these notes were given in evidence, and the testimony tended to show that some of them had been sent away or taken up, and they were not before the court. It was held that it was competent for the state to introduce testimony as to the possession of other notes, which were shown to be forged and in the possession of the defendant, and her dealings with them,—at least about the time of the transaction in question,—and whether this occurred before or after the particular transaction specified in the indictment. *Devere v. State*, 5 Ohio C. C. 509.

Upon the trial of an indictment for forging an instrument, evidence was offered on the part of the prosecution to prove that the defendant actually passed the instrument. Objection was made that it tended to show a distinct offense. It was held that the evidence was competent for the purpose of showing that the instrument was actually passed, and thereby establishing the *quo animo*, or intent with which it was forged. *Hoskins v. State*, 11 Ga. 92.

Upon the trial of an indictment for forgery by indorsing upon a certain bond of the city of Baltimore the name of the payee, or obligee, Frederick M. Ketchum, Jr., the state proved that, on or about the time of the forgery of the indorsement of the bond set out in the indictment, the accused deposited with a person another bond of the city of Baltimore of like character, as collateral security for money loaned by such person to them; and, to prove that the bond thus deposited with such person bore the name of Ketchum, the obligee, and that said name was forged, offered in evidence the bond itself. It was held that, as the appellants were indicted, not only for forging the indorsement of Ketchum on the bond set out in the indictment, but also for uttering the same knowing it to be forged, it was competent for the state, to prove guilty knowledge, to show that, on or about the time of the forgery charged in the in-

dictment, the appellants held and uttered similar forged instruments. *Bishop v. State*, 55 Md. 138.

Defendant was indicted for forging, altering, and erasing from the book a county warrant which had been put in judgment, certain words of special indorsement, and also the memorandum that judgment had been rendered thereon, and obtaining and defrauding the prosecutor of the amount paid by him for the warrant thus altered. Upon the trial for the forgery evidence of the passage of similar forged paper by the defendant was admitted to prove the *scienter*, and proof of erasures on the paper thus passed, like the erasures on the instrument set out in the indictment, was admitted. The court held that, if the objection was to the admissibility of such testimony because tending to establish independent offenses, it was not sustainable, as it was well settled that evidence of the issuance of other forged papers is admissible to prove the *scienter* in trials for forgery. *Garner v. State*, 5 Lea, 213.

dictment, the appellants held and uttered similar forged instruments. *Bishop v. State*, 55 Md. 138.

Defendant was indicted for forging, altering, and erasing from the book a county warrant which had been put in judgment, certain words of special indorsement, and also the memorandum that judgment had been rendered thereon, and obtaining and defrauding the prosecutor of the amount paid by him for the warrant thus altered. Upon the trial for the forgery evidence of the passage of similar forged paper by the defendant was admitted to prove the *scienter*, and proof of erasures on the paper thus passed, like the erasures on the instrument set out in the indictment, was admitted. The court held that, if the objection was to the admissibility of such testimony because tending to establish independent offenses, it was not sustainable, as it was well settled that evidence of the issuance of other forged papers is admissible to prove the *scienter* in trials for forgery. *Garner v. State*, 5 Lea, 213.

Upon the trial of an indictment for forging the deed or title to land a witness for the state implicated himself, along with the defendant, in other forgeries, for which indictments were pending against him in the same court. It is difficult to tell, from the statement of facts (or, rather, lack of statement), whether the defendant objected to this testimony as involving other offenses; but it is assumed that he must have done so, as the court, in its opinion, says: "All the other objections to the admissibility of the evidence are believed to come within the same general rule, as stated by Mr. Greenleaf. He says: 'In proof of the criminal uttering of a forged instrument, it is essential to prove guilty knowledge on the part of the utterer,'" and then proceeds with the remainder of 3 Greenleaf on Evidence, § 111. *Ham v. State*, 4 Tex. App. 645.

Defendant was upon trial under an indictment charging the forgery of a transfer from William Smith to R. W. Bell of a land certificate issued to one John Todd. After proof had been made by a witness that he and the defendant forged the conveyance to the Todd certificate, purporting to be a conveyance from Todd to Smith, the prosecution offered in evidence the conveyance from John Todd to William Smith of the Todd certificate; to the admission of which the defendant objected on the ground, among others, that it was not competent for

before his death the child had been attended by a parish doctor, who had prescribed morphia, prussic acid, and bismuth in medicinal doses. It was shown that the doctor kept prussic acid, bismuth, and arsenic in separate bottles on the same shelf. The bismuth was in the form of subcarbonate of bismuth, which the doctor said was sometimes adulterated with arsenic, but only in minute quantities. It also appeared that shortly before the death of the child a mixture of soft soap and from four to six drachms of arsenic had been used for cleansing furniture and certain parts of the house. There was testimony tending to show that when this mixture was dried by exposure to the air it would release particles of the arsenic, amounting to 300 grains, which would float

about in the room, and could be inhaled and absorbed into the system by means of the lungs, but not through the stomach. Under these circumstances, evidence was offered by the prosecution, and received by the court, to show that two other children of the defendant and one Mattrass, a lodger, had died within a few months of each other with symptoms of arsenical poisoning; that their bodies had been exhumed, and arsenic had been found in the organs of each of them. The evidence was received on the authority of *Reg. v. Geering*, 18 L. J. M. C. N. S. 215, where the defendant was tried for the murder of her husband, the cause of whose death was not free from doubt. Three sons had died at about the same time, all exhibiting the same symptoms. The court held that

the state to show another and different forgery than the one charged in the indictment, for the purpose of showing *scienter* in this. The objection was overruled, and the evidence admitted. It was held that the court did not err in admitting the testimony. *Francis v. State*, 7 Tex. App. 501.

On the trial of an indictment for forgery of the acceptance of a bill of exchange, evidence of what the prisoner said respecting other bills of exchange which were claimed to have been forged, but which were not in evidence, is not admissible. The court said that the mere talking of forged documents will not do. *Reg. v. Cooke*, 8 Car. & P. 586.

But upon the trial of an indictment for forging a bank note, the second count of which charged accused with uttering the same well knowing it to be forged, the prosecution proposed to offer evidence of statements made by the prisoner, as to other bank notes, supposed to have been the subject of a guilty uttering by him. *Crompton, J.*, said that it had been decided that such statements are not admissible in evidence. Counsel for the prosecution said that he was aware that it had been so held, but contended that that decision was not founded upon a correct principle, and asked the court to overrule it. *Crompton, J.*, said: "I confess that I entertain doubts upon the subject; but I think you had better not offer the evidence in question. I do not see the force of the reasoning upon which *Cooke's Case* [*Reg. v. Cooke*, 8 Car. & P. 586, *supra*] was decided; but I am not at present prepared to overrule it." *Reg. v. Brown*, 2 Fost. & F. 550.

Upon the trial of an indictment charging the prisoner with falsely making and counterfeiting a certain bill of exchange after evidence has been introduced of the uttering of the bill knowing it to be forged, other forged bills upon the same house, which were found upon the prisoner at the time of his apprehension, are admissible as evidence of guilty knowledge. *Rex v. Hough, Russ. & R. C.* 120.

Upon a charge of forgery of a check, before proof of other forgeries can be admitted to prove guilty knowledge, it must appear that the check described in the indictment was itself a forgery; and it must also appear that the other instruments were signed by the name of a real person, and without his authority. *People v. Whitman*, 114 Cal. 338, 40 Pac. 90.

In *People v. Bird*, 124 Cal. 32, 56 Pac. 639, 62 L. R. A.

it appeared that the defendant was prosecuted for forging his employer's name to a check on a bank. It was proved that defendant presented the check to the bank and obtained the money thereon, and the employer testified that he, the witness, did not draw the check and had not authorized defendant to do so; and, further, that the money drawn was not used by him, or for his benefit. On the other hand, the bank teller, who paid the check, and the assistant cashier of the bank, both testified that in their opinion the check was genuine. The prosecution then introduced a number of checks drawn in the name of the employer on the same bank, which the employer swore were forgeries. There was no evidence whatever tending to connect defendant with these forgeries, if they were such. It was held that, if proof had been forthcoming to show the connection of defendant with these other checks, which were said to have been forged, still such coincidence was not admissible to prove the *corpus delicti*, but only after that had been established, to show guilty intent, and that the prosecution assumed the same burden of proof as to each of the checks introduced to show guilty knowledge as in regard to the check for which he was being tried. That as to some of these checks the employer testified that he believed the signature to be defendant's signature,—meaning, perhaps, that he believed that defendant signed his, the witness's name. That he did not say that he knew defendant's handwriting, or whether he believed that the defendant wrote it. That, indeed, there was much to show that his opinion resulted simply from the fact that he did not recollect drawing the check, and that the money had not been used in his business, and there could be no doubt that the evidence was improperly admitted.

Upon the trial of an indictment for forgery evidence of the forgery of other instruments, about nine months after the alleged commission of the crime charged in the indictment, is too remote, and is not admissible. *People v. Baird*, 104 Cal. 462, 38 Pac. 310. In this case the court said that this was a dangerous kind of evidence at best. That it is an exception to the well-established rule that evidence of other crimes cannot be introduced to help along the conviction of the crime charged; and it should not be carried any further than courts have already carried it.

Upon the trial of an indictment for the for-

evidence of the other three deaths was competent to show that all were due to arsenical poisoning, and the domestic history of the family was admissible to enable the jury to determine whether the poisoning was accidental or not. In *Reg. v. Heesom*, 14 Cox C. C. 40, the defendant was charged with the murder of her child by poison on October 3, 1877, and also with the murder of her mother by the same means on November 5, 1877. She was indicted for both offenses. On the trial for the murder of her child evidence was received to show that she had poisoned her mother and another of her children. It appeared that the accused held insurance upon the lives of the three alleged victims. The court, after some hesitation, admitted evidence as to the two previous

deaths, citing *Reg. v. Geering* as authority, and saying: "If there had been no case on the point I would have paused to consider . . . whether the evidence could be received; but after the decision quoted, and with which I am quite satisfied, I have no doubt that it is competent to show that the death of the child . . . was not due to the accidental taking of arsenic." In *Makin v. Atty. Gen.* 17 Cox C. C. 704, the defendant, who kept a "baby farm," was indicted for the murder of an infant, Horace Murray. The Murray child was found buried in a garden attached to defendant's house. The bodies of other children were found buried in the same garden and the gardens attached to other houses previously occupied by the defendant. Here, again, the authority of

gery of an instrument with intent to defraud a city and county, evidence of other forgeries of similar instruments about the same time, to show guilty knowledge and intent, is admissible. *People v. McGlade* (Cal.) 72 Pac. 600.

Upon the trial of an indictment for forgery in signing the name of a person as indorser upon a promissory note, where the question of the prisoner's guilt or innocence depended upon the inquiry whether he made the indorsement under the honest belief that he was authorized to do so, or whether he knew at the time that he had no such authority, and signed the person's name with a criminal intent, letters written by the prisoner to his father-in-law, the contents of which might fairly be considered as admitting that the prisoner had made a wrongful and unauthorized similar use of the name of his father-in-law upon other notes, are incompetent as evidence to show what the intentions of the prisoner were at the time he made and uttered the paper in question, as the fact that the prisoner made an unauthorized use of the name of his father-in-law, if established, showed that he was morally capable of committing the same offense against the person claimed to be injured in this action, but did not legitimately tend to show that he did so, or that he knew or understood that that person's authority had been withdrawn, or that the signature in question was made with a criminal intent. *People v. Corbin*, 56 N. Y. 363, 15 Am. Rep. 427.

Upon the trial of an indictment for making a false instrument in writing, evidence that the defendant had previously committed a similar offense is admissible. *Howard v. State*, 37 Tex. Crim. Rep. 494, 36 S. W. 479.

Upon the trial of an indictment for forging a bill for £40, the uttering of other forged bills, drawn on different persons, can be given in evidence as proof of guilty knowledge. *Reg. v. Salt*, 3 Post. & F. 834.

Upon the trial of an indictment the counts of which were for forging certain receipted bills for hides, etc., and for uttering the same, evidence tending to show that the defendant fabricated certain other unreceipted bills of a like character, and uttered them to the same persons by a continuous series of transactions, extending some months later than the last forgery of which the defendant was convicted, is admissible. *Com. v. White*, 145 Mass. 302, 14 N. E. 611.

On a trial for forging an order for goods, an

other order than that set out in the indictment, in the same handwriting and addressed to the same person, and purporting to be signed by the same party, is admissible in evidence to shed light on the intent of the defendant as to the order set out in the indictment. *Wright v. State* (Ala.) 34 So. 1009.

c. Uttering.

On the trial of a person charged with uttering, publishing, and putting off as true a false or forged instrument, and for the purpose of bringing home to the defendant a knowledge of the false and forged character of the instrument there involved, and to fix upon him a criminal intent, other instruments found in his possession, or passed by him, about the same time, may be introduced in evidence upon proof that they are also false, forged, and fraudulent. Without such proof, they are not admissible. *State v. Rose*, 70 Minn. 403, 73 N. W. 177.

On the trial of an indictment for uttering and passing a forged bank bill, for the purpose of showing defendant's guilty knowledge, witnesses were introduced on the part of the state to prove that he had passed other counterfeit bills of the same denomination and on the same bank as the counterfeit bills laid in the indictment. But the bills were not produced in court. It was held that, in order to render this testimony in regard to passing other bills admissible, those bills should have been produced in court, if within the reach of the prosecution, or notice must have been given the defendant to produce them, and he have failed to do so after it appeared they were in his possession. *State v. Cole*, 19 Wis. 129, 88 Am. Dec. 678.

But see *Reed v. State*, 15 Ohio, 217, *infra*, III. c. 14, (c), where the opposite view seems to be taken.

Upon the trial of an indictment for passing a counterfeit order or check, purporting to be drawn by a president of a branch bank of the United States, on the cashier of the bank of the United States, the *scienter* may be proved by the fact of similar forged orders found in possession of the defendant, or of an accomplice in passing them. *United States v. Hinman*, Baldw. 292, Fed. Cas. No. 15370.

On the trial of an indictment for uttering a forged instrument, it appeared that the defendant and two other parties were in a room in the rear of a saloon. That, at the request and dic-

Reg. v. Geering, 18 L. J. M. C. N. S. 215, was invoked, and evidence of other similar deaths was received. In *Reg. v. Roden*, 12 Cox C. C. 630, the defendant was indicted for the murder of her child, an infant nine days old, whose death was caused by suffocation while he was in bed with his mother. The defense was accident. To rebut this defense, testimony was received to show that five other children of the defendant had all died in infancy. The prisoner was acquitted, however, upon the testimony of a physician, who said the child might have been accidentally suffocated by the mother overlaying it or by the covering on the bed. In *Reg. v. Flannagan*, 15 Cox C. C. 403, the defendants, who were sisters, were indicted for murdering the husband of the defendant

Higgins by arsenical poisoning. The defendants had also been indicted for the murder of Margaret Jennings, John Flannagan, and Mary Higgins, apparently members of the same family. Evidence of the previous deaths was received "with a view to showing, not that the prisoner had feloniously poisoned the deceased, but that the deceased had in fact died by poison administered by someone." In *Zoldoske v. State*, 82 Wis. 581, 52 N. W. 778, the defendant was indicted and prosecuted for the murder of one Ella Maly, who died of strychnine poisoning. The evidence tended to show that the defendant was enamored of Dr. Mitchell, in whose family she lived as a servant, and was jealous of his attentions to Maly. Evidence was received to show the circumstances of

tation of the defendant, one of the parties wrote a deed from the original patentee of certain land to himself, the writer, and in the same manner another deed of the same land from himself to the defendant. That the other person in the room then, at the request of the defendant, signed and forged the name of the actual patentee of the land to the first deed, and the person who wrote the deeds at defendant's dictation signed the second deed from him to defendant. That, after they were written, all three of the parties went to a notary, where the person who had signed the name of the patentee and owner of the land acknowledged that deed, and the person who made the other deed, and who wrote both deeds, acknowledged the deed made by him to defendant, and defendant paid the notarial fees. It was held that the evidence in regard to the deed from the person who wrote both deeds at the request and dictation of the defendant, to the defendant, was properly admissible in evidence, as it was the connecting link between the alleged forged deed and defendant, showing his interest in the matter, and was executed and acknowledged at the same time as the forged deed. *Preston v. State*, 40 Tex. Crim. Rep. 72, 48 S. W. 581.

In a case in the circuit court of the United States for Massachusetts Mr. Justice Story, in holding that the intent to defraud in a revenue case might be deduced from the various circumstances occurring, not merely between the same parties, but between the party charged with the conspiracy or fraud and third persons, said: "Thus, in a prosecution for uttering a bank note, or a bill of exchange, or promissory note, with knowledge of its being forged, proof that the prisoner had uttered other forged notes or bills, whether of the same or of a different kind, or that he had other forged notes or bills in his possession, is clearly admissible as showing that he knew the note or bill in question to be forged." *Bottomley v. United States*, 1 Story, 135, Fed. Cas. No. 1,688.

In *McDonald v. State*, 83 Ala. 46, 8 So. 305, which was a trial for forgery, the court said that the established general rule is, that the prosecution will not be allowed to introduce evidence of other distinct offenses for the purpose of showing that the accused is guilty of the offense specifically charged in the indictment, though they may be of the same nature; but that this general rule has its limitations, or exceptions; and that one of these exceptions is, 62 L. R. A.

that such evidence is admissible when it is material to show the intent with which the act charged was committed. That the intent to defraud is a material constituent of the crime of forgery, and is matter of inference to be drawn by the jury from the evidence before them. That the inference of guilty intent, which the jury may draw from the absence of testimony showing the existence or custody of the forged paper charged in the indictment, until the defendant presented it and obtained the goods on the faith of it, is strongly sustained by evidence of his possession of another forged paper of similar kind, at or about the same time, and purporting to be the act of the same person; and that such evidence is corroborative and relevant to the point in issue.

The defendant was indicted for obtaining money upon a forged draft. Upon the trial a quantity of other drafts similar to that mentioned in the indictment, together with envelopes, stamps, and other documents which were, as the evidence tended to show, found in the defendant's possession when he was arrested, were introduced in evidence. It was held that this evidence was clearly competent as tending to show guilty knowledge and intention. *Whitman v. People*, 83 Ill. App. 369.

Upon the trial of a person for knowingly uttering a forged check, the state was permitted to introduce in evidence, over the objection and exception of the defendant, a check other than the one described in the indictment, which the evidence tended to show was a forgery, and to show that defendant had, a few days previous to the day on which she uttered the check charged in the indictment, in the same city, uttered it knowing it to be a forgery. It was insisted by defendant that this evidence was improperly admitted, because it tended to show that defendant was guilty of another separate and distinct offense. It was held that, while such evidence is not permissible for the purpose of proving the commission by the defendant of other and distinct crimes than that for which he is on trial, when, as in this case guilty knowledge is an ingredient of the offense charged, it is admissible for the purpose of showing the intent with which the act was done. *State v. Hodges*, 144 Mo. 50, 45 S. W. 1093.

On a trial for uttering forged railroad passenger tickets, where the evidence tended to prove that the defendant sold a ticket, upon the sale of which the charge in the information was pred-

Mrs. Mitchell's death, which occurred prior to the death of Maly, for the purpose of showing that the latter was not accidental. In the case of *Goersen v. Com.* 99 Pa. 388, the defendant was accused of causing the death of his wife by arsenical poisoning. On the trial evidence of the death of the wife's mother was admitted to show that arsenic had been administered to both of them in pursuance of a design on defendant's part to obtain their property. This evidence was held to be competent to show the defendant's purpose and intent, the system by which that purpose was to be accomplished, and also to rebut the theory of accident, suicide, or the negligent or ignorant administration of arsenic either by the defendant or his wife. In *People v. Seaman*, 107 Mich. 348,

65 N. W. 203, on prosecution for manslaughter in committing an abortion, where the proof of the killing was circumstantial, and the theory of the defense was that the premature birth was due to accidental causes, it was held proper to receive evidence that the respondent had performed other abortions in the same house. There are other cases of similar character in which this kind of evidence was not received. These will not be referred to, as our only purpose in citing the foregoing authorities under this head is to show the radical difference between the cases which must be relied upon by the prosecution and the case at bar. While the early English cases have gone to great lengths in the admission of testimony tending to establish other crimes than the one

alleged, to a "ticket broker" which was the return portion of an excursion ticket from one city to another and return, evidence that on the same day the defendant, in the same city, made quite a number of other sales to different ticket brokers of similar tickets, differing only in the number, is admissible to show the intent or guilty knowledge of the accused. *Davis v. State*, 58 Neb. 465, 78 N. W. 930.

Upon the trial of an indictment for forgery in procuring another to utter a false check, the people, after proving that the witness had received the forged check from the defendant and was induced by him to attempt to obtain the money upon it from the bank upon which it was drawn, were allowed to prove, against the objection of the defendant, the uttering of other forged checks by him upon other occasions. It was held that this was no error. The defendant, by his plea of not guilty, had put in issue everything which it was incumbent upon the people to prove. That the people had no direct or positive evidence that the defendant personally forged the check which he uttered, and it was open for him to show that at the time he uttered it he had no knowledge that it was forged, and was, therefore, innocent of the crime; and, for the purpose of showing the prisoner's guilty knowledge in such cases, it has always been held competent to prove other forgeries. *People v. Everhardt*, 104 N. Y. 591, 11 N. E. 62.

On the traverse of an indictment for uttering a forged check, knowing it to be forged, the public prosecutor, for the purpose of showing the *scienter*, will be allowed to prove that the prisoner had passed a check not laid in the indictment, purporting to be drawn by a person who had no account at the bank on which such check was drawn. *Coffey's Case*, 4 N. Y. City Hall Rec. 52.

Upon the trial of an indictment for passing a forged bill for jail fees, objections were taken by the defendant to the admission of evidence of other forged bills for jail fees, passed by defendant, than those set out in the indictment. In holding that the objections were not well taken, the court stated that it was held by this court, in a prosecution for forging county warrants, that the issuance of other forged warrants was admissible to prove the *scienter*: citing *Garner v. State*, 5 Lea. 219; *Britt v. State*, 9 Humph. 31; *Defrese v. State*, 3 Helsk. 62, 8 Am. Rep. 1; *Links v. State*, 13 Lea, 701, *Foute v. State*, 15 Lea, 712. 62 L. R. A.

Upon the trial of an indictment for uttering forged notes of the Kingdom of Poland, conversations with the prisoners respecting the forgery and circulation of forged Austrian notes were held to be admissible in evidence to prove the *scienter*. *Rex v. Harris*, 7 Car. & P. 429.

The defendant was charged, by indictment, with knowingly and fraudulently passing as true a forged instrument in writing. At the time of his arrest, and in the same conversation in which he confessed that he forged the instrument in question, he also confessed that he had embezzled other funds. It was held that the confession in regard to the embezzlement of such funds was admissible to throw light on the intent of the defendant in uttering the forged instrument. *Strang v. State*, 32 Tex. Crim. Rep. 219, 22 S. W. 680.

Upon the trial of an indictment for passing a forged instrument to the party named in the indictment, evidence that the defendant attempted to pass said instrument on the same day, but at a different time and place, to another person, is admissible to prove his fraudulent intent with respect to the attempt for which he is on trial. *Burks v. State*, 24 Tex. App. 326, 6 S. W. 300.

On the trial of a person accused of uttering and publishing a forged deed for the conveyance of real estate with intent to defraud, other forged deeds for the conveyance of real estate, including deeds of trust, made to a trustee to secure the payment of promissory notes or bonds, found in the possession of accused, or proved to have been uttered and published by him, are competent testimony to show his guilty knowledge. *Lindsey v. State*, 38 Ohio St. 507.

On a trial of an indictment for uttering a forged note, after the state had introduced evidence tending to show that the note was forged, it was allowed, against defendant's objection, for the purpose of showing that defendant knew it was forged, to introduce the evidence of a witness who testified that defendant had, about the time the alleged crime was committed, another forged note purporting to be signed by the same persons, which he had signed, and that the signatures to it were, in his opinion, in the same handwriting as those to the note referred to in the indictment. It was held that it was error to admit such testimony without the production of the note referred to by the witness. That if the note had been produced, it might

charged, it is clear that the only two theories upon which the rulings therein have been attempted to be or could be defended are: First, that the killing may have been accidental; or, second, that the cause of death was in doubt. In the one instance proof of other deaths in the same family under similar circumstances and identical symptoms may have been the only evidence obtainable to prove a felonious killing. In the other instance the uncertainty as to the cause of death could possibly have been removed by evidence of previous deaths in the same family circle, under conditions which would make the cumulative evidence of all the deaths cogent proof of the cause of the particular death charged in the indictment. No such case is presented here. The poison

used is clearly and positively identified. The analyses of the contents of the bromo seltzer bottle, the glass from which a portion thereof was taken by the victim, and of her internal organs, point unerringly to the swift and terrible agent of death employed by the murderer. The poison is rare, subtle, deadly. It is mixed with a harmless powder of common use, contained in a bottle labeled and prepared with the design to deceive the recipient. It is accompanied by other articles calculated to induce the belief that they are component parts of a gift from a friend. It is sent by mail on the eve of that great holiday when the spirit of generosity and good will pervades the land, when friendships are renewed and enmities are forgotten, when distrust and suspicion are allayed by the

be that a mere comparison of the signatures would have been sufficient to rebut the witness's testimony; but even if not, that it was the defendant's privilege to examine witnesses in regard to the genuineness of the signatures, and the production of the note was necessary for this purpose. *State v. Breckenridge*, 67 Iowa, 204, 25 N. W. 130. Two of the five judges dissented from this decision, the one who delivered the dissenting opinion stating that the evidence showed that the defendant had the note in his possession and delivered it to the witness (cashier of a bank) as collateral security, and that it was obtained from the bank by defendant's wife after the indictment was found. That the state, therefore, could not produce it, as it could not compel either the defendant or his wife to deliver it up, or produce it on the trial; and was, therefore, under the rule laid down by the majority, deprived of important testimony because it could not produce the instrument to which it refers, the instrument being in the possession, or under the control, of the defendant; and that such a rule ought not to obtain in any case. The decision, of course, is mainly to the effect that the evidence could not be given without the production of the note; but the implication is fair that all the members of the court assumed, and agreed, that, if the note had been produced, the evidence of the offense other than that charged in the indictment would have been properly admitted.

The defendant was indicted for forgery in uttering a forged deed of trust of the property of another person. Evidence was offered by the prosecution of the procuring by the defendant from a third person of a sum of money upon the security of a deed of trust of the property conveyed by said alleged forged deed, purporting to be executed by the grantee in such forged deed, which was objected to by the defendant as forming another and entirely distinct transaction, and as being neither admissible nor competent evidence to maintain either count of the indictment. The indictment charged the act to have been committed with intent to defraud the original owner. A request that, if the jury should find that the procuring of an advance of money from the person who had testified that he did advance it upon the security of the deed purporting to be executed by the grantee in the forged deed, was an utterance of the latter deed, and that the same was done to defraud the person who had advanced the money, 62 L. R. A.

the defendant could not be convicted on the count for uttering the said forged deed, was refused by the court. It was held that no error was committed, either in admitting the testimony of the latter transaction, or in refusing to charge as requested; and a motion for a new trial was denied. *United States v. Brooks*, 3 MacArthur, 315.

Where the prisoner, who was the stamp distributor of the Queen's bench division, was indicted for uttering three law forms with forged stamps impressed thereon, and it appeared that the forms which were the subject of the indictment were those ordinarily used by the stamp distributor of the exchequer division, and bore his particular mark; and that sometimes, in the process of stamping, a second sheet of paper was inadvertently placed under the sheet which was brought into contact with the die; that this second sheet would receive an impression, but of a fainter character, and one which could be distinguished from the impression made on the outer sheet; and these second sheets were called "blinds," and were never supposed to be issued by the stamping department, nor were they regarded as genuine dies,—evidence of several documents from the files of the Queen's bench division, which were on forms bearing the prisoner's particular mark, and the stamps on which were, in the opinion of an expert, forgeries of a similar character as those the subject of the indictment, is admissible to meet the defense that, when the prisoner sent to purchase genuine stamps, his messenger, either deceived by the guilty party, or in collusion with him, brought back "blinds," which were then innocently sold by the prisoner; and the facts so proved were rightly submitted to the jury as evidence of guilty knowledge. *Reg. v. Colclough*, 15 Cox C. C. 92, Ir. L. R. 10 C. L. 241.

On the trial of an indictment for uttering a forged note the prosecutor is at liberty to show other cases in which the prisoner had uttered forged notes, and likewise his conduct at the time of uttering them. But what he said or did at another time, collateral to such other utterings, cannot be given in evidence, as it is impossible that the prisoner could be prepared to combat it. *Phillips's Case*, 1 Lewin C. C. 105.

On the trial of an indictment for forgery, where it appeared that the prisoner uttered a bill of exchange purporting to be drawn by a certain person, and at the time of the uttering

higher and kindlier impulses of human nature. Was this poison sent by mistake or accident? Are not utter depravity, venomous malignity, murderous design, fiendish cunning, indelibly stamped upon every fact and circumstance connected with the act? It would be a travesty upon our jurisprudence to hold that, in a case of such appalling and transparent criminality, it could ever be deemed necessary or proper to resort to proof of extraneous crimes to anticipate the impossible defense of accident or mistake. The same irrefutable logic of fact and circumstance that establishes felonious intent as clearly negatives the possibility of accident or mistake.

Fourth. As to a common plan or scheme: It sometimes happens that two or more

crimes are committed by the same person in pursuance of a single design, or under circumstances which render it impossible to prove one without proving all. To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both. Underhill, in his work on Criminal Evidence (§ 88), thus states this exception to the general rule: "No separate and isolated crime can be given in evidence. In order that one crime may be relevant as evidence of another

represented that the drawer was then clerk at a railway station, which was untrue, it was held that similar statements made by the prisoner with reference to the drawer on previous occasions, when he applied to get another bill discounted, were admissible in evidence. *Reg. v. Nisbett*, 6 Cox C. C. 320.

Upon the trial of an indictment for forgery by uttering a forged check, it is material error to admit, as bearing upon the question of intent, other similar checks found upon the person of the defendant with the forged check counted upon, without proof that they were also forgeries. *People v. Altman*, 147 N. Y. 473, 42 N. E. 180.

Upon the trial of an indictment for uttering and publishing forged promissory notes evidence tending to show that defendant had had a questionable connection with another note was improperly admitted, when there was no evidence that such other note was forged, and when the note referred to was not produced, nor its absence accounted for. *State v. Saunders*, 68 Iowa, 370, 27 N. W. 455.

Upon the trial of an indictment for uttering a bill of exchange with a forged acceptance, knowing the acceptance to be forged, the prosecution proposed to give in evidence, for the purpose of showing guilty knowledge in the prisoner, other bills of exchange, precisely similar, with the same drawers' and acceptors' names, etc., passed by the prisoner to the prosecutor subsequently to the uttering charged in the indictment, which bills afterwards turned out to be forgeries, which was objected to by the prisoner on the ground that what occurred subsequently could not be given in evidence to show a previous guilty knowledge. The trial judge, after consulting with the Lord Chief Baron, was disposed to allow the evidence to be received, but said that he would reserve the point for the opinion of the judges; whereupon the prosecution declined to press the evidence. *Rex v. Smith*, 4 Car. & P. 411.

In a note to the above case it is stated that, "in the case of *Rex v. Taverner* (Carr. Supp. 195, *infra*, III. c. 14, (c)), which was tried at the Old Bailey in the year 1809, before Lord Ellenborough, Lord Chief Baron Thomson, and Mr. Justice Lawrence, the prisoner was indicted for uttering forged bank notes; and, to show a guilty knowledge, the prosecutors wished to prove the uttering of another forged note, five weeks after the uttering which was the subject of the indictment. It was objected that the

fact of the indictment. It was objected in that case, as it was by . . . [counsel for the prisoner] in the principal case, that only previous acts could show *quo animo* the thing was done. And the three learned judges who presided at the trial held 'that the evidence was not admissible, unless the latter uttering was in some way connected with the principal case, or it could be shown that the notes were of the same manufacture.'"

On the trial of an indictment for passing a forged instrument in writing, evidence that defendant had previously attempted to pass the same forged instrument upon another person is admissible for the purpose of showing the intent with which he subsequently passed the same upon the prosecuting witness. *Leslie v. State* (Tex. Crim. App.) 47 S. W. 387.

Upon the trial of an indictment for attempting to pass a forged check, evidence that defendant passed, about the same time, other forged checks, is admissible. *Steele v. People*, 45 Ill. 152; *Mallory v. State*, 37 Tex. Crim. Rep. 482, 36 S. W. 751.

(d) Making and uttering.

The fact of the false making, or the uttering, of an instrument shown to have been forged,—for the making and uttering of which the defendant is on trial,—having been shown, evidence of collateral forgeries, and uttering of forged instruments of like description, is admissible, as tending to show the intent with which the false making was done, or the guilty knowledge of the defendant in uttering the instruments named in the indictment. *Anson v. People*, 148 Ill. 494, 35 N. E. 145.

But the evidence of other forgeries, or uttering of forged instruments, is not admissible, and cannot be considered for the purpose of establishing the act of forging or uttering the instrument charged in the indictment as being forged or uttered. *Ibid*.

On the trial of an indictment for forging the name of a person to a draft, and for uttering and passing the draft knowing the same to be false and forged, evidence is admissible tending to establish the fact that the defendant murdered the person whose name was alleged to be forged previous to the date of the draft, as it is evident that the person whose name was alleged to have been forged had died before the day upon which the instrument bore date, and

er, the two must be connected as parts of a general and composite scheme or plan. Thus the movements of the accused prior to the instant of the crime are always relevant to show that he was making preparations to commit it. Hence, on a trial for homicide it is permissible to prove that the accused killed another person during the time he was preparing for or was in the act of committing the homicide for which he is on trial. And, generally, when several similar crimes occur near each other, either in time or locality,—as, for example, several burglaries or incendiary fires upon the same night,—it is relevant to show that the accused, being present at one of them, was present at the others if the crimes seem to be connected. Some connection between the crimes must be

shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received. This connection must clearly appear from the evidence. Whether any connection exists is a judicial question. If the court does not clearly perceive it, the accused should be given the benefit of the doubt, and the evidence should be rejected. The minds of the jurors must not be poisoned and prejudiced . . . by receiving evidence of this irrelevant and dangerous description." The compendium just quoted, of the exception now under discussion, is so accurate and concise that no other text writers will be cited, although there are many of them. There is, indeed, no room for discussion in regard to the general prin-

that the defendant knew of his death, and therefore tended to show that he knowingly passed a forged instrument; and the prosecution, having the undoubted right to prove these things, was not to be deprived of that right merely because the proving of the death involved evidence of the crime of murder against the defendant. *People v. Sanders*, 114 Cal. 216, 46 Pac. 153.

Upon the trial of an indictment charging the defendant with making and uttering a forged check, evidence that, when arrested, he had three other checks upon the same bank, and tending to show that the checks found upon him, and also two others passed by him about the same time as the one set out in the indictment, were forgeries, is admissible in order to show an intent to defraud by the forgery, and also to show knowledge on the part of the accused with reference to the particular document which he is charged with uttering. *Com. v. Russell*, 156 Mass. 106, 30 N. E. 763.

In a prosecution for forging and uttering a forged instrument, it is proper to prove that defendant had in his possession, or had uttered, other forged instruments of like kind, although not connected with the particular transaction, to prove guilty knowledge and intent. *State v. Allen*, 56 S. C. 495, 35 S. E. 204.

In a case of forgery and uttering a forged bill, a letter written by the prisoner to a third person, saying that that person's name is on another bill, and desiring him not to say that that bill is a forgery, is receivable in evidence, to show guilty knowledge; but the jury ought not to consider it as evidence that that other bill is forged, unless such bill is produced, and the forgery of it proved in the usual way. *Rex v. Forbes*, 7 Car. & P. 224.

Upon the trial of an indictment charging the defendant with the forgery of a deed, and also with uttering the same, other forged deeds, pretending to convey the title to the person whose name the defendant is charged with forging, are admissible in evidence, this being an exception to the general rule forbidding the introduction of testimony tending to establish the commission of an offense distinct from the offense for which the party is being tried,—which obtains in cases where knowledge, or intent, is a constituent element of the offense charged. *Heard v. State*, 9 Tex. App. 1.

State v. Southall, 77 Minn. 206, 70 N. W. 1007, *supra*, III. c. 7, and *State v. Prins*, 113 Iowa, 72, 84 N. W. 980, *infra*, XVI. a, 1, are 62 L. R. A.

also cases to the effect that evidence of another crime may be given to show intent or guilty knowledge in forgery.

As to evidences of other offenses for the purpose of showing common scheme, plan, or system in forgery cases, see *supra*, III. b, 3.

14. Counterfeiting.

(a) In general.

Counterfeiting is a species of forgery. The term is usually applied to the making and uttering false money, or forging bank notes which are the equivalent of money. This term is of more frequent use in the United States than in England, where it is generally mentioned and associated with other forgery; the latter term being used in a more comprehensive sense than here.

As to admission of evidence of other offenses for the purpose of showing common scheme, plan, or system in counterfeiting cases, see *supra*, III. b, 4.

(b) Making.

Upon the trial of an indictment for coining money some instruments calculated to coin money were offered in evidence to show the *quo animo* with which the coin was passed. This was objected to by the counsel for the prisoner, because it operated as a surprise to give in evidence coining instruments, when their possession, under the act, constitutes a distinct crime; and because, had the prisoner been apprised of their being introduced in evidence against him, by seeing them charged in the indictment, he might have been prepared to rebut the presumption of guilt arising from their possession by opposite proofs. It was held that the objection was properly overruled; that when a man is charged with coining and passing counterfeit coin, there can be no more direct mode of proving his guilt than by producing the instruments with which the coin was made, and that such proof would not operate as a surprise; that the connection between the offense and the instrument is such that the accused would naturally be prepared to account for the possession of the latter, when he came prepared to defend himself against the former. *State v. Antonio*, 3 Brev. 562.

Where it appeared on the trial of an indictment for counterfeiting a trademark by printing

ciples upon which evidence is admitted to show that a defendant is guilty of other felonies or misdemeanors than the one upon which he is tried. As stated in *People v. Sharp*, 107 N. Y. 467, 14 N. E. 344, "whether the evidence in any particular case comes within the well-known exceptions to the general rule is often the difficult question to solve, and not as to what the rule itself really is."

Before advertng to the facts and circumstances upon which the prosecution rests its claim that there is such a connection between the alleged killing of Barnet and the killing of Mrs. Adams as to justify proof of the former in support of the latter, we will pursue the course hitherto adopted, in citing some authorities upon which the prosecution

copies of the labels used by the owner of the trademark, that the defendant was engaged in the business of furnishing a large amount of spurious labels, evidence of the fact that there was found in his possession a large number of counterfeit labels, and that he was selling them secretly, and that he received an order to print them, and furnished a large quantity in pursuance of that order, was competent as showing that he knew they were spurious, and furnished and had them in his possession with a fraudulent intent. *People v. Molina*, 7 N. Y. Crim. Rep. 51, 10 N. Y. Supp. 130.

(c) Uttering.

Upon the trial of an indictment for uttering forged money, knowing it to be forged, evidence is properly received of former acts and transactions which tend to bring home the *scienter* to the defendant, notwithstanding such evidence may fix upon him other charges beside that on which he was tried. *State v. Twitty*, 9 N. C. (2 Hawks) 248. In this case the evidence was objected to on the ground that it must be confined to notes of the same kind, or purporting to have been issued by the same bank, as the one in question. The court refused to so restrict the evidence. But a new trial was granted upon other grounds.

Upon the trial of an indictment for uttering and putting off a counterfeit bank note, it is lawful to prove that the prisoner attempted to utter the note at different times and places, where it had been suspected and challenged as false. *State v. Smith*, 5 Day, 175, 5 Am. Dec. 132.

In *Langford v. State*, 33 Fla. 238, 14 So. 815, it was held that, on the trial of an indictment for forgery in uttering a counterfeit note, it is competent, in order to prove the *scienter*, to show that the prisoner has passed other counterfeit notes of a similar character, and that he has such in his possession; although this may be the foundation of other prosecutions, yet it affords evidence, and sometimes very strong evidence, of the knowledge of the falsity of the paper on which the indictment is founded.

Upon the trial of an indictment for passing counterfeit money, the principal witness on the part of the state testified that the defendant's wife sold to him a \$20 counterfeit bill belonging to the defendant, in his absence; but that the defendant subsequently was advised of the

rely, and which illustrate and limit the exceptions to the general rule. In *Goersen v. Com.* 99 Pa. 388, the deaths of the defendant's mother-in-law and wife, respectively, were connected by evidence tending to show defendant's design to obtain possession of their property. There was a single motive, intent, and purpose. In *Hester v. Com.* 85 Pa. 139, which is known as one of the *Molly Maguire Cases*, the defendants were on trial for a murder which had been preceded by a highway robbery in which they were implicated. Evidence was received to show that the defendants were members of a secret society which had for its object the commission of various crimes, such as beatings, arsons, robberies, and murders, and the protection of its members from arrest and pun-

transaction and sanctioned it. This was not the bill for the passing of which the defendant was indicted. It was held that the evidence was admissible as tending to show knowledge on the part of the defendant that the bill passed by himself was counterfeit, as the transactions were about the same time. *Bersch v. State*, 13 Ind. 434, 74 Am. Dec. 263.

On the trial of an indictment for passing counterfeit money, evidence that the defendant, on his way to the place where the crime was committed and afterward at different places, offered counterfeit bills of \$10 and \$20 in payment of small amounts, when at the same time he had small change more than sufficient for those small expenses; that, after arriving at the place where the bill was passed upon which the charge was made, he went around to different stores and offered counterfeit bank bills of \$10 and \$20 in payment of trifles which he purchased, receiving the difference in good money, —was competent to prove a *scienter* and intent. *State v. Van Houten*, 3 N. J. L. 672, 4 Am. Dec. 407.

In a prosecution for passing counterfeit money it is relevant, on the question of guilty knowledge, to show that on the same evening and in the same town there were other instances of the same offense, even though the person guilty of it could only be identified with respondent in general appearance. *People v. Clarkson*, 56 Mich. 164, 22 N. W. 258.

In the traverse of an indictment for forgery and passing counterfeit bills the public prosecutor may produce evidence that the prisoner passed spurious bills not laid in the indictment, for the purpose of establishing *scienter*. *Helm's Case*, 1 N. Y. City Hall Rec. 46; *Smith's Case*, 1 N. Y. City Hall Rec. 49.

On the trial of an indictment charging the defendant with passing counterfeit bank bills, it is competent to prove that he has passed other counterfeit paper, without producing it. If it be out of the jurisdiction of the court. *Reed v. State*, 15 Ohio, 217.

This case would seem to be at variance with *State v. Cole*, 19 Wis. 129, 88 Am. Dec. 679, *supra*, III. c. 13, (b), and *State v. Breckenridge*, 67 Iowa, 204, 25 N. W. 130, *supra*, III. c. 13, (c), and to support the theory of the two dissenting judges in the former case. And, as will be seen, it is at variance, also, with the two cases immediately following. And see *Rex v. Millard*, Russ. & R. C. C. 245, and *Dibble v.*

ishment by secreting them, aiding them to escape, and otherwise. This was held to be competent to show that the crime charged was within the scope of the purposes for which the conspirators were banded together, and to explain and corroborate other testimony which bore directly upon the commission of the crime charged. In *People v. Zucker*, 20 App. Div. 363, 46 N. Y. Supp. 766, Affirmed in 154 N. Y. 770, 49 N. E. 1102, the crime charged was arson in the first degree, for burning a building in New York city. It appeared that in August, 1891, the defendant had a house in New York city containing some furniture. The furniture was removed to a house in Newark, New Jersey. The defendant stated to an accomplice, who was a witness for the

prosecution, that his object in removing the furniture was to have it insured in the name of Seltzer, because he (the defendant) had been blacklisted by the insurance companies and could not get it insured in his own name. On January 4, 1892, the house in New York was burned, and a few days before that the furniture in Newark had also been burned. It was held that evidence in respect to the Newark fire was competent, upon the ground that both arsons were perpetrated with a single object and motive, and in pursuance of the same plan. The court said: "Where one crime is committed to prepare the way for another, and the commission of the second crime is made to depend upon the perpetration of the first, the two become connected and related transac-

People, 4 Park. Crim. Rep. 199, Affirmed in 3 Abb. App. Dec. 518,—*infra*.

In order to render admissible evidence that the prisoner passed other counterfeit bills than those laid in the indictment, for the purpose of establishing the *scienter*, such bills must be produced. *Smith's Case*, 4 N. Y. City Hall Rec. 166.

And in *People v. Lagrille*, 1 Wheeler C. C. 415, the court decided that proof of forging and uttering other forged paper of the same amount and denomination, before the court, might be given in evidence to prove the *scienter* of the notes laid in the indictment; but notes of a different bank and denomination, or even notes of the same bank of a different denomination, could not be given in evidence, unless the notes were produced before the court, or notice given to the prisoner to produce them, and he had failed to do so, after proving them in his possession.

On the trial of an indictment for uttering a false, forged, and counterfeit note purporting to be the note of a certain bank of Virginia, it is proper for the commonwealth to prove, upon the cross-examination of a witness for the prisoner, that the witness had passed to him a \$5 note which was said to be a counterfeit on one of the banks of Virginia, which bank he did not remember, and that the prisoner afterwards took that note back and gave him another note in lieu of it; as, in a prosecution for uttering counterfeit money or notes, evidence that the accused had, about the same period, passed other counterfeit money or notes, of the like kind, is admissible as tending to prove the *scienter*. *Martin v. Com.* 2 Leigh, 745.

In *Stalker v. State*, 9 Conn. 341, the public prosecutor, on an information for passing a counterfeit coin purporting to be a half dollar, knowing it to be counterfeit, offered evidence of the prisoner's having in his possession, at the same time, an engraved paper having the appearance of a bank note, but not purporting to be signed or countersigned, for the purpose of showing the guilty knowledge of the prisoner charged in the information. It was held that such evidence was inadmissible. But the court in this case said, among other things: "In order to show the guilty knowledge of the prisoner, evidence was admissible that he had uttered other base coin to other persons, on the same day or near the time. So the circumstance that the prisoner, at the time of uttering 62 L. R. A.

the half dollar, had other counterfeit coin,—especially if it was of the same description with that uttered,—is also evidence to the same purpose."

On the trial of an indictment for disposing of and putting away a forged note, which purported to be a promissory note of the governor and company of the Bank of England, knowing the same to be forged, proof was adduced that the note in question was forged, and that it had been uttered by the prisoner, so that the only remaining question was as to his guilty knowledge of the forgery. To establish this, evidence was offered, and admitted, that at a time preceding he had passed off a £10 Bank of England note, likewise forged, and of the same manufacture; and that there had been paid into the Bank of England various forged notes, dated previously to the time of the uttering of the forged note named in the indictment, all of the same manufacture and having different indorsements upon them in the handwriting of the prisoner. The prisoner was convicted, and sentence was respited for the purpose of taking the opinion of the twelve judges as to the admissibility of the evidence. Heath, J., who admitted the evidence upon the trial, afterwards delivered the opinion of the judges in an address to the prisoner previous to passing sentence upon him, in which he stated that, after mature deliberation, all of the judges were of the opinion that the evidence was admissible to prove the prisoner's knowledge that the note was forged; and on consideration that there could be very little doubt of the propriety of receiving it. *Rex v. Ball*, 1 Campb. 324, Russ. & K. C. C. 132, 2 Leach C. L. 987, note, 10 Revised Rep. 695.

In *Sunderland's Case*, 1 Lewin C. C. 102, the prisoner was indicted for uttering a forged Rochdale bank note. Two false £5 Bank of England notes, which were found upon his person, were given in evidence to show guilty knowledge. No objection was made by the prisoner's counsel, and no observation by the judge. A statement is made in the note that the counsel for the prosecution expected that the evidence would have been opposed, and was prepared to combat it.

Upon the trial of an indictment for disposing of, and putting away, a forged bank note knowing the same to be forged, after it has been proved that the prisoners put off the note stated in the indictment, and that the same was forged, evidence that the prisoners had before passed

tions, and proof of the commission of the first offense becomes relevant to show the motive for the perpetration of the second." In *Hope v. People*, 83 N. Y. 418, 38 Am. Rep. 460, the defendant was indicted and tried for the crime of robbery in the first degree. The evidence disclosed that a number of masked men entered the apartment of the janitor of a bank and forcibly took from him the key to the bank. The bank was burglarized on the same occasion. The two crimes were held to be so connected that evidence of the burglary was deemed competent to connect the defendant with the robbery. In *People v. Murphy*, 135 N. Y. 451, 32 N. E. 138, the defendant was convicted of the crime of arson in the third degree. The specific charge was that defendant had burned

a barn belonging to the man by whom he had been employed as coachman and gardener. The defendant had been discharged from this position. A poisonous preparation had been kept in the barn for use in destroying insects in the garden. The defendant knew of this. Evidence was received to show that on the night of the fire, and before it occurred, a span of horses, a pony, and a cow had been poisoned and died. This evidence was held competent as tending to prove that the injury to the animals was done by the incendiary, and as a part of the same criminal scheme which resulted in the destruction of the barn. In *Kramer v. Com.* 87 Pa. 301, the defendant was convicted of arson, in attempting to burn a hotel of which he had been an inmate. The evidence,

other forged notes to other persons is admissible in evidence to prove knowledge. *Rex v. Wylie*, 1 Bos. & P. N. R. 93, 2 Leach C. L. 983.

Upon the trial of an indictment for uttering a forged note on a banking company, commonly called a bank note, evidence of the uttering of other forged notes, purporting to be notes of the same denomination, on the same banking company, are admissible to show knowledge. *Reg. v. Green*, 3 Car. & K. 209.

In *State v. Van Houten*, 3 N. J. L. 672, 4 Am. Dec. 407, the defendant was indicted for uttering and publishing as true a counterfeit \$10 bank bill of the Bank of the United States. Upon the trial the Attorney General offered to prove that the defendant had passed other counterfeit bills the same evening that he passed the bill charged in the indictment, in the same city, at several stores, under very suspicious circumstances, and also at other places on the road the same day, which was objected to by the defendant on the ground that the facts offered to be proved were in no way connected with the crime charged against him; and second, that it would be giving in evidence a substantive offense, different from the one charged in the indictment. Of the three judges present, Kirkpatrick, Ch. J., was against the admission of the testimony. Russell, J., could not perceive any legal objection to the admission of the testimony. Pennington, J., was clearly of opinion that the whole of the conduct of the defendant from the time he left Newark, the day before he passed the bill at Trenton, until he was apprehended the same evening, was a proper subject of inquiry; not, however, to prove the fact that he passed the bill, or that the bill itself was counterfeit, but to prove his knowledge that it was counterfeit at the time of passing it, and the fraudulent and evil intent with which he did it. A note to the case says that this question had arisen at the Hunterdon oyer and terminer, at which the chief justice presided, when he decided as in the present case. It also had been raised at the Essex oyer and terminer, at which Pennington, Justice, presided, when he gave an opinion similar to the one he gave in this cause. In this cause, both the chief justice and Pennington, J., argued the question at some length; and, although the reporter (Judge Pennington) might be able to state from memory his own argument, yet, as he had not the argument of the chief justice, he was not sure it would be correct to give the 32 L. R. A.

opinion of one of the judges without the other, in a case circumstanced as the present case is.

In *State v. Petty*, Harp. L. 59, which was a trial for forging a bank note, the court permitted evidence to be given to the jury of the prisoner's having had other bills in his possession supposed to be forged. The court said: "On this ground, the court concur with the presiding judge. The question was, whether the prisoner passed the bill knowing it to be counterfeit. Any circumstances which went to show this knowledge are clearly admissible. What effect the testimony is to produce must be left to the jury, and would necessarily depend upon the degree of certainty in the evidence. How is this fact ever to be proved but by circumstances? And what circumstances can tend more strongly to prove that a man knew a bill to be forged, than his having other bills of a similar appearance (to the one proved to be a forgery) in his possession? It is said that it is taking the prisoner by surprise; that it is allowing proof of his having committed one crime to be given in evidence on the charge of another. But this is certainly a mistaken view of the subject; for it is no crime to have a forged bill in one's possession, although it may become a crime to pass it after it has been suspected. . . . But let it be admitted that it is a crime, yet, if the proof of it has a tendency to support the issue in the case before the court, it is admissible."

Upon the trial of an indictment for uttering and passing as true a certain false, forged, and counterfeit bank bill, evidence that the defendant swallowed another counterfeit bill which he had in his possession at the time of his arrest, after the commission of the offense alleged in the indictment, the bill being similar to those passed by him the evening before, was pertinent; for it tended to prove guilty knowledge and a guilty intent. *Com. v. Hall*, 4 Allen, 305. Whether the evidence allowed here showed another offense would depend upon the statute of the state, and, possibly, upon evidence that did not appear in the case, showing that he had the bill that he swallowed in his possession with a criminal intent of uttering the same, and therefore making it a crime. But whether this be so or not, the case is on a level with those where the evidence is held to be admissible whether it imputes another crime or not.

Upon the trial of an indictment for uttering and publishing counterfeit coin, proof of more

which was circumstantial, pointed to the defendant as the guilty person. Evidence was offered and received to show that two days after the first attempt, which had proved abortive, the defendant was apprehended with combustible materials in his possession, under circumstances which strongly indicated a second attempt at burning the hotel. The evidence was held to be competent to show a renewed purpose to accomplish the crime previously attempted, and to identify the person who made both attempts. In approving of this ruling the court quoted with approval the statement in *Shaffner v. Com.* 72 Pa. 63, 13 Am. Rep. 651, that, "to make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together

for some purpose he intended to accomplish, or it must be necessary to identify the person of the actor by a connection which shows that he who committed the one must have done the other." There are other cases where two or more crimes are so connected that it is impossible to distinguish them, and proof of all, in the effort to establish one, is a part of the *res gestæ*. Illustrations of this class will be found in *Brown v. Com.* 76 Pa. 319, in which defendant killed a man and his wife at the same time and place, under circumstances showing that both were committed by the same person; and in *People v. Foley*, 64 Mich. 148, 31 N. W. 94, where the defendant murdered his two children in the same bed and at the same time.

Without further multiplying the cases

than one uttering of similar coin by the party charged about the same time is admissible, though but one uttering is alleged in the indictment. *Tharp v. State*, 15 Ala. 749. The court stated that it was analogous to the rule that, if one be indicted for uttering a forged bank note, knowing it to be forged, it may be shown that other forged notes were uttered by the accused for the purpose of showing his knowledge of the forgery.

On a trial for passing a counterfeit bank note it appeared that the uttering was done while the prisoner and the prosecutor were gambling. The court admitted proof that the prisoner, on the same day, and at the same gambling sitting, passed as genuine, spurious, as distinguished from counterfeit, bank bills, and that he had several such bills, both signed and unsigned, in his possession, for the purpose of showing that he knowingly passed the counterfeit bill with the uttering of which he was charged. It was held that the evidence was competent, for the same reason that the passing of other counterfeit bills would have been competent, the notion upon which the admissibility of such testimony is based being the tendency of such evidence to prove that the prisoner is a dealer in such paper, caught in the very act of disposing of it, instead of the casual receiver and innocent passer of the particular bill traced back to him. *State v. Brown*, 4 R. I. 528, 70 Am. Dec. 168.

The prisoner was indicted for uttering base coin. It was proved that he had uttered a counterfeit shilling, and, in order to show guilty knowledge, the prosecution tendered in evidence the fact that five other counterfeit shillings had been found in his possession five days after. It was objected, on the part of the prisoner, that such evidence could not be received. The trial judge, after conferring with Alderson, B., held it to be admissible. *Rex v. Harrison*, 2 Lewin C. C. 118.

Upon the trial of an indictment for uttering counterfeit coin, in order to prove a guilty knowledge evidence may be given of a subsequent uttering by the prisoner of counterfeit coin of a different denomination to that mentioned in the indictment. The difference in the denomination of the coin goes to the weight of the evidence, but not to its admissibility. *Reg. v. Forster*, Dears. C. C. 456, 3 C. L. Rep. 681, 24 L. J. M. C. N. S. 134, 1 Jur. N. S. 407, 6 Cox C. C. 521.

On the trial of an indictment for passing a
62 L. R. A.

counterfeit notes, evidence may be given that the defendant passed similar counterfeit notes, in order to prove the guilty knowledge that the note in question was counterfeit. *United States v. Roudenbush*, Baldw. 514, Fed. Cas. No. 16,198.

But if an indictment is for passing a counterfeit note of a particular bank, evidence of passing a counterfeit note of another bank at another time is not admissible, or, if given without objection, the jury should be instructed not to consider it. *Ibid.*

So, after evidence that a note of the description laid in the indictment had been forged and passed, evidence may be given of delivering or passing other counterfeit notes on the same bank before or after passing the one in question. *United States v. Doeblen*, Baldw. 519, Fed. Cas. No. 14,977.

Where a prisoner had been convicted of disposing and putting away a £5 Bank of England note knowing it to be forged, with intent to defraud, at a subsequent term, at a meeting of all the judges (except Lord Ellenborough and Mansfield, Ch. J.), it was the unanimous opinion that, evidence having been left to the jury of forged bills uttered by the prisoner on other occasions which were not proved to have been forged, the prisoner should be recommended to mercy. Some of the judges seemed to think that, even if those bills had been clearly proved to have been forged bills, being bills of a different description and denomination than that on which he was indicted, they ought not to have been given in evidence; and some seemed to doubt, too, whether the distance of time (about four months) was not too great. *Rex v. Millard*, Russ. & R. C. C. 245.

In order to show a guilty knowledge, on an indictment for uttering forged bank notes, evidence of another uttering, subsequently to the one charged, is not admissible, unless the latter uttering was in some way connected with the principal case, or it can be shown that the notes were of the same manufacture; for only previous or contemporaneous acts can show *quo animo* a thing is done. *Rex v. Taverner*, Car. Supp. 195, Cited in note to *Rex v. Smith*, 4 Car. & P. 411. See *supra*, III. c. 13, (c).

In *State v. Odel*, decided by Brevard, J., in the constitutional court of Columbia April, 1816 (3 Brev. 552), the judge said: "The defendant has been indicted and convicted of passing counterfeit Spanish milled dollar, knowing it

which exemplify and support the exception to the general rule that extraneous crimes may be proved to establish the specific crime charged, when all are shown to have been committed in pursuance of a common design, or when they are so connected that evidence of one tends to prove the other, we will now quote from a single authority which clearly and succinctly prescribes the limitations of this exception, and the reasons for careful judicial discrimination in its application. In *Shaffner v. Com.* 72 Pa. 63, 13 Am. Rep. 651, the highest court of Pennsylvania said: "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish, or it must be necessary to

identify the person of the actor by a connection which shows that he who committed the one must have done the other. Without this obvious connection, it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence, it is obvious it should not be received unless the mind plainly perceives that the commission of the one tends, by a visible connection, to prove the commission of the other by the prisoner. If the evidence be so dubious that

to be counterfeited. The act under which he is indicted, after stating what coins shall be current in this state, declares any person who shall counterfeit, or alter, or attempt to pass, knowing them to be counterfeit, any of the aforesaid gold or silver coins, or shall make or keep in his or her possession any stamp, die, or mould for coining the same, shall be adjudged guilty of felony, etc. *Grimke*, 314. A motion is made for a new trial, on the ground that testimony was offered to prove that the defendant had said, some months before this transaction took place, speaking of other dollars, that he had made them. Also, that he had said, he had made and passed counterfeit dollars at 50 cents. It was also permitted to be proved that implements for counterfeiting were found in his possession. . . . With regard to the first, I am of opinion, the evidence ought not to have been received. *East* 1. C. 123. Evidence of facts which went to prove substantive distinct offenses, other than that with which the prisoner stood charged, ought not to have been admitted, unless it went directly to prove him guilty of that offense. *Fost.* C. L. 245, 246. Proof that he made this identical dollar would have been conclusive evidence that he knew it to be counterfeit, and, therefore, might have been proper. But proof that he made or passed any other dollar, or had implements for coining in his house, did not go to establish the fact that he knew this dollar to be counterfeit, and, therefore, was improper."

Upon the trial of an indictment for forgery and uttering a forged bank note and having the same in possession with intent to utter, evidence of a supposed attempt by the defendant, three years previously to the trial and the finding of the indictment, to utter forged bank notes of another bank, is manifestly illegal evidence, besides having a strong tendency to prejudice the minds of the jury against the defendant. *Morris v. State*, 8 *Smodes & M.* 762.

Before the district attorney can procure evidence that a prisoner, charged with uttering and having in his possession, with the intention of uttering, a particular bill, had in his possession and uttered counterfeit bills not laid in the indictment, it is incumbent on him to show that the prisoner actually passed, or had in his possession, the bill laid in the indictment; as proof of the *scienter* is not admissible before the principal charge is established. *Jones's Case*, 6 N. Y. City Hall Rec. 86.
62 L. R. A.

Upon a trial for passing counterfeit money, after the prosecution had proved that the prisoner passed the counterfeit note or bill described in the indictment, it proved by another witness that the prisoner, a day or two thereafter, passed a \$5 bill upon a peddler, and afterward another \$5 bill on another peddler. The witness could not tell the name of the bank by which the two bills the prisoner passed to the peddlers purported to have been issued. The bills were not produced at the trial, nor was there any evidence given to show that they were forged or counterfeit, except, when the bill was passed to the first peddler, a bystander said it was not good, and the second peddler, on seeing the defendant the second time, said that a postmaster told him the bill passed on him was bad; whereupon the prisoner took the bill back and gave the peddler the ring and small bills in change which he had received. It was held that this evidence was inadmissible, and did not in any way connect the passing of the bills to the peddlers with the passing of the one for which the defendant was indicted; and the judgment of conviction was, therefore, reversed. *Dibble v. People*, 4 *Park. Crim. Rep.* 199, *Affirmed* in 3 *Abb. App. Dec.* 518.

(d) *Possession with intent to utter.*

In support of an indictment for having counterfeit bank bills, with intent to pass them, knowing them to be false, evidence was admitted of previous declarations of the defendant showing that he was then engaged in the business of passing counterfeit money. The court held that the conversations of the defendant with the witness who testified to them were clearly competent and relevant to the issue. That one of the material points which it was necessary for the prosecution to make out was the guilty knowledge of the defendant respecting the bills found in his possession. That this is sometimes shown by evidence that the defendant has recently had in his possession other counterfeit money than that which is the subject of the indictment, and has offered to pass the same as true, and that such testimony is deemed to be admissible, although it may relate to a different kind of money from that which is described in the indictment; and it is held to be relevant, although several weeks, and even months, may have elapsed since such previous possession or attempt to pass. *Com. v. Edger-*

the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact carrying with it no proper evidence of the particular guilt." This statement voices the keynote of the distinction between the civil law and our own more merciful common law. Under the former there is no presumption of innocence. A mere official charge of crime puts the accused upon his defense. His history is an open book, every page of which may be read in evidence by the prosecution. Every crime or indiscretion of his life may be laid bare to feed the presumption of guilt. How different is our own common law, which is the product of all the wisdom and humanity of

all the ages! Under it the accused comes into a court of justice panoplied in the presumption of innocence, which shields him until his guilt is established beyond a reasonable doubt. His general character can be thrown into the balance by no one but himself. The incidents of his life, not connected with the crime charged, are his sacred possession. He faces his accuser in the light of a distinct charge, with the assurance that no other will be or can be proved against him.

Let us now endeavor to make a practical application of these principles to the case at bar, remembering that the subjects of motive, intent, accident, and mistake have already been discussed, and that the subject of identity remains for separate considera-

ly, 10 Allen, 184. In this case the conversation alluded to proved an admission or confession of the defendant that he was a dealer in counterfeit money, and had attempted to dispose of it as such to the witness; that it could not be doubted that a direct statement by the defendant, made previous to the transaction which formed the subject of the indictment, that he was accustomed to buy and sell counterfeit money, and was familiar with different kinds of forged notes or bills, would have been admissible as tending to prove the guilty knowledge of the defendant, and that the testimony introduced at the trial was, in effect, of this character, and it was competent as a confession or admission having a material bearing on one of the issues before the jury, without the aid of extrinsic facts to render it admissible.

Upon the trial of an indictment accusing the defendant of having in his possession a counterfeit bill on the Boston Bank with intent to utter and pass the same knowing it to be counterfeit, evidence that, eight days afterwards, the defendant had in his possession counterfeit bank bills on banks in Rhode Island and New Hampshire is admissible as bearing upon the question of guilty knowledge or intent. *Com. v. Price*, 10 Gray, 472, 71 Am. Dec. 668.

Upon the trial of an indictment for having in possession, for the purpose of selling, counterfeit bank notes, proof that other counterfeits were found secreted in the defendant's house, and in possession of his wife, is admissible to prove the guilty knowledge of the defendant. *Hess v. State*, 5 Ohio, 5, 22 Am. Dec. 676.

Defendants were jointly indicted for having in possession, with intention to pass, several counterfeit bank bills. A large quantity of counterfeit money on several banks and of the denomination stated in the indictment were found in the possession of one of the defendants. The other defendant told a witness that the defendant in whose possession the counterfeit money was found, and himself, were equally concerned in the business of passing counterfeit money. It was held that the possession of one was constructively the possession of the other, and the evidence of such possession was competent evidence against both on the question of intent and scienter. *Van Houton's Case*, 2 N. Y. City Hall Rec. 73.

On the trial of an indictment for having in possession a counterfeit bill on a certain bank with intent to utter or pass the same as true, 62 L. R. A.

knowing it to be false, and for having it in possession, with intent to sell or otherwise dispose of it, as a counterfeit bill, to be rendered current as true, the admission of evidence of a witness that the defendant sold the bill to him, and said to him that in about three weeks he would have a large amount of counterfeit bank bills on the City Bank of Montreal, together with evidence of another witness that he arrested the defendant three or four weeks afterwards, and found in his possession \$8,000 in \$10 counterfeit bills on the City Bank of Montreal, is error, as the defendant's having in possession a large amount of counterfeit bills so long a time after his statement to the first-named witness was not, in itself, a crime; and, if it had been, he was not on trial for that offense, and the evidence was calculated to prejudice the jury against him. *People v. Stewart*, 5 Mich. 243.

Upon the trial of an indictment alleging that the defendant had in his custody and possession a certain piece of false and counterfeit coin with intent then and there to pass the same as true, he then and there well knowing the same to be false and counterfeit, it is competent and proper, in order to show his guilty knowledge, to admit evidence of his other antecedent acts of passing similar coins, which were the subject of other indictments then pending. *Com. v. Stearns*, 10 Met. 256.

Upon a trial for counterfeiting coin and having the same in possession with intent to utter it, the counsel for the prosecution proceeded to inquire of a witness whether he found in the prisoner's possession counterfeit bank bills. This inquiry was objected to, upon the ground that having in possession counterfeit bank bills was a specific offense, different from either of the offenses contained in the indictment. The objection was overruled, and evidence was admitted that two counterfeit bills were found on one of the defendants. *Quinn's Case*, 6 N. Y. City Hall Rec. 63.

Reg. v. Weeks, 8 Cox C. C. 455, Leigh & C. 18, 30 L. J. M. C. N. S. 141, 7 Jur. N. S. 472, 4 L. T. N. S. 373, 9 Week. Rep. 553, was a case reserved by the trial judge for the opinion of the court of criminal appeal. The prisoner was indicted, along with others, for knowingly and without lawful excuse, feloniously having in their custody and possession a mould on which was impressed the figure and apparent resemblance of the obverse side of a half crown

tion. Mrs. Adams was killed on the 28th day of December, 1898. The cause of the latter's death was clearly established by evidence connected with a definite motive and unmistakable intent. The only mistake or accident that was possible did in fact happen. The intended victim innocently administered the poison to another. We are therefore to consider whether the killing of Mrs. Adams and the alleged killing of Barnet were part of a common plan or scheme, or were so connected that evidence of the death of Barnet and its cause tended to prove the murder of Mrs. Adams. Barnet died on the 10th day of November, 1898. Subsequent events proved that he died of mercuric poisoning. There was no evidence tending to connect the defendant with the sending of

the poison to Barnet, except the inference which may be drawn from the assumption that it was sent by mail, and this assumption is based upon the utterly incompetent statement of Barnet to his physicians. The motive for the alleged killing of Barnet is so distinct from the motive assigned for the crime charged in the indictment that a new and common motive is sought in the alleged forgeries of the defendant, and this, as we have seen, is the creation of counsel upon the argument of the appeal, never having been suggested upon the trial. The motive against Barnet, exploited upon the trial, was without the support of evidence, since a large part of the testimony upon that subject was stricken from the record. But, assuming for present purposes that the prosec-

Upon the trial it was proved that the prisoner had for about a month occupied a certain house. The police attacked the house, and two of the women, one of whom was the wife of the prisoner, snatched up something from the table, which they threw into the fire. The police overpowered the men in sufficient time to preserve a part of what the women were endeavoring to destroy. It proved to be a fragment of a plaster of Paris mould of a half crown. It was proved that the prisoner, thirteen days before the night in question, passed a bad half crown, but there was no evidence to show that the bad half crown which he passed had been made in the mould found in his house. In delivering the judgment of the court, Pollock, C. B., said: "We are all of opinion there was enough evidence to be left to the jury to enable them to say whether the mould was knowingly and feloniously, and without lawful excuse, in the custody and possession of the prisoner, and that the conviction for the felony must be affirmed. It was found in a house of which he was the master, and it was there apparently for a felonious purpose. In order to prove the *scienter*, evidence of other substantive offenses of any sort having a tendency to prove guilty knowledge may be given. If a man is charged with a commission of one felony, and his commission of another offense has a tendency to prove guilty knowledge on his part, no doubt you may give evidence of that fact collaterally."

In the following additional cases it is held that evidence of similar instances to that for which the accused is being tried may be received to prove intent or guilty knowledge: *Tharp v. State*, 15 Ala. 749; *Mount v. Com.* 1 Duv. 90; *State v. McAllister*, 24 Me. 139; *Com. v. Bigelow*, 8 Met. 235; *Com. v. Jefferies*, 7 Allen. 548, 83 Am. Dec. 712; *State v. Mix*, 15 Mo. 153; *Dougherty's Case*, 3 N. Y. City Hall Rec. 148, 4 N. Y. City Hall Rec. 166; *State v. Twitty*, 9 N. C. (2 Hawks) 248; *State v. Williams*, 2 Rich. L. 418, 45 Am. Dec. 741; *Peek v. State*, 2 Humph. 78; *Hendrick v. Com.* 5 Leigh, 707; *Com. v. Woodbury*, *Thacher Crim. Cas.* 47; *Kirkwood's Case*, 1 Lewin C. C. 103; *Martin's Case*, 1 Lewin C. C. 104.

15. Embezzlement.

Embezzlement is a species of larceny committed by a person acting in a fiduciary capacity, into whose possession the money or other property embezzled originally came lawfully, 62 L. R. A.

who afterwards wrongfully converts the same to his own or another's use without the consent of the owner.

In trials for embezzlement evidence of other contemporaneous acts of a similar character is competent for the purpose of showing a guilty intent, and to repel the inference or defense of accident or mistake.

As to admission of evidence of other offenses for purpose of showing common scheme, plan, or system, see *supra*, III. b, 5.

Upon the trial of a defendant upon an indictment for falsifying his accounts as United States marshal, other false accounts, made by the defendant at about the same time, may be introduced in evidence for the purpose of proving guilty knowledge. *United States v. Russell*, 19 Fed. 591.

Upon the trial of an indictment for making false returns for a certain quarter year, the prosecutor was allowed, against the objection of the defendant, to introduce in evidence, not only the false returns for that quarter, but other similar returns for other periods before and after the time covered by the indictment, all being in the handwriting of the defendant. It was held that there was no error in this ruling; that, where the question is one of fraudulent intent, it is allowable, as well in criminal, as in civil, cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. *United States v. Snyder*, 4 McCrary, 618, 14 Fed. 354.

The principle is well settled in Alabama that, on a trial in which an agent is charged with embezzling the funds of his principal which have come into his hands by virtue of his agency, his conversion of, and failure to account for, other sums of money similarly received in the line of his agency are competent testimony on the inquiry whether the act was done knowingly and intentionally. *Lang v. State*, 97 Ala. 41, 12 So. 183.

On the trial of a joint indictment charging an employee of a national bank with having unlawfully abstracted money from the bank, and the drawer of checks upon which the money was paid out with having aided and abetted in such abstraction, evidence to show that, while the second defendant had, apparently, a balance to his credit, as shown by the books, his account had in fact been overdrawn for years, is rele-

cution did in fact prove all that it sought to prove, it is impossible to perceive any legal connection between the two cases. Barnet was said to have been poisoned because he had interfered in the defendant's love affair. Cornish was to be poisoned because he had incurred the hatred of the defendant as the result of quarrels between them over club matters. Barnet died November 10th, and Mrs. Adams died seven weeks later. Let us suppose that the defendant, having a motive for the killing of Barnet, had shot and killed him in November, 1898, and that in darkness of night on the 28th day of December, 1898, some one had shot and killed Mrs. Adams while she was near to Cornish; that in a subsequent investigation it had transpired that defendant also had a different motive

for killing Cornish, thus creating the suspicion that the bullet which killed Mrs. Adams had been intended for Cornish,—could it be shown that the defendant shot Barnet to prove that he shot Mrs. Adams? The two deaths were caused by the same means, at different times, inspired by separate motives, and charged against one person. Is there any connection between the two crimes? It is said that the connection is established by the Barnet and Cornish letter-box correspondence. Let us assume for the present that the Barnet letters were competent for all the purposes for which they were used. Referring to the Barnet correspondence and its incidents, it appears that the defendant rented a letter box in the name of Barnet. Through it the letters addressed to Barnet

were sent, and the particular act was done demonstrated beyond all reasonable doubt."

Where the defendant had been convicted of the crime of embezzlement of public funds, as an officer, which he received as such officer for the use and benefit of a county, and fraudulently appropriated to his own use, evidence was admitted showing that defendant collected personal-property taxes from other parties, and failed to pay over or account for the money so collected. The court held that this evidence was admissible for the purpose of showing guilty knowledge and intent in the appropriation of the moneys alleged to have been embezzled. *People v. Cobler*, 108 Cal. 538, 41 Pac. 401.

Upon the trial of an indictment for embezzlement of public moneys the prosecution was allowed to prove, against the objections of the defendant, numerous other acts of embezzlement committed by the defendant, in addition to the one charged in the information. It was claimed on the part of the defendant that no evidence could be introduced on behalf of the people respecting any other crime than that charged. The court held that, as a general rule, such is undoubtedly so; but that there are exceptions to this general rule; that in the case at bar, the avowed object of the district attorney in introducing evidence of other acts of embezzlement of public moneys by the defendant was simply to prove a guilty knowledge and a criminal intent in the appropriation of the \$700 described in the information; and that there were numerous authorities holding that the evidence admitted was competent for that purpose. *People v. Gray*, 66 Cal. 271, 5 Pac. 240.

In *Reeves v. State*, 95 Ala. 31, 11 So. 158, the court said: "In embezzlement, generally, the very confidence and trust reposed furnish the most potent means for its accomplishment and effectual concealment, so that guilt can generally be established only by reasonable inferences drawn from the general course of conduct of such officer, agent, clerk, or servant with respect to the subject-matter of his trust, and from all the facts and circumstances surrounding his acts, which tend to throw light upon, or illustrate, their nature. *Ker v. People*, 110 Ill. 627, 51 Am. Rep. 706 [*infra*]. Again, upon this principle, evidence of other offenses similar to those charged in the indictment is admissible. A single act charged in an indictment, standing alone, might be susceptible of inferences of honesty of purpose, or of mere mistake, which, when viewed in the light of a long course of conduct and of repeated acts of a similar nature, intimately and directly connected with the particular accusation, would be utterly inconsistent with such inferences, and the fraudulent intent with which

62 L. R. A.

the particular act was done demonstrated beyond all reasonable doubt."

the crime of embezzlement of public funds, as an officer, which he received as such officer for the use and benefit of a county, and fraudulently appropriated to his own use, evidence was admitted showing that defendant collected personal-property taxes from other parties, and failed to pay over or account for the money so collected. The court held that this evidence was admissible for the purpose of showing guilty knowledge and intent in the appropriation of the moneys alleged to have been embezzled. *People v. Cobler*, 108 Cal. 538, 41 Pac. 401.

A statute of Florida provides that, upon the trial of an indictment for embezzlement, evidence might be given of any embezzlement committed within six months after the time stated in the indictment. Rev. Stat. § 2897.

In *Thalheim v. State*, 38 Fla. 169, 20 So. 938 the court, in holding that a fact or circumstance occurring prior to the time stated in the indictment might be admitted, where, taken into consideration with other evidence in the case, it tends to show a specific act of embezzlement within the period provided by the act, and is, therefore, proper to be received in evidence, said: "The authorities even go so far as to permit proof of other acts of embezzlement besides those put in issue by the indictment, when such acts tend to show the fraudulent intent of the defendant in committing the specific embezzlement for which he is being tried."

Defendant was indicted for embezzlement in converting to his own use, while treasurer of a railroad corporation, the funds of the corporation. A paper was drawn up by the defendant as a statement of all sums taken by him. He was indicted for the conversion of one item stated in that paper, of \$5,000. In holding that the other acts of a similar character, which were enumerated with the \$5,000 charged in the indictment, in the paper drawn up by the defendant, the sums were admissible in evidence to show the intent with which the act charged was committed. The court said: "The intent and purpose of the defendant, in the withdrawal of the sum of \$5,000 from the treasury of the corporation, and in the disposal and appropriation which he made of it, was an essential matter of inquiry in relation to the issue to be tried. His alleged guilt consisted, not merely in the conversion of the money, but in its fraudulent con-

were received. There is no suggestion of Cornish in the renting of the box, or in any of the communications which passed to and fro in the name of Barnet. When the defendant undertakes to describe a person who is not Barnet, as it is said he did in the "diagnosis blank," he describes himself. Seven months later, and six weeks after the death of Barnet, the defendant rents a letter box in the name of Cornish. This was the medium under cover of which the Cornish correspondence was sent and received. Neither in the renting of this box, nor in any of the letters addressed to, or written in the name of, Cornish, is there any reference to the Barnet case. Where is the connection between them? It is argued that it exists in the similarity of the methods em-

ployed in the two cases, and in the identity of the remedies written for in both names. It is true that "calthos" and "Kutnow" powder were found among the belongings of Barnet. The same things were found in the letter-box agency of Koch, addressed to Cornish, but placed in the wrong box, and therefore never delivered until given up to the police. What do these things prove? Simply this: That, if the same person was operating through both boxes, he was employing similar means for different ends, or for some common purpose not disclosed by this record. The methods referred to are as identical as any two shootings, stabbings, or assaults, but no more so. In this connection it may be well to remember that Kutnow powder was not written for in the name of

version to his own use. Hence, it was competent for the government to introduce evidence of any facts tending directly to show his fraudulent intent, or from which that intent might justly and reasonably be inferred. It was in this view that the government was permitted to lay before the jury proof of the embezzlement by the defendant of the several sums of money mentioned in the written statement which constituted a part of his confessions." *Com. v. Tuckerman*, 10 Gray, 173.

Where defendant was on trial for embezzlement by taking the money of his employer, there was evidence that, in a conversation subsequent to the alleged acts of embezzlement, the defendant admitted that he had been taking money from his employer "all along, ever since he began to work for him, but could not say how much he had taken." The judge instructed the jury that they should not consider this confession, unless it had reference to some of the specific matters charged in the indictment. It was held that this was certainly sufficiently favorable to the defendant, as testimony in reference to similar transactions is admissible to show the criminal intent of a party when other transactions of the same general character, and connected therewith, are investigated. *Com. v. Sawtelle*, 141 Mass. 140, 5 N. E. 312.

The prisoner, a member of a friendly society, was employed to receive the weekly payments made by the members. He gave correct receipts to the members, but omitted to enter in the contribution and cash books a large number of the sums so received. On being called upon for an explanation he admitted that he had received the sums so omitted. It was held that he was guilty of embezzlement, and that, upon the trial, these books which were tendered generally in evidence were properly received over the objection of the prisoner that the evidence must be confined to the three particular entries referring to the three charges in the indictment. This objection was, however, overruled, and the case left to the jury. *Reg. v. Proud, Leigh & C.* 97, 31 L. J. M. C. N. S. 71, 8 Jur. N. S. 142, 5 L. T. N. S. 331, 10 Week. Rep. 62, 9 Cox C. C. 22.

The prisoner was indicted for embezzlement. The evidence on the trial showed that it was the prisoner's duty to make out weekly accounts of the payments made by him, by entering them in a book, and adding them up at the end of each week. On three several occasions within

six months the prisoner entered the payments made by him correctly, but, in adding up the items, made the totals £2 greater than they really were, and took credit with his employers for the larger amount. These were the cases on which the indictment was founded. At the trial, evidence was tendered that on a series of occasions before and after those mentioned in the indictment precisely similar errors had been made by the prisoner, and advantage taken of them by him, which was objected to. It was held that, to explain motives and intentions, this evidence was admissible. *Reg. v. Richardson*, 2 Fost. & F. 343, 8 Cox C. C. 448.

An indictment charged a prisoner with having, as a booking clerk of certain steamship owners, embezzled the money of his master on three separate occasions, the charges being contained in three counts of the same indictment. In support of the first count, it was proved, among other things, that the prisoner received money for the carriage of animals by steamer, which it was his duty to pay over to his master's cashier, which he failed to do; in support of the second count, that he was supplied with a number of tickets for issue to passengers by his master's steamers, which purported to be numbered consecutively, but were not examined before they were delivered to him. The tickets were tied up in bundles, and were in the prisoner's charge, he alone having a key of the case in which they were kept. Certain tickets bearing numbers corresponding to the numbers of certain of the tickets in one of the bundles delivered to the prisoner, assuming such bundles to have been complete, were put in evidence, which tickets were stamped in a manner similar to other tickets which the prisoner had issued to passengers by one of the steamers, and which were notched as they would have been had they been used by passengers on board such steamer, and evidence was given that the prisoner had not handed over to the cashier any money in respect of such tickets. Evidence was also given in support of the third count, but upon this count the jury found the prisoner not guilty, while they convicted him upon the first and second counts. The jury were directed, as to the first count, that they might take into consideration the evidence given as to the prisoner's conduct in relation to the matters charged in the second and third counts; and, as to the second count, that, if they were of opinion from the whole of the evidence that the prisoner had issued the

Cornish until the 21st day of December, 1898, the very day on which the bottle holder was purchased which exactly fitted the bottle of bromo seltzer containing the poison sent to Cornish. This would indicate that when the Cornish letter was written, asking for a sample of Kutnow salts, the vehicle had already been chosen for the poison that was to be sent Cornish. While this fact would not necessarily be inconsistent with the poisoner's efforts to obtain other materials to effect his designs if the bromo seltzer should fail, it remains true that whatever was done in December had reference to the death of Cornish, and not of Barnett; the latter having died in November. It is also urged that the poison which caused the death of Mrs. Adams was one which

could only be secretly and successfully produced and administered by a person who had the requisite knowledge and skill, and therefore it was proper to show the use of the same poison in a previous case. Other evidence had been properly admitted to show that the defendant had the knowledge, skill, appliances, and opportunity to produce the poison used in the Adams case. It is as plain as that two and two make four that the man who could produce it in one case could do so in another. But the naked fact that the same means were used in the two cases simply proves that two distinct crimes may have been committed by the same person by similar means. There is not a fact or circumstance in the Barnett case that, taken by itself, legitimately tends to prove

tickets for money in the ordinary way, and taken the money he had received for his own use, making false entries in his books to conceal it, they might find him guilty. It was held that the jury were justified in presuming, from the evidence in support of the second count, that the prisoner had issued tickets and received money for them, which he had appropriated; and that they were at liberty, in order to arrive at a conclusion upon any one of the charges, to take into consideration the evidence given in support of the other charges, notwithstanding the fact that upon one of such charges they found a verdict of not guilty. *Reg. v. Stephens*, 58 L. T. N. S. 776, 16 Cox C. C. 387, 52 J. P. 823.

The indictment seems to have been framed under an act of Parliament permitting three distinct and different embezzlements to be united in one indictment. Lord Chief Justice Coleridge said: "I am of opinion that this conviction should be affirmed, and that there was no misdirection by the learned recorder. The indictment contains three separate charges of embezzlement of three separate sums on three separate occasions from the same masters, and, of course, separate evidence would have to be given upon each charge. Now, inasmuch as, if you could only indict a person in respect of one embezzlement in an indictment, it might easily be said to have arisen out of a mistake in his accounts, although there might really have been a number of other cases against him, the legislature very properly enables three separate charges to be included in the same indictment. If, therefore, any evidence tendered in the course of the trial was relative to any one of the charges, it was admissible in consequence of the express enactment of the act of Parliament; and in this case it is admitted that the evidence tendered in support of the first count was admissible, and rightly admitted, and that the recorder could not have rejected it had he been told that it would not go to prove the second or third counts. The evidence was clearly admissible when it was given, and it went to the jury, who had the three charges left to them, and were told that they must consider the three cases separately. They acquitted the prisoner on the third count, but found him guilty on the first and second counts." *Manisty, J.*, stated that he was of the same opinion, and declined to say anything except upon the allegation that there was a misdirection in tell-

ing the jury that they might take into consideration the evidence given in support of the second and third counts in considering the first count. He proceeded to say, further: "There were three counts, charging three embezzlements. As to the first count, the evidence was not sufficient to convict the prisoner. Now, in the first place, was the evidence admissible? I take it as a general rule that evidence ought to be confined to the particular issue upon which it is given; and here it is said there are three issues. But the general rule is subject to several exceptions, one of which is with a view of explaining the object and intention of the prisoner." He afterwards quoted the case of *Reg. v. Richardson*, 2 Fost. & F. 343, 8 Cox C. C. 448, *supra*, and stated that, while numbers of instances are given in illustration of the rule, he did not think he could refer to any case which put it more clearly than what Hawkins, J., said in his opinion, even if there had been no second or third count, but all the evidence offered was admissible on the issue raised on the first count of the indictment; that one of the essential ingredients of the indictment for embezzlement is, that the conversion of the money should be fraudulent, that the evidence was equally admissible if the second or third counts were struck out, for the jury were told that they were entitled to consider it, in order to show whether it was an accidental misappropriation or not; and that he did not like to call it an exception to the general rule, for he considered it was evidence directly applicable to the issue in order to prove fraud, and was clearly of opinion that the conviction was right and ought to be affirmed. The other judges were of the same opinion, and the conviction was affirmed. *Ibid.*

Upon the trial of an indictment against a member of a copartnership for receiving, on account of the partnership, three different sums of money, all charged, in three separate counts, to have been received within six months of each other, and embezzling the same, it appeared that it was his duty to receive money of the partnership, and, once a week, to render an account and pay over the gross amount received during the previous week. During each of three several weeks, within six months, the prisoner received various small sums, and failed to account for them at the end of the week, or to pay the gross amount, but embezzled the money. The court held that he might properly be charged with embezzling the weekly agree-

any essential fact in the Adams case until we come to the subject of the handwriting of the Barnet and Cornish letters, and that will be considered under the head of handwriting evidence.

Fifth. As to identity: Another exception to the general rule is that, when the evidence of an extraneous crime tends to identify the person who committed it as the same person who committed the crime charged in the indictment, it is admissible. There are not many reported cases in which this exception seems to have been affirmatively applied. A far larger number of cases, while distinctly recognizing its existence, have held it inapplicable to the particular facts then before the court. The reason for this is obvious. In the nature of things, there cannot be many cases where evidence of separate and

distinct crimes, with no unity or connection of motive, intent, or plan, will serve to legally identify the person who committed one as the same person who is guilty of the other. The very fact that it is much easier to believe in the guilt of an accused person when it is known or suspected that he has previously committed a similar crime proves the dangerous tendency of such evidence to convict, not upon the evidence of the crime charged, but upon the superadded evidence of the previous crime. Hence our courts have been proverbially careful to subject such evidence to the most rigid scrutiny, and have invariably excluded it in cases where its relevancy and competency were not clearly shown. As was said in *People v. Sharp*, 107 N. Y. 471, 14 N. E. 345, such evidence "tends necessarily and directly to load the

gates; that three acts of embezzlement of such weekly aggregates within three months might be charged and proved under one indictment; and that evidence of the small sums received during each week was admissible to show how these aggregates were made up. The court said that it was quite true that if a man receives a number of separate sums and has to account for each of them separately, only three instances of failure to account can be proved under one indictment. That thus, if there would be one on Monday and one on Tuesday and one on Wednesday, etc., only three defaults could be charged and proved; that, even in such a case, evidence of other instances might be given in order to show that the instances charged were not merely accidental, but that what was done was done intentionally and fraudulently. *Queen v. Balls*, L. R. 1 C. C. 328, 40 L. J. M. C. N. S. 148, 1 Moody C. C. 470, 12 Cox C. C. 96, 24 L. T. N. S. 760, 19 Week. Rep. 876.

On the trial of an indictment for embezzlement by the defendant, as clerk of the circuit court, of money received by him in his official capacity, belonging to the state, known as solicitors' fees, evidence was given, over the objection of the defendant, to prove the taking of fees other than those stated in the indictment. The evidence introduced by the state related to solicitors' fees on convictions of persons, other than those with which the solicitor elected to charge the defendant, and consisted of proof of the convictions of such persons, the collection of solicitors' fees by the sheriff, and the receipts of defendant for the same; also, of the transcript of the auditor's office of the reports of defendant, of the amount of solicitors' fees paid in the cases of conviction, and that no part thereof had been paid by defendant. The solicitors' fees thus reported accrued at the fall term of one year, and the spring and fall terms of the following year, of the circuit court. It was held that these facts showed that the proofs offered of other acts of embezzlement were entirely and directly connected with the particular accusation against defendant, and the evidence adduced to establish it; that they formed, to some extent, parts of one transaction, and were material to show the knowledge and intent with which the particular acts charged were committed, and tended to rebut any inference of accident or mistake. *Stanley v. State*, 88 Ala. 154, 7 So. 273.
62 L. R. A.

On a trial for embezzlement it is not error to permit the state, over the objections of the defendant, to introduce evidence tending to show separate and distinct acts of embezzlement as proof of the substantive offense charged, as such several acts are, in fact and in law, a single embezzlement and it is a satisfactory answer to the objection, that the evidence shows the crime to have been a continuing offense, committed by a trusted servant by means of a series of connected transactions, and in such case a charge of embezzlement on a certain day would cover and admit evidence of the whole. *Brown v. State*, 18 Ohio St. 496; *Ker v. People*, 110 Ill. 627, 51 Am. Rep. 706; *State v. Pratt*, 98 Mo. 482, 11 S. W. 977; *Campbell v. State*, 35 Ohio St. 70; *State v. Reinhart*, 26 Or. 466, 38 Pac. 822.

But in *Edelhoff v. State*, 5 Wyo. 19, 36 Pac. 627, which was an indictment for embezzlement, it was held that, where the evidence discloses that the embezzlement consisted of collecting rents monthly, from a tenant of the employer, and retaining the same, reporting monthly that the premises were vacant and unoccupied, there was a separate and distinct act of embezzlement at each monthly period; and, as the indictment charged but one offense, and the verdict fixed the amount embezzled as the whole sum of all the conversions, the verdict was erroneous as a conviction of several offenses when but one was charged. In laying down this proposition, the court said: "It seems to us that the offense of embezzlement was complete in each month, as all the elements of the crime were present, and the offense of embezzlement was complete. These monthly offenses were not dependent upon each other, and, taken together, do not constitute a single fact of one endeavor.

Neither was the offense a continuing one, as it presents none of the conditions of the old illustration,—that of a felonious taking of gas from a main or wine from a butt by means of a tube, where the felonious asportation was uninterrupted and continuous. The receipt of the money was shown; the report that the house for which the rent was collected was vacant, which was tantamount to a denial of the receipt of the money for it, the false accounting, and the failure to pay over or account for the money,—present for each month a clear case of embezzlement, and all the elements of the crime.

prisoner down with separate and distinct charges of past crime, which it cannot be supposed he is or will be in proper condition to meet or explain, and which necessarily tend to very gravely prejudice him in the minds of the jury upon the question of his guilt or innocence." Such evidence gives opportunity for the conviction of an accused person upon mere prejudice, instead of by evidence showing the actual commission of the crime for which a defendant is on trial. It compels a defendant to meet an accusation not charged in the indictment, which he might successfully refute if given the opportunity to do so unembarrassed by other issues.

Before applying the exception under discussion to the case at bar, let us examine a few authorities which illustrate the theory

upon which evidence of previous crimes is admissible to identify the person who is charged with the commission of the crime set forth in the indictment. In *People v. Rogers*, 71 Cal. 565, 12 Pac. 679, the defendant was convicted of a murder committed by him while burglariously entering the house of the deceased. Evidence was received tending to show that the defendant had committed a prior burglary at which he had stolen a knife and chisel, and still another burglary at which he had stolen a pistol. The evidence also tended to show that the burglary at the house of the deceased had been committed by means of the knife and chisel, and that the deceased had been killed with the pistol which the defendant had previously stolen. It will be seen at once that there was such a palpable connec-

Each transaction is separate and distinct, and in no manner dependent upon another."

This case would seem to be at odds with *Brown v. State*, 18 Ohio St. 496, and *State v. Reinhart*, 26 Or. 466, 38 Pac. 822, and the several other cases on the subject, before cited, and which an attempt is made to distinguish, with what success a reading of the case will exhibit. There is no doubt but that the weight of authority is to the effect that, where there are several frequent and continuous acts of embezzlement, they may all be given in evidence, and therefore the defendant may be convicted generally of the crime.

In *Kribs v. People*, 82 Ill. 425, which was a writ of error from the circuit court, where a conviction had been had for an embezzlement, the court said: "On the trial, the court allowed the people, over the objection of the defendant, to prove that the defendant had collected or received money belonging to other parties, and on several occasions, which he had fraudulently converted to his own use. This was error. The evidence should have been confined to the charge for which the defendant was indicted. On the trial of this indictment, the law did not require him to come prepared to meet other charges, nor does it follow, because he may have been guilty of other like offenses, that he was guilty of the offense charged in the indictment. The evidence should have been confined strictly to the offense charged in the indictment."

Upon the trial of an indictment charging the defendant with embezzling the money of a company while acting as an officer of the same, it was held error to permit the prosecution to show that the defendant, with a person claiming to act as president, had executed a deed conveying to a third person land belonging to the company for shares of the capital stock of the company, which stock at the time of such conveyance was worthless, for the purpose of defrauding the company. The court said that there was no fact in the record legitimately bearing upon the case being tried, which in the slightest manner was elucidated by this land transaction. That it was not in itself competent evidence tending to prove the embezzlement, and that it did not tend remotely to explain any material fact in the case. And that its effect, therefore, was to place the defendant before the jury as a corrupt man, capable of committing at least a fraud upon the rights of the company for which 62 L. R. A.

he was then secretary and treasurer. *Malcolmson v. State*, 25 Tex. App. 287, 8 S. W. 468.

The defendant was agent of an express company, and as such received into his hands money belonging to the company. It was his duty to send to the principal office weekly reports of the money-order business of his local office accompanied by the amount due the company. The defendant was indicted for the embezzlement of \$5,800 of the funds of the company. The embezzlement was alleged to have occurred on the 15th of April, 1889. It appeared that defendant had correctly reported the money-order business up to that date. It appeared, however, that the reports were delayed by defendant. Evidence of the disposition by defendant of money orders of the company for his own use prior to that date was admitted. It was held not to be error, as it tended to connect him with the subsequently discovered deficit. *Territory v. Meyer* (Ariz.) 24 Pac. 183.

By a statute of Minnesota, under an indictment for statutory larceny or embezzlement, the state may prove any and all acts of embezzlement by the defendant in the same employment, committed within six months next after the time stated in the indictment; and the defendant may be convicted of the whole. But, under such an indictment, evidence of acts of embezzlement committed prior to the time stated in the indictment is inadmissible as evidence of the substantive offense. It would only be admissible, if at all, for a collateral purpose; for example, the showing the intent with which the acts relied on as constituting the substantive offense were committed. *State v. Holmes*, 65 Minn. 230, 68 N. W. 11.

On a prosecution for embezzlement, evidence that defendant, two months after the offense charged in the information, embezzled another sum of money from his principal, is not admissible to show his intention in taking the first sum. *People v. Hill* (Cal.) 34 Pac. 854.

16. Receiving stolen property.

Receiving stolen property knowing it to be stolen is a crime in which, as its name implies, the guilty knowledge of the theft must be established to justify a conviction. It is for this reason that, on a trial for this offense, evidence of a former receipt by the accused of goods under circumstances showing knowledge of their

tion between the several crimes referred to that the identification of the means used in the commission of the crime charged, while incidentally proving the defendant guilty of other crimes, also directly identified him as the person who was guilty of the murder. In *Com. v. Choate*, 105 Mass. 451, the defendant, a ship joiner, was indicted for burning the buildings of one Ackerman. The charred remains of a box of peculiar construction and equipment were found on the ground beside one of these buildings. After the fire the defendant fled from the state. Soon thereafter his shop was searched, and certain tools and materials were found, which, upon inspection and comparison, tended to show that the box found at Ackerman's buildings had been made in the defendant's shop from the materials and with

the tools that were there. Another box of similar design, material, and workmanship had been previously found at a church near by, under conditions indicating an attempt at incendiarism. Comparison was made between the box first found and a piece of wood in defendant's shop, and it was shown that they had been originally parts of the same piece of wood. An anonymous letter which had been sent to the municipal authorities, threatening general incendiarism, was shown to have been written by the defendant. The admission of the evidence relating to the box found at the church was upheld on the ground that "it tended to show that the defendant was possessed of the requisite skill, materials, tools, and opportunity to have made the box used at the Ackerman fire," and, in connection with said letter, "to show

having been stolen is competent and admissible, though it establishes, or tends to establish, a distinct crime.

One of two defendants was charged in an indictment with stealing on a certain day a quantity of goods, the other prisoner with having received the aforesaid goods knowing them to have been stolen. The evidence against the latter of her having received the goods was, that many of them were found in her possession; that others were pledged with different pawnbrokers, both by herself and by other persons by her direction, at different times, for a period of between four or five months before her apprehension; that other parcels of the goods were sent by her to another woman; and that still other parcels were proved to have come into her possession at several distinct times. She admitted that all these things had been given to her by the other prisoner, who was charged with the theft, but she denied knowing them to have been stolen. Upon the objection of the counsel for the prisoner, the judge decided that, as to the prisoner charged with receiving them, as there was evidence that some of the things came at different times, these were several distinct acts of receiving; and that, therefore, as to her, the prosecution must elect what act of receiving they relied upon to support the felonious receiving; the prosecutor then elected to go, as to her, upon the receiving of two particular pieces of silk. In summing up the case to the jury the judge told them, among other things, that, unless they were satisfied that the prisoner charged with stealing stole one or both of the pieces of silk, they must acquit the prisoner charged with receiving; the judge also told the jury that, as to the prisoner charged with receiving, as it appeared that the different articles had all been taken from the house of the prosecutors, and had all come into her possession, they might take into consideration the circumstance of her having the various articles of stolen property in her possession, and pledging or otherwise disposing of them at various times,—as an ingredient in coming to a determination whether, when she received the two pieces of silk, she knew them, or either of them, to have been stolen. *Rex v. Dunn*, 1 Moody C. C. 146. *Car. Crim. Law*, 132.

Upon the trial of an indictment for feloniously receiving property knowing it to have been stolen, such property consisting of cloth,

where it was proved that the defendant was found in possession of it under circumstances which, it was claimed, showed an attempt to conceal such possession, evidence that the defendant's house had been searched within an hour after the property named in the indictment was found in his possession, and that upon this search two other pieces of cloth were found in the house; and that, three months previous, the defendant had been in possession of two more pieces of cloth; and that the four pieces of cloth had been stolen more than three months previous from another mill than that from which the property mentioned in the indictment was stolen, and were the property of different owners, no one of whom was connected with the owner of the cloth mentioned in the indictment,—is inadmissible for any purpose, as the possession of stolen property is evidence, *prima facie*, not of the receiving, but of stealing, and to admit such evidence in a case like the present would be to allow a prosecutor, in order to make out that a defendant had received property with a guilty knowledge, to show that he had three months previous stolen some other property from another place belonging to other persons. *Reg. v. Oddy*, 2 Den. C. C. 264, 5 Cox C. C. 210, 20 L. J. M. C. N. S. 198, 15 Jur. 517, Temple & M. 593.

A section of a statute provided that, "where proceedings are taken against any person for having received goods, knowing them to be stolen, or for having in his possession stolen property, evidence may be given, at any stage of the proceedings, that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen, which forms the subject of proceedings taken against him." The prisoner was indicted for receiving stolen goods. To show guilty knowledge evidence was tendered, under this statute, to show that, a short time previously, the prisoner had sold for half its value, and had otherwise disposed of, other property stolen within the preceding period of twelve months. It was held that the words of the statute did not extend to such evidence, which was, therefore, inadmissible. *Reg. v. Drage*, 14 Cox C. C. 85; *Reg. v. Carter*, L. R. 12 Q. B. Div. 522, 53 L. J. M. C. N. S. 96, 15

that the defendant made both boxes with the single motive" expressed in the letter. As proof of the crime there charged depended wholly upon circumstantial evidence, the mere finding of the box at Ackerman's buildings was not sufficient to establish either motive or intent. Evidence of other attempts at arson was therefore necessary and competent to establish these essential elements of the crime charged. Such evidence was, of course, not rendered incompetent because it also tended to identify the defendant as the person who was guilty of that crime. In *Hope v. People*, 83 N. Y. 418, 38 Am. Rep. 460, a robbery committed by masked men was followed by burglary of a bank. The janitor of the bank had been robbed of the key thereto by these men. Evidence of the burglary was held proper to

identify those known to have been implicated therein with the persons who had committed the robbery. In *Rea v. Clewes*, 4 Car. & P. 221, a nisi prius case, imperfectly reported, there was a question of identity. A. was indicted for the murder of H. The theory of the prosecution was that A., having malice against P., hired H. to murder him; that H. having committed the murder, but having been detected in the act, A. murdered H. to prevent the discovery of his (A.'s) guilt. In each of the last two cases there was an immediate and direct connection between the crime charged and the extraneous crime proved. In the first case the burglary of the bank, by men who were known, with the key of which the janitor had been robbed, directly identified the burglars as the masked men who but a moment before

Cox C. C. 448, 50 L. T. N. S. 432, 596, 32 Week. Rep. 663, 58 J. P. 456.

Upon the trial of an indictment for receiving stolen property, knowing it to have been stolen, evidence that the accused has frequently received similar articles of property, under like circumstances, from the same thief, stolen from the same person or place, knowing that they were stolen, is proper upon the question of guilty knowledge. The court said that, if a person has frequently received articles of property of a particular kind from another, knowing that such other person stole them from a particular person or place, and he is offered on a subsequent occasion similar articles by the same person and under like circumstances, it does directly tend to establish that the articles thus offered were also known to be stolen; that it is a natural and necessary inference, and one which every reasonable man would draw, and is an inference derived from the laws of human action. *Copperman v. People*, 56 N. Y. 591.

Where the accused is a pawnbroker, evidence of prior purchases by him of similar stolen articles to those alleged in the indictment is not incompetent, because it establishes that the accused was also guilty of violating another statute, or an ordinance prohibiting licensed pawnbrokers from buying property. *Ibid.*

Upon the trial of an indictment for receiving stolen goods, when it appears that the defendant is in the habit of buying different kinds of property, some of it legitimately and honestly, the wrongful act in receiving one article is not competent to prove a criminal intent in receiving another, differing in time, kind of property, the person from whom stolen, and the person from whom received. *Coleman v. People*, 55 N. Y. 81.

Where, upon the trial of an indictment for receiving stolen goods, evidence was admitted of a stealing of iron of a similar description and like kind to the iron mentioned in the indictment, from the same owners and prosecutors, but a short time before the transaction under investigation, and of the purchase of the iron by the accused for a very inadequate price, with actual knowledge that it was stolen; it was held that, within all of the cases, the evidence was competent. *Coleman v. People*, 58 N. Y. 555.

On a prosecution for receiving a stolen cow-hide from four boys all under fourteen, evidence 62 L. R. A.

that the defendant had bought of the same boys another stolen hide a few days before, and had told them at that time that he would buy all they could bring, was competent to show knowledge by the defendant that the hide in question was stolen property. *People v. Doty*, 73 App. Div. 78, 76 N. Y. Supp. 630.

The fact that the evidence showed that the previous purchase was of property of a person other than the owner of the property for receiving which accused was on trial, although mentioned, was not made conspicuous, either in the statement of facts or the opinion. But, on appeal to the court of appeals, the question whether evidence of the receipt of the property of such other person was admissible, was the sole object of discussion, and it was held that it was; it appearing that the thieves from whom it was received were young boys who would not be likely to be in the legitimate possession of it; and that in each instance the property was of the same kind and character, and a price grossly inadequate to its actual value was paid for it by the accused. Two of the seven judges dissented from this view. 175 N. Y. 164, 67 N. E. 303.

Upon the trial of an indictment for the crime of receiving stolen goods the state, in the examination of a witness, was permitted to inquire into a transaction between him and defendant with reference to other stolen property, at a time antedating the commission of the crime charged, and the same line of examination was permitted as to another witness. And in an instruction given by the court the jury were told, in substance, that they might consider these transactions for the purpose of determining whether defendant received the goods in question with knowledge of their having been stolen. It was held that there was no doubt of the correctness of this procedure. That it was certainly competent to show the previous course of dealing between these parties; for, if the defendant had, prior to the time in question, been receiving from these men property which he knew to have been stolen, it certainly tended to show his knowledge that these particular goods were stolen. *State v. Feuerhaken*, 96 Iowa, 299, 65 N. W. 299.

Where the defendant was indicted for receiving and buying property stolen from a railroad company knowing it to be stolen, after the state had proved that another person had stolen

committed the robbery which was charged in the indictment. In the second case, proof that the defendant hired H. to murder P., and that H. was detected in the act, was cogent evidence that the same man who had hired the assassin had a motive for getting rid of him when his confession seemed imminent.

What is there in the evidence of the alleged killing of Barnet that tends to identify the defendant as the person who poisoned Mrs. Adams? Assuming Barnet to have been killed by the defendant, the crime has its own separate motive, intent, and plan. This is equally true of the crime charged in the indictment. The mere fact that the two crimes are parallel as to the methods and means employed in their execution does not serve to identify the defendant as the poi-

soner of Mrs. Adams, unless his guilt of the latter crime may be inferred from its similarity to the former. Such an inference might be justified if it had been shown conclusively that the defendant had killed Barnet, and that no other person could have killed Mrs. Adams. But no such evidence was given. The evidence tended to show that the defendant had the knowledge, skill, and material to produce the poison which was sent to Cornish. But he was not shown to be the only person possessed of this knowledge, skill, and material. Indeed, it is common knowledge that there are many such persons. Therefore the naked similarity of these crimes proves nothing. It is said that the renting by the defendant of two letter boxes, one in the name of Barnet and the other in the name of Cornish, and the cor-

it from the company and sold it to the defendant under its value, informing her at the time that the property had been stolen, evidence that the same person had previously sold to the defendant other goods which she knew were stolen, was held to be clearly admissible as a circumstance tending to show that the defendant knew that the goods for the receipt of which she was on trial had likewise been stolen,—especially when taken in connection with other circumstances, such as that the goods mentioned in the indictment were sold under value, received at night, or concealed. *Shriedley v. State*, 23 Ohio St. 130.

On the trial of an indictment of two, one for stealing and another for receiving, a quantity of lead, the property of a railroad company, from a hotel, where the first-mentioned prisoner pleaded guilty to the larceny, evidence by a woman that the two prisoners had on various occasions sold portions of lead to her of the same description as that produced in court; that on seven occasions the prisoners had come together; that they were apprehended together on the last occasion; and that she had disposed of all the lead with the exception of that brought by them on the last occasion, but that it was all of a similar description; and that she paid the money to one or the other of them on each of those occasions,—is admissible; and the jury may take the same into consideration in forming their conclusion as to the guilty knowledge of the person charged with receiving. *Reg. v. Nicholls*, 1 *Fost. & F.* 51.

Defendant was convicted on an indictment for receiving stolen goods. Upon a petition for a new trial it appeared that the person who stole the goods was a shipping clerk in the employ of a corporation which owned the goods for receiving which the defendant was convicted, which corporation was located in Newport; that defendant had a place of business in Providence; that the employee, after stealing the goods in question, sent them by express, under a previous arrangement between him and the defendant, to the latter at his place of business in Providence. The petition for new trial was based solely on the ground that, for the purpose of showing guilty knowledge on the part of the defendant, the trial court wrongfully admitted in evidence the books of the express company to show shipments of other goods to the defendant on days when the sale book of the Newport firm

did not show sales to the defendant, the claim on the part of the state being that these were all criminal transactions like the principal one alleged, fixing guilty knowledge as to that upon the defendant. These shipments were under dates of November 12, November 21, December 12, and December 22, 1891. There was no evidence that the goods were ever under the control, or in the possession, of the defendant in Newport, except that they were delivered to the express company in the manner aforesaid; and there was no direct evidence that these particular shipments had been received by the defendant. The particular transaction charged in the indictment was laid on the 6th day of January, 1892. It was held that, for the purpose of showing guilty knowledge on the part of the defendant, it was competent for the prosecution to offer proof of similar transactions shortly prior thereto; and that, in view of the previous fraudulent arrangement which was shown to have existed between the employee and the defendant, the jury might properly have inferred, in the absence of any proof to the contrary, that such shipments of goods were duly received by the defendant. *State v. Habib*, 18 R. I. 558, 30 *Atl.* 462.

On the trial of an indictment for receiving stolen goods, knowing them to have been stolen, it is proper for the prosecution to prove acts of receiving goods stolen from the same person other than those described in the indictment, in order to show guilty knowledge on the part of the defendant. *Com. v. Johnson*, 133 Pa. 203, 19 *Atl.* 403. In this case, as in the one immediately preceding, the original larceny was committed by an employee of the prosecutor.

Defendant was convicted upon a count in an indictment charging him with receiving stolen property knowing the same to have been stolen. It appeared from the evidence that, at the time the defendant received the animal described in the indictment, he, together with another, received two other animals from the same person, and all three animals were stolen property at the time the defendant and the other person came into possession of them; and when found in their possession had been rebranded,—that is, new and different brands had been placed upon them, covering and changing the old brand. Defendant objected to all of the testimony in relation to the two animals not mentioned in the indictment, he being charged with respect

respondence which passed through them, proves that the man who rented both boxes and carried on the correspondence is the same man who committed both murders. Let us see how logical this deduction is. As we have shown, there is nothing in common between the subject-matter of the Barnet correspondence and the Cornish correspondence except the fact that in the main it all relates to advertised remedies for impotence. There is one letter in each series in which the writer sends for "calthos." One Cornish letter asks for a sample of Kutnow powder. A box of this powder is found in the Barnet letter box, and another is found in the Cornish letter box. Assuming Barnet to have been poisoned with cyanide of mercury contained in Kutnow powder administered to or taken by him, it is clear that the package

found in the Barnet letter box did not contain the powder used for that purpose, and it is equally clear that no one is shown to have written for Kutnow powder in the name of Barnet. The Kutnow powder found in the Cornish letter box could not have been placed there until after the poisoner had decided to use bromo seltzer in the Cornish case, for the bottle holder was purchased on the same day that the Cornish letter box was rented, and that was seven weeks after the death of Barnet. All that is shown by the character of this correspondence is that defendant used the names of Barnet and Cornish to carry it on, and that it related generally to a common subject not connected with either of the alleged murders. As the contents of none of the letters in the one series contain any reference to or throw any

to only one of said animals, which objections were overruled, and he excepted. It was held that the testimony was properly admitted for the purpose of proving the fraudulent intent on the part of the defendant with respect to the animal named in the indictment, and knowledge on his part, at the time he received it, that it was stolen property. *Harwell v. State*, 22 Tex. App. 251, 2 S. W. 606.

Upon the trial of a defendant charged in the information with stealing a horse, the state having claimed and offered evidence to prove that the horse was actually stolen on a certain date by another person, by the procurement and direction of the defendant; and having further claimed that, if the defendant was not chargeable with the actual theft, he, yet, afterward received the horse from such person on a subsequent date and concealed it knowing that it had been stolen:—this was objected to by the defendant upon the ground that, the information charging in a single count that the defendant stole the horse, the state's attorney could not offer evidence of his receiving and concealing it knowing it had been stolen; second, that he could not be tried on this information for the distinct and separate offense of criminally receiving a horse at a different time and place from that specified in the information, and without being charged with the last-named offense. The state then offered to prove that, in May next previous to the stealing of the horse, the brother of the person who stole the horse, and another person, broke open the smokehouse of a third person in another place in the same county, and took therefrom five hams, and, after concealing them over night, on the following day, in company with his brother who stole the horse, carried them to the defendant's house, and sold them to him, and at the same time communicated to him all the circumstances of the stealing of them, and that the proceeds of the sale were then and there divided with the other person who broke open the smoke-house. In holding that this evidence was admissible, the court said: "Again, it is claimed that the court erred in receiving evidence tending to show knowledge on the part of the defendant that the property in question had been stolen, by showing that he had previously received other stolen goods from the principal perpetrator in this case, knowing that they had been stolen. We see no error in this. We have nothing to
62 L. R. A.

do with the question of fact which the counsel for the defendant attempts to raise, whether the principal thief in this case was or was not concerned in the stealing and delivery of the stolen property to which the admitted evidence related. It is sufficient that the state claimed on the trial that he was concerned in both transactions, and that the question of fact was submitted to the jury. All that the court below had to determine was, whether guilty knowledge could properly be proved in the manner proposed; and we have no doubt that the ruling of the court was correct." *State v. Ward*, 49 Conn. 429.

On a trial for receiving stolen horses knowing them to have been stolen, evidence tending to prove that in other transactions, and at other times than the one being investigated, the defendants had received horses and other stolen property from a witness testifying on behalf of the state, where it appeared that such witness had previously stolen horses and delivered them to defendants by agreement with them, and also that such witness accompanied the person who stole the horses for the receiving of which the defendants were being tried, and was present and assisted in the delivery of such horses to the defendants, is competent. *Goldsberry v. State* (Neb.) 92 N. W. 906.

On the trial of an indictment for receiving stolen property evidence of receiving other stolen property by the defendant than that charged in the indictment is admissible as tending to show a systematic plan on defendant's part to commit the crime charged. *Morgan v. State*, 31 Tex. Crim. Rep. 1, 18 S. W. 647.

On the trial of an issue for receiving stolen goods, other acts of receiving, not so far removed in point of time or circumstance from the specific act charged in the indictment as to constitute a totally distinct transaction, may be given in evidence to establish the fact of guilty knowledge. So held in a case where the defendant was indicted for receiving and disposing of a horse knowing the same, at the time, to have been stolen, where upon the trial, and to show guilty knowledge, evidence of other instances of receiving by the defendant from the same party, and trading off, other stolen horses some months prior to the one charged in the indictment, was admitted against objection by defendant. *Com. v. Charles*, 2 Luxerne Legal Reg. 137.

light upon the matters referred to in the other series, it is difficult to understand how the letters in the Barnet series tend to identify the murderer of Mrs. Adams. As briefly as possible, we have discussed each of the five foregoing exceptions to the general rule in the effort to exclude them, one by one, from application to the case at bar. If, as we think, we have successfully eliminated each of them, then they are all removed from the case, and it necessarily follows that none of the evidence tending to prove the poisoning of Barnet was relevant or competent to prove the murder of Mrs. Adams.

Before leaving this point it may be added that, even if the evidence relating to the death of Barnet were generally competent for the purpose of proving the murder of Mrs. Adams, yet there was fatal error in the

admission of the statements made by Dr. Douglass as to what Barnet had told him with reference to receiving the box of Kutnow powder by mail. This evidence was clearly incompetent. It may be conceded for the purposes of this discussion that, when evidence of an extraneous crime is admissible to prove the crime for which a defendant is on trial, it is not necessary to prove every fact and circumstance relating to the extraneous crime that would be essential to sustain a conviction thereof. But it cannot require serious argument to show that such evidence, to be admissible, must be relevant and competent to the issue on trial. There was therefore no competent testimony in the case that Barnet ever received Kutnow powder through the mail, and as there was nothing in the Barnet correspondence to show

Upon the trial of an indictment for receiving stolen property knowing the same to have been stolen, evidence of the receiving by the defendant, of other stolen property, than that charged in the indictment, is competent, and admissible for the purpose of showing the intent of the defendant with reference to receiving the property mentioned in the indictment. *Devoto v. Com.* 3 Met. (Ky.) 417; *People v. Rando*, 3 Park. Crim. Rep. 335; *State v. Crawford*, 39 S. C. 343, 17 S. E. 799; *Morgan v. State*, 31 Tex. Crim. Rep. 1, 18 S. W. 647.

Upon the trial of an indictment for receiving stolen goods knowing that they were stolen, the district attorney was going on to prove the receipt of part of the articles by the defendants, at sundry times, from the hand of the person who stole them, when it was objected by the defendant that there was but one count in the indictment; and that on a charge against the prisoners, of a specific act, it was incompetent for the district attorney to show a different one, in order to prove the reception of some of the articles by the defendants. The court was of opinion that the counsel for the prosecution ought to be confined in its proof to the charges laid in the indictment. *People v. Green*, 1 Wheeler C. C. 152.

A store was broken open, and a number of cigars were stolen therefrom. The defendant was indicted for receiving the cigars knowing them to have been stolen. A witness swore that he and two others committed the larceny. At the trial one of the two other persons also testified that he knew of defendant receiving stolen goods from what he heard him say before the larceny. This was at defendant's hotel, and this latter witness was talking with him about receiving stolen goods, about securing the goods; that he couldn't tell what defendant did say, but he acknowledged that he took them. It was held that this testimony was too vague, and should not have been received. *Kilrow v. Com.* 89 Pa. 480.

The inference is that, if the evidence had shown that the defendant had said with reasonable precision that he had previously received stolen goods, it would have been competent.

17. Miscellaneous crimes.

When it is material to show the intent with which the particular act or acts charged were

done in a criminal case, evidence of another similar act, or other similar acts, though in itself, or of themselves, constituting a criminal offense may be given. *Brown v. State*, 108 Ala. 18, 18 So. 811.

In a prosecution for an assault with intent to commit sodomy upon the person of another, perpetrated upon a moving train, evidence is admissible of a prior assault committed upon the same train a couple of hours previously, although made in another state, for the purpose of showing the defendant's real intention in making the second assault. *State v. Place*, 5 Wash. 773, 32 Pac. 736.

On a trial for aggravated assault by an adult made upon a female child, evidence of like assaults on other occasions is admissible upon the question of intent of accused. *Rogers v. State*, 40 Tex. Crim. Rep. 355, 50 S. W. 338.

Upon the trial of an indictment for wrongfully obtaining, receiving, and converting money of a county with intent to defraud the county, in that defendant received from the supervisors, for a bill claimed to be due to the superintendent of an orphan asylum, an amount which exceeded by \$400 the sum actually paid by defendant to the asylum, it was held by one justice, two only taking part in the decision, that a like transaction occurring the following year, whereby the defendant obtained \$300 by means of another increase of the amount of the audit of the bill of the same asylum for that year, was competent evidence upon the question of guilty knowledge. The other justice held that it was not. *People v. DeGraff*, 5 N. Y. Crim. Rep. 561, 6 N. Y. S. R. 412. The judgment in this case was reversed by the agreement of the justices upon another question.

On the trial of an indictment for accusing a person of an unnatural crime with intent to extort money,—the prisoner being a soldier, and the accusation having been made while he was on duty as sentry,—evidence of a declaration made by him on a former occasion, on coming off guard, that he had obtained money from a gentleman by threatening to take him to the guardhouse and accuse him of an unnatural crime, was held admissible. *Reg. v. Cooper*, 3 Cox C. C. 547.

Upon an appeal from a conviction and sentence for the crime of perjury the court held that, while it was true that the jury could not consider any other perjury than that assigned, for

that the defendant had ever written for Kutnow powder in the name of Barnet or in any other name until the Cornish letter of December 22, 1898, was written, the record is barren of evidence which tends to connect the defendant with the killing of Barnet. At this point it is proper to observe, also, that even if it could have been proper to prove two distinct crimes, with separate motives, there was an utter absence of evidence of motive in the *Barnet Case*. The evidence of the witness Rachel Green to the effect that the defendant and his wife had lived together before their marriage was stricken out upon the court's own motion, on the ground that the district attorney had not connected it with the defendant, nor made it material to the case at bar, as he had promised to do. This evidence was, how-

ever, not stricken out until it had been in the case a full month, and even then the district attorney was permitted to present the case to the jury precisely as though the evidence had been retained.

As to the evidence of handwriting: For the purpose of proving that the defendant wrote the address upon the package of poison received by Cornish, the prosecution offered, and the court admitted, as standards of comparison, three classes of writings. The first class consisted of 56 specimens of defendant's handwriting, gathered from various places and in sundry ways, and conceded by him at the trial to be his genuine handwriting. The second class consisted of the so-called "request writings," seven in number, admitted to have been written by the defendant under the circumstances dis-

the purpose of determining the guilt of the defendant upon such other perjury, yet, since the evidence in the case of such other perjury was legitimately brought out before the jury in the development of the whole case, and related to the same oath and subject-matter as the perjury charged, they might properly consider it in determining the question of corrupt intent in swearing to the false matter upon which the perjury was assigned. *State v. Raymond*, 20 Iowa, 582.

If persons who formed part of a mob obtained money from a person by advising him to give money to the mob, and are indicted for this as a robbery, the prosecutor, in order to show that this was not bona fide advice, may give evidence of demands of money, made by the same mob at other places before and after, in the course of the same day, if any of the prisoners were present on those occasions. *Rex v. Winkworth*, 4 Car. & P. 444.

In a prosecution for lewdness committed by the defendant by the wilful exposure of his person in a public place on a day named, evidence of similar acts on the same day, and on the preceding day, in the presence of persons other than the prosecuting witness, though accompanied by an indecent proposal to a young lady, is admissible for the purpose of showing that such exposure was intentional. *State v. Stice*, 88 Iowa, 27, 55 N. W. 17.

Upon the trial of an indictment for indecent exposure, evidence that the defendant at other times, and to other persons, made indecent exposures of his person, is inadmissible, where the defendant admits that, if the act with which he is charged was done at all, it was designedly done. *State v. Vance* (Iowa) 94 N. W. 204.

Upon the trial of an indictment for delivering milk from which cream had been taken, to a cheese factory with intent to defraud, where the indictment contained three counts alleging the offense to have been committed on July 15th, on August 1st, and on August 15th, evidence that the defendant from the last of June to the 10th of September daily carried milk to the cheese factory knowing it to be skimmed, is competent, when admitted, only for the purpose of showing guilty knowledge on the part of the defendant. *Bainbridge v. State*, 30 Ohio St. 264.

Upon the trial of a defendant charged with the crime of asking for a bribe to influence his vote and action as alderman of the city, the 62 L. R. A.

crime, being charged and shown to have been committed in asking the bribe of the junior member of a firm of contractors, evidence that, on the day previous, the defendant had a conversation with the senior member of such firm in regard to the construction of a proposed reservoir and boulevard, in which defendant stated to such senior member that there was one way to get that work, and, on being asked what it was, replied, if they would put up \$10,000 they could get it, is admissible under the rule which, in certain cases, permits evidence of other similar offenses for the purpose of proving criminal intent. *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127.

Upon the trial of an indictment for having cards or tickets of a certain railroad and fraudulently filling in the same, it appeared that an officer of that railroad, in the course of his official duties having in his possession certain blank annual passes over that road and another, lost the same, and afterwards identified one of the passes of his railroad as one of those stolen from him, and testified that no one had any authority to use those passes in the form in which the one was which was shown him; that the blank space on its face must be filled up with the name of the person using it, by the proper officer of the company. The state then offered three annual passes of the other railroad, and proposed to show that they were passes precisely of the same character, and in possession of the witness, for the same purpose, as to that road, as the others already given in evidence in respect to the first-mentioned road, and that no one but witness had authority to issue these latter passes, and that they were never issued by him, but were stolen from him at the same time with the passes of the other railroad, already given in evidence. It was represented by the state that this proof would be followed by evidence tracing these last passes into the hands of the defendants for the purpose of unlawfully and fraudulently dealing with them, and showing that they did unlawfully and fraudulently deal with them. The court admitted the passes in evidence. It was urged, on behalf of the defendants, that this was equivalent to an attempt to establish a conspiracy to deal unlawfully with the passes of one road, by showing a like conspiracy as to the passes of another. It was held that the admission of the testimony was in strict compliance with the rules of evi-

closed in the statement of facts. The third class consisted of nine so-called Barnet letters, five Barnet envelopes, and three so-called Cornish letters. These Barnet and Cornish letters, although unlike in many respects, and introduced in part for different purposes, may be classed together in considering the questions arising out of the exceptions taken to the rulings of the court upon the subject of comparison of handwriting. The facts upon which the prosecution based the charge that the defendant had written the writings of the third class, and the facts necessary to be understood in considering the admissibility of the writings of the second class, briefly recapitulated, are as follows: On the 27th day of May, 1898, the defendant rented a letter box in the name of H. C. Barnet from one Heckman, who kept

a private letter-box agency at No. 257 West Forty-Second street, New York city. The nine Barnet letters consist of exhibits B, C, F, H, I, M, O, P, and Q. The envelopes consist of exhibits B', J, K, N, and R. These letters were addressed to various manufacturers of proprietary medicines for remedies. None of them referred in terms to any fact or circumstance connected with the death of Mrs. Adams. All of these letters are said by the experts to disclose certain peculiarities of handwriting which also appear in the Cornish letters, in the poison-package address, and in the conceded writings of the defendant. One of these, the "diagnosis blank," written in the name of Barnet, is said to describe the defendant, and not Barnet. The Cornish letters embrace exhibits D, E, and G. Exhibit D is one addressed to

dence to establish a fraudulent intent. *Bloomer v. State*, 48 Md. 521.

Upon the trial of an indictment against several people for unlawfully meeting together with persons unknown for the purpose of exciting discontent and disaffection, where it appeared that large bodies of men had come to the meeting from a distant march in regular order resembling a military march, it was held proper, in order to show the character and intention of the meeting, to receive evidence that, within two days of the same, considerable numbers were seen training and drilling about daybreak at a place from which one of the bodies had come to the meeting; and that, on their discovering the persons who saw them, they ill treated them, and forced one of them to take an oath never to be a King's man again. It was held, also, that it was admissible, for the same purpose, to show that another body of men, in their progress to the meeting, on passing the house of the person who had been so ill treated, expressed their disapprobation of his conduct by hissing. *Rex v. Hunt*, 3 Barn. & Ald. 566, 22 Revised Rep. 485.

Where it was charged in an indictment that the defendant wilfully placed an obstruction upon the track of a railroad, whereby the lives of persons were endangered, it was proper to permit the state, upon the trial, over objections made by defendant, to prove another obstruction in addition to the one charged in the indictment, made on the same night and very soon after the first one, but at a point on the railroad some three fourths of a mile distant from the place of the first obstruction; and that the defendant assisted in placing both obstructions upon the track. *Barton v. State*, 28 Tex. App. 483, 13 S. W. 783.

Upon the trial of an indictment for selling a lottery ticket, the prosecution was properly permitted to read to the jury the contents of other envelopes besides the one sold, for the purpose of showing the true character of the transaction, since whatever will prove the intent is admissible. *Thomas v. People*, 59 Ill. 160.

Upon the trial of a person charged in the indictment with being a common gambler, it was proper to allow the state to prove that the defendant visited other places in the same city where gambling with cards was permitted and carried on. *Courtney v. State*, 5 Ind. App. 356, 32 N. E. 335.

02 L. R. A.

Upon the trial of an indictment which charges the defendant with unlawfully disposing of an article of personal property covered by a chattel mortgage with intent to defeat the right of the mortgagee, evidence that, five months after the offense was committed, the defendant offered to dispose of another article covered by the same mortgage, is inadmissible to prove the intent with which the offense was committed. *State v. Jeffries*, 117 N. C. 727, 23 S. E. 163.

Defendant had, by request of the complaining witness, bought stocks for him on a margin, and the complainant had, at various times, advanced and paid him money on account thereof. Defendant, becoming involved, had sold the stock which he held for the complainant, and thereafter received various amounts from him, among them \$575, which the complainant paid upon the stock supposing it still to be in the hands of the defendant. Defendant never informed complainant that he had so sold the stock. Defendant, as a witness in his own behalf, was permitted to testify that he did not, at the time he received the \$575, intend to defraud complainant, but was not permitted to testify as to his intention in this respect when he received the other payments. This was held error: that, as proof of such other payments was competent only to show a guilty intention, he had the right to show that he did not receive them with such intent. *People v. Baker*, 96 N. Y. 340.

The following cases also show when evidence of another crime is admissible for the purpose of proving intent: *People v. Craig*, 111 Cal. 460, 44 Pac. 186; *State v. McGann* (Idaho) 66 Pac. 823; *Schintz v. People*, 178 Ill. 320, 52 N. E. 903; *State v. Lowe*, 6 Kan. App. 110, 30 Pac. 912; *State v. Mulholland*, 16 La. Ann. 376; *State v. Desroches*, 48 La. Ann. 428, 19 So. 250; *People v. Seaman*, 107 Mich. 348, 65 N. W. 203; *State v. Patrick*, 107 Mo. 147, 17 S. W. 666; *State v. Pennington*, 124 Mo. 388, 27 S. W. 1106; *State v. Callaway*, 154 Mo. 91, 55 S. W. 444; *People v. Van Tassel*, 26 App. Div. 445, 50 N. Y. Supp. 53, Affirmed in 156 N. Y. 561, 51 N. E. 274; *People v. Dimick*, 107 N. Y. 13, 14 N. E. 178; *State v. Murphy*, 84 N. C. 742; *State v. Roberts*, 15 Or. 187, 13 Pac. 896; *Com. v. Major*, 24 Pa. Co. Ct. 199; *State v. McDonald*, 14 R. I. 270; *Williams v. State*, 8 Humph. 585; *Richards v. State*, 3 Tex. App. 423; *Street v. State*, 7 Tex. App. 5; *Heard v. State*, 9 Tex.

Stearns & Co., asking for information about Harpster; exhibit E is a letter to Kutnow Bros., asking for a sample of salts; and exhibit G is the letter to Van Mohl & Co., asking for "five days' trial." As we have seen, these three letters were written upon the egg-blue, tricescent paper, which was also used in writing the Burns letter (exhibit 2), which paper was of the same character and description as that seen by the witness Melando in the drawer of the sideboard in the defendant's room at the Hermann factory in Newark. The second class consists of the so-called "request writings," embracing exhibits 3, 4, 6, 7, 8, 9, and 10, written by the defendant in the presence and at the suggestion of Kinsley, the handwriting expert who had been retained by Capt. McClusky as early as the 1st day of January, 1899. The

admission by the trial court of these standards of comparison raises interesting and important questions which will be considered in their order.

The first point made by the defendant is that comparison of the address upon the poison package could not be made with any other writings whatever, under the statutes regulating the subject in this state. When the genuine writings of the defendant, known in the case as the "conceded writings," were offered by the prosecution as standards of comparison, the defendant objected to them upon the ground that comparison of handwriting is competent only in a case in which the disputed writing is the subject-matter of the issue to be tried, and never when it is only evidentiary; in other words, that comparison may be made when

App. 1; Powell v. State, 13 Tex. App. 244; Jones v. State, 14 Tex. App. 85; Brackenridge v. State, 27 Tex. App. 513, 4 L. R. A. 360, 11 S. W. 630; Moore v. State, 28 Tex. App. 377, 13 S. W. 152; Barton v. State, 28 Tex. App. 483, 13 S. W. 783; Morris v. State, 30 Tex. App. 95, 16 S. W. 757; Hayes v. State, 36 Tex. Crim. Rep. 146, 35 S. W. 983; Bonners v. State (Tex. Crim. App.) 35 S. W. 650; Goodall v. State (Tex. Crim. App.) 47 S. W. 359; Hamilton v. State (Tex. Crim. App.) 56 S. W. 926; State v. Sheppard, 49 W. Va. 582, 39 S. E. 676; Rex v. Voke, Russ. & R. C. C. 531.

IV. To show malice.

In criminal trials, particularly in cases of murder and libel, evidence of the other crime is sometimes admitted to show malice.

Upon the trial of an indictment for murder the people were permitted to prove by a witness that, on the night previous to the murder, the prisoner, while at the house where the homicide occurred, wanted the deceased to go out with him away from the house, and she would not go, and he then struck her and bit her hand, and yet she would not go. It was held that this evidence was entirely proper for the purpose of showing deliberation and malice on the part of the prisoner, and was properly received by the court. *Walter v. People*, 6 Park. Crim. Rep. 15. Affirmed in 32 N. Y. 147.

On the trial of the defendant for murder, the mother of the deceased, after detailing a certain altercation between several young men, among whom were the deceased and the defendant, which occurred two nights before the killing, further testified that later the same night the accused returned to the house where she lived, and commenced cursing; said he wanted to find some one to,—using a vile term, and afterward left the house. This testimony was objected to throughout. The court said, in reference to this objection and the error alleged thereon, that it is a rule of law, which is well settled, that when the *scienter* or *quo animo* is requisite to, and constitutes a necessary and essential part of, the crime with which the person is charged, and proof of such guilty knowledge or malicious intention is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct, or declarations of the accused as tend to establish

such knowledge or intent is competent, notwithstanding they may constitute, in law, a distinct crime. *McKinney v. State*, 8 Tex. App. 626.

Upon a trial for homicide the testimony of a witness that, on two occasions recently before the homicide, he came into contact with the defendant, on each of which occasions defendant drew his pistol and attempted to kill the witness; and that thereafter, apologizing for these demonstrations, the defendant explained that he took the witness to be the deceased,—is competent and admissible, as it evidences the malice he bore deceased, and that his apparent hostility toward the witness was because of his mistaken identity with the deceased. *Angus v. State*, 29 Tex. App. 52, 14 S. W. 443.

Defendant was indicted for murder; and proof was admitted, showing that he had beat his wife, and forced her to abandon his house and seek refuge under the protection of the deceased. It was held that the protection afforded by the deceased was an aggravating circumstance to the prisoner, and therefore proper proof of malice prepense on the part of the prisoner; and that the incidental abuse accompanying, and perhaps inducing, the flight of the wife, is not such proof of a separate criminal charge as vitiates the verdict. *Stone v. State*, 4 Humph. 27.

Upon the trial of an information charging defendant with the murder of a woman, evidence is material and competent which shows that the defendant and his victim, while living together, had quarreled, resulting in her leaving him and fleeing to a neighbor's house for protection, in his following her and attempting to make a murderous assault upon her, and in his making threats against her when his assault was frustrated; as this tended to show malice and ill-will on his part, and a motive for the murder committed a few days later. *People v. Chaves*, 122 Cal. 134, 54 Pac. 596.

Upon a trial for murder, the prosecution was permitted to prove, over the objection of the defendant, that on one occasion the defendant beat his wife, and the deceased, being present, witnessing the battery, told the defendant she was going to report him for it; whereupon defendant replied: "If you do I will knock your head off. I am tired of niggers reporting me, and I am going to kill the first nigger that does so." That the deceased then left, going to—

the disputed writing is the fact in issue, but not when it is merely a fact relevant to the issue. The disposition of this objection goes to the foundation of the people's case, and requires a statement of the rule at common law, and of its statutory modifications. There is some difference of opinion among the highest courts of the several states concerning the extent to which comparison of handwritings may be made at common law. The rule long established in England, which was adopted in this state and existed until the enactment of the statute of 1880, was briefly this: Whenever it was relevant, according to the general rules of evidence, to prove that any person had or had not written a particular paper, such proof might be made either (1) by witnesses who had seen the paper written, or to whom it had been

acknowledged; or (2) by witnesses familiar with the handwriting of the person charged to be the writer, and who were able to testify from their familiarity with his handwriting to a belief respecting the genuineness of the handwriting in question; or (3) by what has come to be known as comparison of hands, which could be made at common law by witnesses, or by the court or jury without the aid of witnesses, between the disputed writing and other writings already in evidence for other purposes. It has often been pointed out that the second class of evidence above mentioned is, equally with the third, a comparison of hands, for in the second class the witnesses compare the disputed writing with a standard or exemplar present in their own minds. It has never been doubted, however, that the second class

ward town; and at about 9 o'clock of that morning did make complaint before the justice, in which she charged defendant with an assault and battery upon his wife. It also appeared, by the other facts, that defendant took the life of the deceased, and that the only instigation thereto was a fiendish revenge for thus "reporting him for the assault and battery upon his wife." It was held that the evidence was competent. It was insisted by the counsel for the defendant that the evidence relating to the assault upon his wife was calculated to prejudice the defendant. The court said that this might be true, but because evidence showed another offense it did not always follow that it was not admissible; that this character of evidence, tending to show another offense, is frequently interwoven with facts which are clearly admissible, and should not be rejected because it develops some other offense; that in the case at bar it was of the greatest importance for the state to show malice. *Williams v. State*, 15 Tex. App. 104.

Upon the trial of an indictment for murder it appeared that the victim was shot dead by an unseen assassin. The state was then allowed, in connection with other circumstances, to prove that the deceased had been shot and wounded a short time previous to the murder, and that the defendant had admitted that he was the person who committed that assault. It was held that the evidence was competent as showing the *animus* of the defendant toward the deceased. *Washington v. State*, 8 Tex. App. 377.

Upon the trial of an indictment for murder, evidence that on the day before the fatal assault, and several days prior thereto, the prisoner had beaten, and otherwise maltreated, his victim, was admitted. In affirming this ruling, the court said: "The charge of murder against the prisoner necessarily involved the question of malice, for there must be malice, express or implied, to constitute murder. As bearing, then, upon this question, the evidence was clearly admissible. In the absence of evidence tending to show justification, excuse, or extenuation, malice, it is true, may be presumed from the proof of the homicide itself; but the state is not bound to rely upon this presumption, and may offer other and independent evidence tending to prove malice,—and this, too, without regard to the evidence offered or defense set up 62 L. R. A.

by the accused." *Williams v. State*, 64 Md. 384, 1 Atl. 887.

For the purpose of showing malice in a prosecution for murder, any evidence which affords an inference of its existence may be admitted, and the fact that such evidence also tends to show the perpetration of another crime by defendant does not render it inadmissible. *State v. Deschamps*, 42 La. Ann. 567, 7 So. 703.

Upon an indictment for the publication of a libel it has always been the law that the commonwealth may give in evidence other libelous articles by the same defendants on the same subject-matter, for the purpose of showing malice. *Com. v. Place*, 153 Pa. 314, 26 Atl. 620.

In *Com. v. Harmon*, 2 Gray, 289, which was an indictment for criminal libel, the court said: "When a guilty knowledge upon the part of a defendant is to be proved, the prosecutor is allowed to give in evidence other instances of his having committed an offense similar to that for which he is indicted. And nearly the same rule applies and prevails when it is requisite to prove that the act charged was done maliciously. . . . In civil actions for defamation, the plaintiff is always allowed, for the purpose of showing the malice of the defendant, to give evidence of his utterance of other words besides those set out in the declaration. . . . The same principle is recognized as applicable to criminal prosecutions for libelous publications. . . . But, in relation to this species of evidence, the prosecutor must be confined, according to the recognized practice and course of judicial decisions in this commonwealth, to the proof of libelous and defamatory publications and statements of the same kind as those of which the defendant is accused in the particular proceeding then pending against him."

V. To prove defendant's connection with act charged.

a. In general.

1. Assault and murder.

Defendant was indicted twice, first for the wilful murder of a man, and, second, for feloniously wounding a woman with intent to murder her. Upon a trial of the indictment for murder it appeared that the defendant was going down a certain road, between 12:30 and 1:45 A. M. At the time last mentioned deceased was

of evidence was admissible whenever, within the accepted rules of evidence, it became relevant to determine whether a particular person wrote a disputed paper. The third class, consisting of direct comparison made by or in the presence of the tribunal charged with the determination of the fact, was limited in England and in this state to comparison between documents properly in evidence for other purposes. Comparison might be made between such documents and the disputed writing in order to determine whether the writer of the other documents was also the writer of the disputed paper, but that was the extent of the rule. No document could be introduced merely as a standard of comparison with the disputed writing. *Doe ex dem. Perry v. Newton*, 5 Ad. & El. 514; *Doe ex dem. Mudd v. Suckermore*, 5 Ad. & El.

703; *Van Wyck v. McIntosh*, 14 N. Y. 439; *Dubois v. Baker*, 30 N. Y. 355; *Randolph v. Loughlin*, 48 N. Y. 456; *Miles v. Loomis*, 75 N. Y. 288, 31 Am. Rep. 470. It will be seen, upon an examination of the decisions establishing the common-law rule in England and in this state, that the idea that a disputed writing must be the very fact in issue, in order that comparison may be made between it and other writings already properly in evidence for other purposes than comparison, finds no support in the rule itself, or in any of the reasons which led to the formulation of that rule. If it has any foundation, it must be in the statutes regulating the subject of comparison of handwriting.

The first statute in this state upon the subject is chapter 36 of the Laws of 1880, entitled "An Act to Amend the Law of Evi-

seen asleep close to the door of a hospital, and twenty-five minutes later he was found bleeding from a wound in the neck of which he shortly afterwards expired. About an hour later the woman, for feloniously wounding whom the second indictment above mentioned was found, was seen sleeping on a seat on an embankment not far from the hospital mentioned, and the prisoner was seen to approach and strike her on the head. He was pursued and taken into custody. In his waistcoat pocket was found a closed penknife of which the blade and a quarter of an inch of the handle was smeared with blood. It was held that the circumstances of the alleged assault upon the woman, in connection with all the other facts of the occasion referred to, were competent and material, being necessary to explain the case, as they were facts explaining relevant facts. *Reg. v. Crickmer*, 16 Cox C. C. 701.

Where the defendant was indicted for the murder of a person, committed on a certain day, evidence is admissible on the trial to show that the deceased and another person, who was murdered on the same day and about the same time, had been fellow travelers, and also to show the circumstances connected with the finding of the dead body of the other person, on the day the body of the deceased was found; and it was proper to allow the witness by whom such evidence was given to describe the wounds found upon the body of such other person. *Fernandez v. State*, 4 Tex. App. 419.

A man called out of his house by a person claiming to have met with an accident, was afterwards found dead. Shortly after he left the house a strange, tall man entered, and, approaching the wife of the deceased, said he wanted a little money. He was described by the woman as wearing a frock coat of good length. The keeper of the prison where defendant had been confined previous to the murder testified that, when defendant was discharged, he gave him a long, dark coat similar to the coat shown in court and referred to by the wife of deceased. Another witness testified that in the house where the prisoner lived when arrested he found two coats, claimed by him, one of which he said he had bought from a tramp. The coat which he alleged he had bought from the tramp was identified by this witness as part of his property, taken by someone from his house shortly after the murder. He also identified the coat, exhib-

ited in court, and referred to by the wife of the deceased and the keeper of the prison, as a coat left at his house at the time his own coat was taken. This evidence was objected to as tending to prove larceny from this last witness,—an entirely distinct offense. The court held that it was admissible. That the tendency of it was to prove in the prisoner's possession the coat "thus identified by the witness." That, in the absence of satisfactory explanation as to how he acquired the property of the witness, the fact that these articles were found in his possession and were claimed by him warranted the inference that he probably took them away and at the same time left the long frock coat in question. That, while the evidence was purely circumstantial, and in itself perhaps not very strong, it was nevertheless relevant and proper for the consideration of the jury in connection with other facts and circumstances tending to prove the identity of the prisoner, and connect him with the commission of the felony charged in the indictment. *Johnson v. Com.* 115 Pa. 369, 9 Atl. 78.

Upon the trial of an indictment for the murder of two persons, where the evidence established the fact that the prisoner had been guilty of criminal relations with the wife of one of the persons for the drowning of whom he was on trial, it was proper to prove that, several months before the drowning, the defendant bought strychnine from a druggist, took it to the house of one of the men whom he was charged with drowning, put it in the desk of the wife of that person, called her attention to it, explained that one grain in milk or coffee would kill a man, and told her to administer it to her husband; and that, on several occasions, about the time the poison was shown to be in the house, the husband become suddenly and violently sick, appearing to be paralyzed in the mouth, a great redness appearing over the face, while he complained of hurting all across his heart and limbs, and foamed at the mouth, etc.; and that these spells occurred early in the morning when the defendant and the husband had just taken a drink together. *Nicholas v. Com.* 91 Va. 741, 21 S. E. 364.

Defendant was indicted for murder in the first degree, and found guilty of manslaughter. Evidence was introduced by the state, against defendant's objection, tending to prove acts of violence and threats of a company of striking

dence and Practice on Civil and Criminal Trials," and is as follows:

"Sec. 1. Comparison of a disputed writing, with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute.

"Sec. 2. This act shall take effect immediately."

It is obvious that the purpose of this enactment was to enlarge, and not in any wise to narrow, the rule established at common law. The latter was generally felt to be too inelastic, as it frequently excluded from the consideration of the court testimony which

common experience proved to be helpful. As early as 1854 the restrictions of the common-law rule had been thrown off in England by statute. 17 & 18 Vict. chap. 125, §§ 27, 103; 28 & 29 Vict. chap. 18, §§ 1, 8. The statute of 1880 is almost verbatim like the English statute of 1854. So far as our research has gone, we have been unable to find any suggestion that the statute was intended to limit comparisons which at common law could be made concerning any writing relevant to the issue to writings which were themselves facts in issue, except a *dictum* presently to be noticed. Such a construction cannot be given the statute without assuming that the legislature, while intending to broaden the common-law rule, actually made it much narrower. The statute of 1880 was first considered by this court in *Peck v. Cal-*

miners, with whom defendant was associated, at a time preceding the homicide. The state was also permitted to show an assault upon new miners, who had been imported to take the place of the striking miners, made an hour and a half before the homicide, by the striking miners in whose company defendant was. This violence was at a mine a mile and a half distant from the place of the homicide. It was held that the evidence was rightly admitted, that it tended to show the nature and extent of the conspiracy and defendant's connection with it. *State v. McCahill*, 72 Iowa, 111, 30 N. W. 553, 33 N. W. 599.

On the trial of an indictment for murder the ball found in the body, which was shown to have produced death, was of the caliber known as "38." A witness for the prosecution, who was the brother of the defendant, had identified a revolver of "38" caliber as one owned and carried by defendant on the night of the murder. This was denied by the defendant, and the state, for the purpose of fixing the ownership or possession of this revolver in the defendant, introduced a witness who had been feloniously assaulted in the nighttime, a few weeks before the murder, by two armed men. This witness was also armed, but, in the struggle, had his revolver wrenched from his grasp by one of the would-be robbers, and carried away in the flight which promptly followed. He also lost his "Derby" hat. Immediate search revealed two revolvers and a "slouch" hat — neither the property of the witness — lying upon the ground. The witness identified the revolver in evidence as the one taken by his assailant, and, with some degree of certainty, the defendant as the man who took it. It was held that his testimony had some value and bearing, precisely as if he had sold or given the weapon to a stranger, but could identify the person and article with the same degree of certainty. The court, in approving the action of the trial court in regard to this matter, said: "In this connection we may also allude to the charge of the court, in which particular and special attention was called to the only purpose for which this testimony was introduced, or could be considered. The jurors were specially and carefully charged, if they found the revolver to have been taken from Chamberlin [the witness] by defendant, to draw no inference prejudicial to him; to give the circumstance no more weight
62 L. R. A.

than if the testimony of the witness had disclosed a sale or gift of the pistol to the defendant, instead of a felonious taking by him." *State v. Barrett*, 40 Minn. 65, 41 N. W. 459.

Upon the trial of an indictment for the murder of a person shot by an unseen assassin, the state was allowed to prove, in connection with other circumstances, that the deceased had been shot and wounded a short time previous to the murder, and that the defendant had admitted that he was the person who committed that assault. It was held that this evidence was competent as tending to identify the defendant as the perpetrator of the homicide. *Washington v. State*, 8 Tex. App. 377.

Upon the trial of an indictment for murder the commonwealth was permitted to prove, over the objection of the defendant, that for about seven years previous to the murder, and down to very nearly the time of the latter, there had been a criminal intimacy between the prisoner and the murdered woman, and that these relations ceased about five months before the murder. It was held that the evidence was properly admitted. That, while it was conceded that an independent crime, unconnected with the murder on trial, may not be put in evidence, such, however, was not the case with the testimony under consideration. That the criminal relation was but one of a series of facts connecting the defendant with the homicide, and that a proper use was made thereof by the prosecution. *Turner v. Com.* 86 Pa. 54, 27 Am. Rep. 683.

On a trial for murder, where it appeared that it was committed in the perpetration of burglary, evidence that the burglary was committed in a certain way, and that defendant was identified with its commission, is not of itself sufficient to authorize proof of another previous burglary committed in much the same way, where it does not appear that any witness at the time saw defendant, and where it is not even suggested that he was suspected of the prior burglary previous to the homicide; and it is prejudicial error to admit such testimony. *Williams v. State*, 38 Tex. Crim. Rep. 128, 41 S. W. 645.

Where, on the trial of a person for murder committed by him while burglarizing the house of the deceased, evidence was introduced by the prosecution tending to show that the defendant gained an entrance to the house with certain instruments which had been stolen from a neigh-

lughan, 95 N. Y. 73. That was an appeal from a decree admitting a will to probate. The questions before this court were whether the surrogate had properly admitted genuine specimens of the testator's handwriting to be used by expert witnesses as standards with which to compare the signature to the will, and had properly rejected specimens of the writing of a person charged to have forged the will. This court held that the rulings were clearly right under the statute. Ruger, Ch. J., said: "This act was evidently intended to enlarge the rules of evidence and extend the facilities for testing the handwriting of a party, the genuineness of whose signature was disputed, beyond the opportunities afforded by the then existing rules." Page 75. The learned chief judge in the following paragraph added a sentence

boring house at the time of a prior burglary, and that the homicide was committed with a pistol which had been taken at the time of another, prior burglary, such evidence is admissible notwithstanding it tended to connect the defendant with the perpetration of the prior burglaries. *People v. Rogers*, 71 Cal. 565, 12 Pac. 679.

On a trial for murder evidence of a burglary committed by the defendant at the houses of two other persons just before the burglary of the house of the person killed, in the commission of which latter the defendant was engaged at the time of the killing, such evidence consisting of pistols found in the possession of the defendant after the murder, which were identified by the persons whose houses had been previously burglarized as having been taken therefrom, is competent, and admissible as a means of identifying the defendant as the party who committed the murder. *O'Brien v. Com.* 24 Ky. L. Rep. 2511, 74 S. W. 666; *Whitney v. Com.* 24 Ky. L. Rep. 2524, 74 S. W. 257.

On a trial for murder evidence that the defendant, some three years before, had been guilty of stealing a quantity of rye, and that he had been convicted and sentenced to the state reformatory therefor, is inadmissible for any purpose, and a claim that it is admissible as tending to identify the transaction with one claimed to have been mentioned by the defendant to the district attorney in accounting for his possession of money has no foundation; and its admission cannot be justified, even if it has such tendency. After stating the general rule against the admission of this class of testimony, the court said that an exception is indulged where other crimes are so connected with the one charged that their commission directly tends to prove some element of the latter,—usually guilty knowledge, or some specific intent; that the exception would obviously have no application to such remote and disconnected events as those here presented. The court then proceeded to say, very truly, that the cases in which over-zealous prosecutors have trespassed upon this rule, so that appellate courts have had occasion to give it reiteration, are almost without number. *Paulson v. State (Wia.)* 94 N. W. 771.

2. Defiling young women.

Evidence that one charged with defiling his 62 L. R. A.

which appears to be the foundation of the defendant's argument against the admissibility of the comparisons made in the case at bar between the "conceded writings" and the address upon the poison package, namely: "The disputed writing referred to in the statute relates only to the instrument which is the subject of controversy in the action, and the specimens of handwriting admissible thereunder are those of the person purported to have executed the instrument in controversy." *Ibid.* This is a slender foundation for the defendant's argument. The observation made by the learned judge must be confined to the facts before the court. Further than that, it was unnecessary to the decision and not binding upon the court.

The decision in *Peck v. Callaghan* was made in 1884, and in 1888 the legislature,

infant sister-in-law, subsequent to the time of the alleged offense, committed an abortion upon her, is admissible as tending to prove his guilt of the crime charged, notwithstanding it tends to prove him guilty of another offense. *State v. Kavanaugh*, 133 Mo. 452, 33 S. W. 33, 34 S. W. 842.

3. Larceny.

It is competent for the state, in a trial for theft, to prove the theft of other property at the same time and place as the property in question, to prove the guilt of the accused by circumstances connected with the theft. *Conley v. State*, 21 Tex. App. 495, 1 S. W. 454.

A conviction of defendant for larceny in one state is inadmissible on his trial for murder in another, as it has no tendency to prove that he committed the latter crime. *Paulson v. State (Wia.)* 94 N. W. 771.

In a prosecution for stealing a horse, where a saddle was stolen at the same time, evidence concerning the stealing of the saddle is admissible as identifying the transaction. *Robinson v. State (Tex. Crim. App.)* 48 S. W. 176.

Upon the trial of an indictment for the theft of a horse, it is proper to permit the state to prove the theft of another horse and a saddle at the time and place as the theft charged in the indictment. *Reno v. State*, 25 Tex. App. 102, 7 S. W. 532. The court said: "The evidence which connects the defendant with the theft of the horse named in the indictment connects him, also, with the theft of the said other horse, and with the saddle."

Upon the trial of an indictment for inveigling, stealing, and carrying away a slave, proof of the slave's arrest in the defendant's quarters, or that he harbored her, is competent evidence; as, while it undoubtedly tends to establish the offense of harboring the slave, it by no means follows that it does not equally tend to prove inveigling and stealing the slave, and aiding her to run away. The same evidence that tends to prove one crime often tends to prove another. *State v. Benjamin*, 7 La. Ann. 48.

Upon the trial of an indictment for the theft of two horses, evidence was adduced to show that, at the same time and place that the defendant took the horses mentioned in the indictment, he took a horse not therein mentioned, the property of another person. It was held

evidently in order to avoid the construction confining the standards of comparison to the genuine handwriting of the person purporting to have executed the disputed instrument, enacted chapter 555 of the Laws of 1888, which is as follows:

"Sec. 1. Section 2 of chap. 36 of the Laws of 1880, entitled 'An Act to Amend the Law of Evidence and Practice on Civil and Criminal Trials,' is hereby amended so as to read as follows: Sec. 2. Comparison of a disputed writing with any writing proved to the satisfaction of the court to be the genuine handwriting of any person, claimed on the trial to have made or executed the disputed instrument, or writing, shall be permitted and submitted to the court and jury in like manner. But nothing within contained shall affect or apply to any action

or proceeding heretofore commenced or now pending.

"Sec. 2. This act shall take effect immediately."

The act of 1888 does not repeal or supersede the act of 1880, but enlarges the operation of the latter by admitting evidence of the kind which it was thought had been decided in *Peck v. Callaghan* to be inadmissible under the statute of 1880. In other words, it authorized evidence which would establish forgery of the disputed writing by a particular person. We see nothing in either of the statutes which have been quoted to justify the construction attempted to be placed upon them by the defendant, while the whole history of the subject at common law and under the statutes of

that such evidence was competent. *Gentry v. State*, 25 Tex. App. 614, 8 S. W. 925.

In a prosecution for the larceny of a mule, the prosecutor having testified that his mule was taken away one night without his knowledge or consent, and that defendant afterward brought him a horse, which he said he had obtained in exchange for the mule, the owner of the horse, who had reclaimed him from the prosecutor, may, upon the trial, state as a witness the circumstances under which defendant obtained the possession of his horse, although it amounts to a criminal offense. *Curtis v. State*, 78 Ala. 12.

Defendant was indicted for stealing a mare. The proof showed that on the night alleged the mare of the prosecutor and a gelding of a near neighbor were stolen from their premises. Five or six days afterward the defendant and his brother were seen on foot about 140 miles from where the theft was committed, and in another county. The next day they were seen together in the latter county, one riding the mare, and the other the gelding; and in a day or two more a son of the prosecutor found the two animals in the possession of two citizens of the latter county. It was held that the defendant's contemporaneous possession of the other horse than the one named in the indictment was a circumstance provable by the prosecution for the purpose of strengthening the inference invoked from his possession of the latter. *Webb v. State*, 5 Tex. App. 115.

In a prosecution for cattle theft testimony that defendant confessed to the witness that he had thrown poison into a yard on a certain date for the purpose of killing certain dogs which he was afraid would bark at him while going by with the cows in controversy, and so hinder the theft, is admissible as bearing on the offense charged, though it also shows a separate and distinct offense; and, in this connection, it is also competent to prove that the dogs were poisoned about the time alleged. *Parker v. State* (Tex. Crim. App.) 67 S. W. 121.

On the trial of an indictment for the larceny of a horse, buggy, and harness evidence was admitted, over the defendant's objection, that, on the day after the larceny, defendant was seen sitting upon the ground apparently as if he had just awakened from sleep. Near by was the stolen property. Defendant was without his coat, and stated that he had left it in a church

not far away. A coat which he admitted to be his was found in the church, and in one of the sleeves was a box of cigars. A basket and some other property were found in the buggy. In affirming the conviction, the court said: "The admission of this testimony is insisted upon as being erroneous, for the reason that the commission of another crime could not be shown for the purpose of convicting defendant of the offense charged in the indictment. But the testimony was not introduced for the purpose of establishing a burglary or larceny of the basket, cigars, and other property. It was to connect defendant with the larceny of the horse and buggy." The court instructed the jury, among other things, that the possession by defendant of the box of cigars stolen at the same time and place with the horse and buggy might be considered to connect defendant with the larceny. It was held that the instruction was correct. *State v. Ditton*, 48 Iowa, 677.

Upon the trial for the theft of a horse, as proof of complicity in the theft, it is competent for the state to show facts tending to implicate the accused in a previous theft of merchandise, perpetrated in a neighboring county. *Hardin v. State*, 8 Tex. App. 633.

Upon the trial of an indictment for grand larceny in stealing a horse, the admission of evidence that the accused took a wagon on the same night from another person was charged as error. It was held that the taking of a wagon to use with a stolen horse, if they were used together, was evidence of a corroborating circumstance to the main charge, and could be used as evidence for that purpose, notwithstanding it was also proof of another felony, not charged in the indictment. *Phillips v. People*, 57 Barb. 353.

Upon the trial of a defendant charged with the larceny of a mare and colt, there was evidence tending to prove that other horses disappeared from the same neighborhood at the same time as the mare and colt, and were found, with the mare and colt, in the possession of the defendant. It was held that the defendant's objection to such evidence was properly overruled. *People v. Lopez*, 59 Cal. 362.

Upon the trial of an indictment charging defendants with the larceny of a horse, and in a second count with the larceny of a buggy, after proof by the state that the prisoner and two others were seen in possession of the prop-

Great Britain and this state requires the contrary view.

The precise question appears never to have been decided in any of the courts of this state, probably for the reason that the bar had deemed the statutes too plain to warrant so fanciful a construction as the defendant's counsel attempts to give them here. We think it too clear for extended argument that the "disputed writing" referred to by the statutes is any writing which one party upon a trial seeks to prove as the genuine handwriting of any person, and which is not admitted to be such, provided that the writing is not inadmissible under other rules of evidence. The statutes were clearly intended to remove the restriction which at common law limited the comparison of a disputed writing either with

other writings put in evidence for other purposes than comparison, or with standards existing in the minds of witnesses familiar with the handwriting of the person sought to be charged with the disputed writing. The class of disputed writings which may be proved upon the trial of an issue has neither been enlarged nor restricted. The admissibility of such disputed writings depends upon other rules than either the common-law or the statutory rules respecting comparison of handwriting. If a disputed handwriting is itself either a fact in issue, or a fact relevant to the issue, it may be proved by the means pointed out by the statutes. If it is neither in issue nor relevant to the issue, it must be excluded, not because the statutes of 1880 and 1888 have anything to do with the question, but because, according to fun-

erty, and after the prisoner had introduced evidence in rebuttal, tending to show that, at the time the property was said to be in his possession, he was in another place,—the court permitted the state to introduce evidence, against the objection of the prisoner, that two certain mules, the property of a person other than the one alleged to be the owner of the horse and buggy, had been stolen at the same time and in the same city; and also that the mules so stolen were in the possession of the defendant and the other two persons at the same time that they had possession of the horse and buggy. It was held that the evidence was clearly admissible for the purpose of establishing the identity of the prisoner. *Yarborough v. State*, 41 Ala. 405.

Upon the trial of an indictment for stealing a horse it is competent to permit the state to prove that another horse than the one which the defendant was charged with stealing was stolen at the same time and place, and was found in the possession of another person at the same time and place that defendant was found in possession of the one he was accused of stealing; where it was proved that this other person and the defendant were together in the neighborhood at the time the horses were stolen, had been companions for some time prior thereto and left the neighborhood together on the night of the theft, and were found together, 100 miles distant, in the possession of the two stolen horses, a short time after the theft. And the court properly instructed the jury that they could consider this testimony for the purpose of identifying the theft of which defendant was on trial. *Holmes v. State*, 20 Tex. App. 509.

On a trial for the theft of a horse the trial court permitted proof to be introduced that other horses and property were stolen at or about the same time as the horse, with the stealing of which the defendant was charged, was stolen, and in the same neighborhood; and further, that this and the other horses were found in possession of the parties when they were arrested for the theft of the horse charged. It was held that the evidence was proper and competent, as, when necessary to establish identity, such evidence is always admitted. *Jones v. State*, 14 Tex. App. 85.

On a trial for larceny in stealing a horse, evidence regarding the theft of another horse, introduced by the district attorney upon a proposition that he would connect the same, which 42 L. R. A.

was not afterwards done, where the court and the district attorney in the trial of another case became familiar with the facts connected with the evidence, and knew that the state would not be able to connect the accused with the theft of this other horse,—should have been rejected; and its admission was held to be error. *Tijerina v. State* (Tex. Crim. App.) 74 S. W. 913.

On a trial for larceny in stealing a cow the court, over the objection of defendant, permitted proof that other stolen cattle were in the bunch with which the cow charged to have been stolen was driven to a certain place. It was held that in this there was no error, in view of the peculiar facts of the case; that the most difficult thing on the part of the prosecution was to connect defendant with the possession of the cow charged to have been stolen; that to do this it was necessary to describe and identify the herd with which she was when taken to the place mentioned; and that, for this purpose, evidence that other cattle on the same range were taken at the same time was proper. *Long v. State*, 11 Tex. App. 381. To the same effect, *Tyler v. State*, 13 Tex. App. 205.

On the trial of an indictment for larceny in stealing one head of cattle, the state has the right to prove that the defendant illegally altered the brand upon the animal, such evidence being admissible to establish identity. *House v. State*, 16 Tex. App. 25.

Upon the trial of an information, the first count of which charged the taking of 3 head of cattle, where it appeared that the 3 head were kept in a herd in which there were 75 head, and that, one morning, all of the cattle were found but 16 head, which were afterwards found together in a car which the defendant had engaged, ready to be shipped, including the 3 head charged in the count mentioned, as well as those belonging to other persons described in subsequent counts,—evidence is admissible of the fact of the ownership of the other cattle, and also of the finding of them in the stock yards of the defendant after they were discovered in the car; as it was proper to show that the 13 others were taken from the same corral at the same time, and that they were found in the stock yards, and also to show to whom they belonged. *State v. Labertew*, 55 Kan. 674, 41 Pac. 945.

On the trial of an indictment for stealing a mare, evidence that on the same night another

damental rules, it can have no bearing upon the controversy. Although similar statutes are in force in several of the states, no such construction as is contended for by the defendant here has ever been suggested, so far as we have been able to ascertain. In this connection it is significant that comparisons between disputed writings merely evidentiary in character and accepted standards have been sanctioned in a number of cases before this court, some of which have passed its scrutiny, although it had the power of correcting errors not pointed out by exceptions. *Sudlow v. Warshing*, 108 N. Y. 520, 15 N. E. 532; *McKay v. Lasher*, 121 N. Y. 477, 24 N. E. 711; *Dracser v. Hard*, 127 N. Y. 235, 12 L. R. A. 456, 27 N. E. 823; *People v. Nliney*, 137 N. Y. 570, 33 N. E. 150; *Mutual L. Ins. Co. v. Suiter*, 131 N. Y. 557, 29

N. E. 822; *People v. Corey*, 148 N. Y. 476, 42 N. E. 1066; *People v. Kennedy*, 164 N. Y. 440, 58 N. E. 852.

It is, of course, beyond dispute that the people's exhibit A, the address upon the poison package, is an important link in the chain of evidence tending to connect some person with the killing of Mrs. Adams. It is a fact relevant to the issue, the fact in issue being whether the defendant killed Mrs. Adams. The defendant's contention is that, if he were on trial for having forged exhibit A (were such a thing possible), then exhibit A would be the fact in issue, and might be compared with the "conceded writings," in order to establish the charge that the defendant wrote exhibit A. But since the fact in issue is the defendant's responsibility for the death of Mrs. Adams, and ex-

mare was stolen from another person, and a saddle and bridle from still another person, and that the defendants were seen at various times for about two weeks with all this property in their possession, after which other property was stolen from three other persons at different places; and that, on the evening of the day following the last stealing, the defendants were arrested, having in their possession both the mare described in the indictment and the other one stolen on the same night, and also the property stolen from the three other persons,—is competent and admissible, as in cases where circumstantial evidence is relied upon for a conviction. Such evidence forms, logically, one link in the chain of circumstances tending to show that he who committed the one crime must have committed the others; and this is so although it may tend to prove distinct felonies. *State v. Baker*, 23 Or. 441, 32 Pac. 161. The judgment of conviction was, however, reversed for another reason.

Upon the trial of an indictment for stealing a cow, evidence tending to show that, after the owner of the alleged stolen cow had recovered the same from the possession of the defendant's brother, an attempt was made to drive off the cow, and that the defendant, wearing a straw hat, had been seen in the neighboring town with other parties, and that, early on the night of the attempt to drive off the cow, three men, one of whom wore a straw hat, were seen in the corner of a fence near the cow pen of the owner of the cow,—was relevant, as, if the defendant was one of the parties who attempted to drive off the cow, such conduct was strictly criminal against him, and the circumstances tended to show that he was one of said parties. *Owens v. State*, 28 Tex. App. 122, 12 S. W. 506. The conviction was reversed upon the ground that the cow was not in the possession of the parties from whose possession it was alleged in the indictment to have been stolen.

Defendants were convicted of stealing a horse. Upon the trial a witness testified that the "doubletrees on defendants' wagon, as he saw it on . . . [a certain day], were the property of witness." He was then allowed to testify that he left this property in the road at a certain place $5\frac{1}{2}$ miles north of where he saw it the next day on defendants' wagon. The witness had already testified that he had examined the wagon of the defendants, and described it, point-

ing out peculiarities of its running. Other evidence had tended to show that the defendants had gone north 20 miles, and that, on the way up, the tracks showed that there were three horses, and on the return, two horses, and the state was trying to connect them with the loss of the missing horse. The court held that, while it was true that the evidence of this witness tended to prove a distinct felony, which it would readily be seen was likely to injure the defendants, yet the testimony was essential to show the guilt of defendants on the charge then being tried. And it would be a singular rule of law that a person accused of a grave crime could compel the exclusion of important and relevant testimony merely by committing two felonies at the same time, or so nearly and intimately connected that the one could not be proved without also proving the other; and that the testimony was competent, not for the purpose of proving another felony, but as tending to show the guilt of the accused in the present case. *State v. Folwell*, 14 Kan. 105.

In a prosecution for grand larceny of a watch, evidence that defendant, within two minutes after he had been seen with the prosecutor, also had his cane, is admissible as tending to show that the parties were together, and not objectionable as tending to prove another crime, although there was no charge that the defendant had stolen the cane. *People v. Taylor* (Cal.) 69 Pac. 292.

Defendant had been convicted upon an indictment charging him with the stealing of a saddle, a blanket, a bridle and a slicker. The owner of this property testified to their being stolen, and that he afterwards found the saddle at the house of the mother of the defendant; that it had different stirrups and girth on it when he got it back. Another witness testified that the stirrups and girth had been stolen from him. A third person testified that he lost a pair of saddle pockets from his saddle about the same time that the other witness had lost the stirrups and girth, and that he found his saddle pockets in the defendant's possession after the defendant had come back from a trip to the Indian territory. To the testimony about the saddle pockets, the stirrups, and girth having been lost and found in the possession of the defendant, the defendant objected before the same was given to the jury; his objection was overruled, and he excepted. After citing and

hibit A is only a link in the chain tending to connect him with the death, no such comparison can be resorted to. We think we have demonstrated the fallacy of this argument, and have already given it more space than it merits.

Another objection made by the defendant at the trial to the standards of comparison admitted by the court was the so-called "request writings." The circumstances in which those writing were made by the defendant have already been detailed. We are of the opinion that it was not error to receive them in evidence. When they were produced, the inquest into the circumstances of Mrs. Adams' death was in progress. The defendant was suspected, as he knew, of being the murderer, and was under subpoena to testify at the inquest. Nevertheless, he was not in

custody, nor had a formal charge been made against him. It is strongly urged upon us that, owing to the publicity of the case, and the known suspicion of the police and prosecuting authorities against the defendant, he could not safely have refused Kinsley's request to produce specimens of handwriting; that such refusal would have subjected him to criticism; that it would have augmented suspicion in the public mind and incited the attacks of certain newspapers, which appear to have tried the case to their own satisfaction without awaiting the more tedious processes of the law. But the court cannot admit the argument. The defendant had the legal right to refuse to write for Kinsley. He preferred to accede to the latter's request, and we can discover no ground upon which the writings thus produced can be excluded

quoting what was stated in the opinion in *Endally v. State*, 39 Ark. 278, *supra*, III. b. 7, the court said: "But the evidence in the case at bar in reference to the saddle pockets, girth, and stirrups, while not competent for the purpose of proving the defendant guilty of the larceny with which he was charged, was competent to identify the appellant as the party who committed the larceny. If these articles had been received by appellant lawfully, and found, as they were afterwards found, attached to the saddle in the possession of the appellant, these facts would have been circumstances tending to show that appellant was the person who took the saddle. If the evidence was competent for this purpose, it would not have been incompetent because it might have tended to show that appellant stole the saddle pockets, stirrups, and girth." *Reed v. State*, 54 Ark. 621, 16 S. W. 819.

On a trial for stealing a horse, evidence that the defendant on the same night and contemporaneous with the theft of the animal in question took the two horses of the prosecutor, and, about a mile from the first theft, took three horses belonging to another, and carried all of these horses, together, to another place, where he and another person arrived early on the following morning, and there disposed of all of the horses, is admissible to prove the guilt of the accused by circumstances connecting him with the theft. *Glover v. State* (Tex. Crim. App.) 76 S. W. 465.

4. Burglary.

Upon the trial of an indictment for breaking into the counting house of a railway station, evidence that the prisoners on the same night had successfully broken into three other stations, and that some of the property taken from one of the three had been found upon two of the prisoners, and property taken from another station upon the third, was properly admitted, as the events of that night relating to the several burglaries were so mixed that it was impossible to separate them. *Reg. v. Cobden*, 3 Fost. & F. 833.

Where it appeared upon the trial of an indictment for burglary, by the testimony of a witness, that he and the defendant proceeded to the house, and defendant took out a pane of glass and entered and handed out to witness

a quantity of pork, which was taken to witness's house, evidence that, several hours afterwards, but on the same night, the defendant, by threats and commands, forced the witness to go with him to the same house, where the defendant entered in the same manner that he had before and took out and carried away a large number of articles, is properly admitted, as the two acts of taking property out of the house and entering the house for that purpose were, in law, but one transaction; and, even if the last breaking could be regarded as an offense separate and distinct from the first, it was, nevertheless, competent evidence to show the whereabouts of the accused the whole of that evening. *People v. Gibson*, 58 Mich. 368, 25 N. W. 316.

Defendant was indicted for burglary in entering a house with intent to commit a felony therein, the felony being rape. It appeared that the defendant in fact entered the house at two different times on the night in question, that the said entries were made in pursuit of but one purpose, and that, his design being frustrated on his first entry because he was frightened away by the inmates of the house, he re-entered about two hours later. It was held that the court did not err in refusing to rule that this constituted two separate burglaries; but it was held, further, that, even if the second breaking could be properly regarded as a distinct and separate offense from the first, it was, nevertheless, competent evidence as tending to show the whereabouts of the defendant during the night in question. And that especially was this true in this case, as the two breakings, if such there were, were only separated in point of time by the brief space of about two hours. *State v. Fitzsimon*, 18 R. I. 236, 27 Atl. 446.

Upon a prosecution for burglary of a photograph gallery evidence of the burglarizing of another gallery in the same town on the same night, and of the finding in defendant's possession upon his arrest, not only the property stolen from the first gallery, but also all that taken from the second gallery, and also a lens taken by means of a burglary from a gallery in another town, it being shown that defendant was in such gallery the day before it was burglarized, is admissible to establish the *res gesta* and as a circumstance tending to connect defendant with the crime charged, and to controvert his statement that he received the property from a third person under a contract to convey it to a cer-

from the case. If, as we have held in another part of this opinion, the defendant's testimony at the coroner's inquest, which he attended under subpoena, and where he was obliged to choose between claiming his privilege against self-incrimination and testifying fully, is admissible, *a fortiori* these "request writings" are competent. Writings created *post litem motam* are inadmissible in favor of a party creating them. Chamberlayne's Best, Ev. 236; *Hickory v. United States*, 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. Rep. 334. But we have found no case holding that such writings should be excluded when offered by the adverse party, except *Reg. v. Crouch*, 4 Cox C. C. 163, which was decided before the English statute of 1854, and *Hymes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538, in which the decision, al-

though made after the passage of our own statute of 1880, was based upon the law as it stood when the controversy arose. It is to be observed, moreover, that in the latter case there were peculiar facts which would have justified the exclusion of the writings there offered in evidence, even if the statute had been in existence when the action was commenced.

The third objection made by the defendant to the standards of comparison adopted at the trial is to the admission of the Barnet letters and Cornish letters. The Barnet letters were undoubtedly admitted in the first instance to support the charge that the defendant had killed Barnet, and the Cornish letters to sustain the charge that he murdered Mrs. Adams. Both were subsequently treated as evidence tending to con-

tain place. *Kelley v. State*, 31 Tex. Crim. Rep. 211, 20 S. W. 365.

On the trial of an information for burglary, which alleged that the crime was committed by entering a certain house, evidence that at the time of the defendant's arrest he and an accomplice were attempting to commit another burglary, that burglar's tools were found in the possession of the latter, and that articles stolen at the first robbery were found on the person of each, is admissible as tending to connect the parties with the robbery. *People v. McGilver*, 67 Cal. 55, 7 Pac. 49.

Where two burglaries were committed in a town, one at K.'s and another at B.'s, between 12 and 3 o'clock of the same night, and at B.'s a crowbar was found, which fitted some marks on a chest broken open at K.'s, and which was proved to have been in the possession of the prisoner previously to the night in question, *Wightman, J.*, on the authority of the case of *Rex v. Wylie*, 1 Bos. & P. N. R. 93, 2 Leach C. L. 983, *supra*, III, c. 14, (c), allowed evidence to be given of the finding of the crowbar at B.'s, and also of the finding of goods stolen the same night from B.'s in the possession of the prisoners, as such evidence tended to show that the prisoners had been at B.'s, and that they might have left the crowbar there. *Reg. v. Stonyer*, Cited in 3 Russell, Crimes, 6th ed. 406.

On a trial for burglary testimony was introduced by the state showing that at the same time property was taken from the burglarized house other property was taken from an adjoining house, against the objection that the goods must be identified as the identical goods taken from the house before any other testimony regarding them would be competent, and that it must be shown that they were found in defendant's possession. It was held that by this testimony the state was not identifying any property, but simply proving a burglary committed at the same time, and within a few feet of the burglary alleged in the indictment; and, if the stolen property from the second house was traced to the possession of the burglar who entered the first, it might become cogent evidence to establish defendant's guilt as the burglar of the first house; and that there was no error in admitting the testimony. *Gass v. State* (Tex. Crim. App.) 56 S. W. 73.

Upon a trial for burglary after evidence had 62 L. R. A.

been given to the effect that a burglary had been committed at the time and place charged, and that the building had been entered some time during the night, and two overcoats and a small amount of money stolen, and that, when arrested next day, the five defendants were together, evidence by certain witnesses living in a small house not far from the location of the premises where the burglary charged was alleged to have been committed, that on the night of the burglary four or five men came to their house, and at least two of them entered the building, and stole certain articles, including a pair of pants, and that one of the defendants was afterwards seen wearing the pants thus stolen; and that other property found at the place where the defendants were arrested was stolen from their house at the same time,—and that the defendants went in the direction of a certain bridge toward a place where they were found together and arrested the next day; and that the house of the witness was on the way from the house where the burglary was charged to have been committed in going from there to the bridge and to the place where the defendants were arrested,—is competent and admissible for the purpose of showing that the accused were together on the night of the burglary in the immediate vicinity of the place where the crime charged was committed, which was the primary object of the testimony, although the testimony concerning the identification of the property found at the place where the accused were arrested did incidentally develop the fact that another crime had been committed, with which the accused may have been connected. *State v. Norris*, 27 Wash. 453, 67 Pac. 983.

Upon the trial of an indictment for burglary and larceny, the evidence against the accused was wholly circumstantial, and consisted, among other things, of tracking four men from the place where the burglary and larceny were committed to a certain house where the prisoner and three other men, who were all jointly indicted, were found. No other person was at that time on the premises. A search was made and prosecuted the next morning after the offense took place, and on the premises were found a part of the articles stolen from the house at the time of the burglary. On instituting a further examination, a lot of burglars' tools were found secreted in a stable a short distance

nect the defendant with each of the crimes said to have been committed by him. All of these letters were also used as standards of comparison from which to determine who wrote the poison-package address. They may, therefore, be considered together for the purpose of review under this head. The statutes of 1880 and 1888 provide that the comparison of a disputed writing may be made with any writing proved to the satisfaction of the court to be genuine. The words "proved to the satisfaction of the court" are to be construed in the light of the obvious purpose for which these statutes were enacted. At common law a paper properly in evidence for general purposes can be compared with a disputing writing, but only when the genuineness of the handwriting of the former is admitted or proved beyond a reason-

able doubt. *Chamberlayne's Best*, Ev. 239; *Doe ex dem. Perry v. Newton*, 5 Ad. & El. 514; 1 Greenl. Ev. 14th Ed. 578; *Miles v. Loomis*, 75 N. Y. 288, 31 Am. Rep. 470; *State v. Scott*, 45 Mo. 302; *Moore v. United States*, 91 U. S. 270, 23 L. ed. 346. Since these statutes were designed to amplify and broaden the common-law rule by permitting the use of genuine writings as standards of comparison, even when they are not competent or relevant for other purposes, it must be assumed that the language prescribing the manner in which the genuineness of such writings is to be established was carefully and deliberately chosen by the legislature. While it is obvious that the words "proved to the satisfaction of the court" do not invest the trial court with a mere personal discretion, which is to be exercised with-

from the house, and at another place divers other articles not mentioned in the indictment. The prisoner objected to all testimony regarding the burglars' tools and the other articles not named in the indictment, but the court overruled the objection and admitted the evidence. After stating the general rule in regard to the admission of evidence of other crimes and the exceptions thereto the court further said: "The evidence adduced on the trial, of the finding of the burglarious implements and the other goods not mentioned in the indictment, was not offered for the purpose of showing the prisoner guilty of another and separate offense, whatever tendency it might have had that way. The prisoner stood charged with burglary and larceny; immediately after the commission of the crime four men were tracked in the snow to a certain house, where four men were found, the prisoner among the number; the fruits of the crime were found on the premises together with the burglarious instruments; the whole formed a part of the history of the transaction, and as such was admissible for the consideration of the jury." *State v. Harrold*, 38 Mo. 496.

Upon the trial of an indictment for burglary and larceny which occurred on a particular night, the theory of the state was that the crime was committed by the defendant and another. After proof that the defendant and the other person were seen frequently together both before and after the burglary, and that they were together on the evening preceding the night of the burglary, the state was permitted to prove that other burglaries had been committed on the same night. At one of the houses were found certain tracks, supposed to be made by the burglars. One of these tracks was imperfect, but, so far as it was plain, it exactly corresponded with a shoe worn by the defendant at the time of his arrest. At the other houses burglarized, the tracks were perfect, and the shoes worn by the defendant exactly fitted one of the tracks. The evidence tended to prove that all these tracks were made on the night in question. In affirming the conviction the court said: "Nor do we think the court erred in permitting the state to prove that burglaries other than the one charged in the indictment were committed on the same night, in connection with the proof that one of the tracks at each of the houses burglarized corresponded with the track made by the appellant. It tended

to prove, not only that the appellant, on that night, was out on a mission of burglary, but also that he was present at the time Gusman's house was burglarized, and thus tended to establish that he had participated in that crime." *Frazier v. State*, 135 Ind. 38, 34 N. E. 817.

Defendant was convicted of feloniously breaking into a house and committing a larceny therein. The house was a farm house in the country, and it was shown that several houses in the neighborhood were broken open the same night, and at one house a plate of butter was taken. The prosecution was allowed to give evidence that on the next day after the burglary the defendant picked up near the road fence the plate on which the butter had been carried off from the house from which it had been taken, claiming to have just found it there. It was objected that this evidence, if of any force at all, could only have tended to connect the accused with the burglary at that house, or, at least, to have raised a suspicion that he was concerned in it. It was conceded by the prosecution that, if it had no tendency to connect accused with the particular offense for which he was on trial, it should not have been received; but their theory of the case was that the several burglaries were all substantially one transaction, and whatever tended to show participation in one was evidence of participation in all. The court agreed in this view, and held that the proof was not given to show a different and distinct felony, but as tending to prove the very felony then under investigation; and its tendency to that end was for the jury. *People v. Mead*, 50 Mich. 228, 15 N. W. 95.

On a prosecution for burglarizing a house evidence of burglaries and thefts committed at two other houses a few miles distant from the one mentioned in the indictment is admissible as part of the *res gesta*, and as serving to identify defendant and connect him with the burglary for which he is on trial, where all the crimes were committed on the same date, and were all along the route which defendant traveled in going to the place where he was arrested, and property taken from each of the several places was found in his possession. *Fleider v. State*, 40 Tex. Crim. Rep. 184, 49 S. W. 376.

On a trial for burglary, where property taken at the time of the commission of the offense was found in the possession of the defendant, evidence that other property, taken from a house

out reference to rules of evidence, it is equally plain that the failure of these statutes to prescribe the precise method or degree of proof necessary to establish the genuineness of a writing for purposes of comparison with a disputed writing renders it necessary to resort to the general rules of the common law for that purpose. Thus, the genuineness of a writing may be established (1) by the concession of the person sought to be charged with the disputed writing made at or for the purposes of the trial, or by his testimony; (2) or by witnesses who saw the standards written, or to whom, or in whose hearing, the person sought to be charged acknowledged the writing thereof; (3) or by witnesses whose familiarity with the handwriting of the person who is claimed to have written the standard enables them to testi-

fy to a belief as to its genuineness; (4) or by evidence showing that the reputed writer of the standard has acquiesced in or recognized the same, or that it has been adopted and acted upon by him in his business transactions or other concerns. Since common-law evidence is competent to establish the genuineness of a writing sought to be used as a standard of comparison, it is apparent, in the absence of a statutory rule as to the degree of proof to be made, that the general rule of the common law as to the sufficiency of evidence must prevail. In civil cases the genuineness of such a paper must be established by a fair preponderance of the evidence, and, in criminal cases beyond a reasonable doubt. Writings proved to the satisfaction of the court by the methods and under the rules adverted to may be used as

in which a burglary had been committed the night previous, was also found in the possession of the defendant at the same time, is competent. *Bright v. State* (Tex. Crim. App.) 74 S. W. 912.

Where the accused was indicted for burglary in entering a house and stealing a watch therefrom, evidence that the defendant afterwards had in his possession a pocketbook taken from the house at the same time, is competent to connect the defendant with the crime alleged in the indictment. *State v. Hullen* (N. C.) 45 S. E. 513.

5. Robbery.

In *Hope v. People*, 83 N. Y. 418, 38 Am. Rep. 460, which was an indictment for robbery, the property taken being charged to be one key of the value of \$1, evidence on the part of the prosecution was to the effect that certain persons, one of whom was the prisoner, compelled the janitor of a bank to disclose the combination of the lock of the bank safe; that they then took and carried away the bank keys from a table in his presence, one of them being the key of the street door, and subsequently entered and robbed the bank. There was no evidence of any intention of returning the keys, or that the street door key was ever returned. It was held that the evidence of the robbery committed on the bank, and the breaking open of the safe, and the larceny of the valuables therein, was admissible for the purpose of showing that the prisoner was one of the gang who committed the robbery of the key; that where the evidence is relevant and material upon the question of the guilt of the prisoner of the crime for which he is upon trial, it cannot be excluded merely because it also proves him guilty of another crime.

Upon the trial of an indictment for robbery the defense set up was an alibi; and, in order to show that the prisoner was near the place of the robbery at the time when it was committed, the counsel for the prosecution called a witness who had been accosted by the prisoner on the road very shortly before the prosecutor was robbed. It appeared, on the depositions of this witness, that he had in fact been, also, robbed by the party who so accosted him; but the counsel for the prosecution abstained from examining him on that point, or as to the manner in

which he had been accosted, until *Alderson, B.* interposed, and said there was no reason whatever why the whole circumstances under which the witness had met the prisoner should not be gone into. Thereupon the witness deposed that the prisoner, at the time when he was met by the witness on the road, committed a robbery on him. *Reg. v. Briggs*, 2 Moody & R. 109.

On the trial of an indictment for robbery, it is competent to show that the defendant had in his possession at the time of his arrest property other than that of the prosecuting witness, acquired by robbery, as a circumstance corroborative of the inference of guilty possession of the property he is being tried for feloniously acquiring. *State v. Balch*, 136 Mo. 109, 37 S. W. 808.

Upon the trial of an indictment for robbery a number of other robberies were introduced in evidence, and the proof on the part of the state tended to show that defendant committed them at the same time and place that he committed the robbery in question. The trial court left it with the jury to say whether or not such testimony tended to show that accused committed such other robberies, stating that, if they should believe that such was the case, then they could use the testimony for the purpose of identifying him as the perpetrator of the robbery for which he was then on trial. It was held that the testimony was admissible for the purpose indicated in the court's charge, and that the court properly guarded the purposes for which the jury could consider such testimony. *Davis v. State* (Tex. Crim. App.) 44 S. W. 1099.

On a trial for robbery of a woman, it was held that it was competent for the state to prove that at the same time and place, and in the same transaction, the defendant ravished another woman who had no money to give him, the two women being together when attacked, and defendant using his pistol in both instances to enforce his demands. *Harris v. State*, 32 Tex. Crim. Rep. 279, 22 S. W. 1037.

On the trial of an indictment for assault with intent to rob, evidence tending simply to show an attack of like character, committed by the defendant upon another person and at another time and place, is inadmissible. *Coble v. State*, 31 Ohio St. 100.

On a trial for robbery committed on the street of a city, it is not competent for the prosecution to prove that, a short time after the

standards for purposes of comparison with a disputed writing, subject, however, to the qualification that writings which are otherwise incompetent should never be received in evidence for purposes of comparison. It is therefore sufficient to say, with reference to the Barret and Cornish letters, that the general rule on the subject of handwriting expert testimony which we have laid down herein will properly guide the trial court in the disposition of the questions which may arise as to them upon another trial.

It was further urged at the bar in behalf of the defendant that the statutes of 1880 and 1888 authorizing comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine are unconstitutional, because in conflict with article 1, § 2, of the Constitution of this

state, which provides that "trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." The argument, in brief, is that this provision of the Constitution requires the submission to the jury in every case properly triable by jury of every material fact relied upon to establish the allegations in controversy. It is unnecessary to go into an extended examination of the question. We are clearly of the opinion that these statutes are not unconstitutional, and that the proper construction of the statute requires the submission to the jury of the genuineness of the standards with which the disputed writing is compared. The word "court" in the statutes is used in its generic sense, and includes both judge and jury in a case where a jury is present. It is significant that the statute

robbery for which the accused was being tried, he robbed another person at a place half or three quarters of a mile away. *State v. Spray* (Mo.) 74 S. W. 846.

On a trial for robbery, where it appeared that the crime for which the defendant was convicted was committed by throwing snuff in the eyes of the complainant at the time of the robbery, it is not competent for the prosecution, for the purpose of establishing the identity of the defendant, to prove that, about three weeks prior to the commission of the offense for which the defendant was on trial, he committed another robbery at the same place, upon another person, by the use of the same means. *People v. Romano*, 84 App. Div. 318, 82 N. Y. Supp. 740.

6. Arson.

On a trial for arson of a barn, it was proved that the dog of the owner of the barn had been poisoned by eating meat with strychnine on it, and it was attempted to fix the crime upon defendant by showing that he was arrested near the farm on which the barn was situated, and that at the time of his arrest he had in his possession meat with strychnine on it, similar to that with which the dog was poisoned, and a chicken that had been stolen from the barn. It was held that the evidence was admissible as tending to connect defendant with the commission of the crime charged, and, with other suspicious circumstances, sufficient to sustain a conviction. *Halleck v. State*, 65 Wis. 147, 28 N. W. 572.

When, on the trial of an alleged accessory before the fact to the crime of arson with respect to a particular house, there was evidence warranting a finding that the accused had incited the alleged principal to burn this house and another, evidence tending to show that the latter house was in fact fired on the same night as the former, and by the alleged principal, was admissible. *Chapman v. State*, 112 Ga. 56, 37 S. E. 102.

Upon the trial of an indictment for arson, evidence tending to show that the defendant, two days after the burning for which he was on trial, made attempts to burn the same building, is competent and proper, as it is a circumstance in the chain of proof, and the fact that it indicated an attempt to fire the building again did not weaken the proof of purpose, because, if 62 L. R. A.

accomplished, it would be a distinct offense; that as the purpose of the first attempt failed because of the extinguishment of the fire, the building being saved, it was clearly the subject of a renewed purpose, and the evidence of this renewed purpose tended strongly to show that the same person had made both attempts. *Kramer v. Com.* 87 Pa. 299.

Upon a trial for arson the state was permitted to show, after objection, that on the same night when the outhouse for the burning of which the defendant was indicted was burned, a dwelling house some 15 yards off was also attempted to be set fire to, by means of fagots of wood tied up with a rope belonging to the defendant, while both buildings had been saturated in places with kerosene oil. The evidence was received as tending to show that the same person had fired both at the same time. It was held that there was no error in admitting the evidence, which tended to identify the person who committed the outrage. *State v. Thompson*, 97 N. C. 496, 1 S. E. 921.

Upon a trial for arson evidence of a previous unsuccessful attempt by the respondent to burn the same building for the burning of which he was on trial was admissible. *State v. Ward*, 61 Vt. 153, 17 Atl. 483.

7. Forgery.

On the trial of an indictment for passing to a certain person, on a certain date, a forged instrument in writing, evidence of a witness that he saw defendant in the town where the instrument was passed on a date earlier than that stated in the indictment, and that defendant then attempted to pass it on him, is admissible for the purpose, not only of showing the intent with which defendant may have subsequently passed the instrument on the person named in the indictment, but also for the purpose of contradicting him, where he had denied all knowledge of the instrument, or any connection therewith, and had also denied being in the town where it was passed until after the time when the person named in the indictment alleged that it was passed on him. *Leslie v. State* (Tex. Crim. App.) 47 S. W. 367.

Upon the trial of an indictment for forging an instrument, evidence was offered on the part of the prosecution to prove that the defendant actually passed the instrument. Objection was 19

of 1880, which was obviously copied from the statute of Great Britain enacted in 1854, substitutes the word "court" for the word "judge." We are not aware that it has ever been decided, even in England, by any court of great authority, that the ultimate decision concerning the genuineness of the standards of comparison must not be made by the jury. Be that as it may, however, such a decision would not, in view of the difference between the powers of the legislature in Great Britain and in this state, and the significant difference in the phraseology of the statutes, serve as a guide to the interpretation of our statutory enactments upon the subject. We have not been referred to, and have not found, any decision of this court to the effect that the judge presiding at the trial has the final decision concerning the

genuineness of the writings offered as standards of comparison. We see nothing in the language of Peckham, J., in *McKay v. Lasher*, 121 N. Y. 477, 24 N. E. 711, which is opposed to the views above expressed. As between a construction which would withdraw from the jury the important question of the genuineness of the standards and a construction which submits their genuineness first to the judgment of the judge, and, upon his acceptance of them, ultimately to the decision of the jury, which must find, within the rules above laid down, that they are genuine, before it can use them, or regard any evidence based upon them, we prefer and are bound to accept the latter construction. The sufficiency of the proof given of the genuineness of the papers offered as standards is a preliminary point to be determined in the

made that it tended to show a distinct offense. It was held that tracing the custody of this forged instrument to the defendant, in connection with the fact that the paper had been supplied to him upon which it was written, demonstrated the truth of the charge in the indictment that he was the forger. *Hoskins v. State*, 11 Ga. 92.

On the trial of a person for forging a bank check, the prosecution proved by a witness that the prisoner explained to him his mode of operation,—how he obtained a genuine check from the person for forging whose name he was upon trial by purchasing a small quantity of goods, giving a bank bill of \$100 in payment, and, at his own suggestion taking a check for the difference. The prisoner then had in his possession a check forged on another firm for \$3,000, and a genuine one for \$80; and he went on to explain to the witness in what manner he got the \$3,000 check, and getting a new stamp, which accorded with the mode he pursued in getting the check of the person for the forging of whose name he was on trial. It was held that this evidence was not for the purpose of proving the prisoner guilty of another felony in forging the \$3,000 check, but for the purpose of identifying him and giving character to the entire transaction; and that it was competent, as identifying the party and the transaction. *Cross v. People*, 47 Ill. 152, 95 Am. Dec. 474.

Upon the trial of an information for forging an order for a requisition upon a county superintendent of public schools, it is not error to permit the prosecution to prove and introduce in evidence other orders of the same general character as the one set out in the information, and to prove that those orders were in the handwriting of defendant, for the purpose of determining, by comparison, whether the defendant was the forger of the order recited in the information. *People v. Bibby*, 91 Cal. 470, 27 Pac. 781.

8. Violation of liquor law.

A plea of guilty to a complaint for keeping a certain tenement open on the Lord's Day within the time covered by an indictment for keeping the same tenement for the illegal keeping and sale of intoxicating liquors is, on the trial of such indictment, competent evidence to show that the defendant kept the tenement within

the time charged. *Com. v. Ayers*, 115 Mass. 187.

Evidence that the defendant, the keeper of a certain house, kept spirituous liquor for sale there, at a certain date, has a tendency to prove that he, still keeping the same house, kept spirituous liquor there for sale at a later date, and is competent for that purpose. *State v. Colston*, 53 N. H. 483.

In a prosecution for the illegal sale of liquor, evidence of sales other than the one charged is admissible only when tending to develop the *res geste*, or to connect the defendant with the sale charged. A witness was permitted to testify that he had bought alcohol from defendant on different occasions about twelve months previous, or within twelve months from the date of the trial. It was held that the testimony was inadmissible, as it tended to throw no light on the transaction at issue in any way. The evidence of other sales does not develop the *res geste*, nor tend to connect defendant with the sale sought to be proved. *Johnson v. State* (Tex. Crim. App.) 62 S. W. 755.

Defendant was convicted of knowingly selling liquor to a minor without written consent of the parent. Upon the trial the state was permitted to prove, by another person than the minor named in the indictment, that he frequently bought beer from defendant before he was twenty-one years old, and that he had frequently seen defendant sell beer to boys under twenty-one years of age; also, by still another witness, that he bought beer from the defendant before he was twenty-one years of age. It was held that this evidence was not admissible, as they were separate and distinct transactions from that under investigation, and defendant had not been notified by the indictment that he would be called upon to meet these sales to other minors. *Freedman v. State*, 37 Tex. Crim. Rep. 115, 38 S. W. 993.

And so, in a prosecution for the illegal sale of liquor in a local-option district, evidence of sales other than the one charged, not tending to develop the *res geste*, or to connect defendant with the sale charged, is inadmissible. *Walker v. State* (Tex. Crim. App.) 72 S. W. 861.

For other cases on defendant's connection with act charged, see also *State v. Dooley*, 89 Iowa, 584, 57 N. W. 414; *State v. Reed*, 53 Kan. 787, 37 Pac. 174; *State v. Brooks*, 1 Ohio Dec. Reprint, 407; *Rucker v. State*, 7 Tex. App. 549,

first instance by the court before permitting the papers to go to the jury. If the court, having regard to the rules adverted to, adjudge the papers genuine, it then becomes the duty of the jury in its turn, at the proper time, before making comparison of a disputed writing with the standards, to examine the testimony respecting the genuineness of the latter, and to decide for itself, under proper legal instructions from the court, whether their genuineness has been established. We are aware that a contrary conclusion respecting the duty of the court to submit the genuineness of the standards of comparison to the jury has been reached in Vermont (*Rovell v. Fuller*, 59 Vt. 688, 10 Atl. 853), and apparently in Massachusetts (*Costello v. Crowell*, 133 Mass. 352). We are convinced, however, that the

sounder rule is the one we have stated. It may be added that comparisons with standards produced in court, whether at common law or under the statutes, may be made by witnesses, or by the court or jury without the aid of witnesses. *Cobbett v. Kilminster*, 4 Fost. & F. 490; *Hickory v. United States*, 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. Rep. 334; *Merritt v. Campbell*, 79 N. Y. 625.

Another point urged upon our attention by counsel for the defense is that the learned trial court erred in admitting in evidence upon the trial the testimony of the defendant given at the coroner's inquest. This question must be decided for the guidance of the court below upon another trial. When this testimony was offered in evidence by the district attorney, the defendant's counsel interposed the objection that it had not

—*supra*, II. a. 2, (a); *Burr v. Com.* 4 Gratt. 534, *infra*, VII. c.—*Moseley v. State*, 36 Tex. Crim. Rep. 578, 37 S. W. 736, 38 S. W. 197, *infra*, XVI. a. 1; *Holt v. State*, 39 Tex. Crim. Rep. 282, 45 S. W. 1016, 46 S. W. 829, *infra*, XVI. a. 2.

b. Common scheme, plan, or system.

In *State v. Fallon*, 2 N. D. 510, 52 N. W. 318, a conviction for assault with a dangerous weapon was reversed, and a new trial ordered, for the reason that the indictment alleged that the assault was committed with intent to rob, and the state's own evidence clearly showed that it was made while endeavoring to escape, and the variance was held to be fatal. But the court, after deciding that a new trial must be awarded, said, further: "But another ruling is assigned as error, which may arise upon another trial; and hence, it becomes proper for us to notice it. The state introduced as a witness one Fleet, who, against the objection of the plaintiff in error, was permitted to testify that on the evening of the alleged assault, and only a very short time before the occurrence, he saw plaintiff in error and said Howard [Howard was informed against with plaintiff in error] on the same street, and but a short distance from the place where the assault was made upon Mr. Curfman; that Howard pushed a revolver in his (witness's) face, and ordered him to get off the street. It is claimed that the state ought not to have been allowed to prove a distinct and collateral offense. It is often difficult to distinguish the effect of prejudice from the effect of proof. When a prisoner is on trial charged with a special offense, the proof of a commission by him of a distinctively collateral offense, or of any number of collateral offenses, whatever be their character, is, as a general rule, no proof whatever of the commission of the offense charged. . . . But, keeping this rule in view, we do not think the court erred in admitting the testimony of the witness Fleet. That testimony tended directly to establish the fact that the prisoner was in the immediate locality where the crime charged was alleged to have been committed, at or near the time of its commission. That fact might have been shown, however, without going to the extent of proving the assault upon the witness Fleet. But proof of such assault had a direct tendency to establish method and system in the 62 L. R. A.

conduct of the prisoner and Howard, and to explain the character and purpose of their further acts. If they contemplated a criminal enterprise, and were there for that purpose, they would naturally object to having witnesses to their conduct, and, if they drove the witness Fleet from the locality, the inference is legitimate and logical that they then contemplated a criminal enterprise. We think the testimony was proper, under *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69, *supra*, I. And see, also, *Guthrie v. State*, 16 Neb. 667, 21 N. W. 455, *infra*; *Kramer v. Com.* 87 Pa. 299, *supra*, V. a, 6; *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110," *infra*, IX. b.

Upon the trial of an indictment for attempting to murder by placing a deadly poison, known by defendant to be such, upon, and causing it to adhere to the under side of the crossbar of a cup belonging to the person whose life was attempted, known as a mustache cup, evidence was admitted, and excepted to by the defendant, that, a few days earlier, a similar substance was found pasted under the bar of the cup, and also at other times in the saucer and cup; and that the person whose life was attempted was sick after drinking from the cup on a previous day. It was held that all this was admissible, so far as it went, to show what, perhaps, was sufficiently clear without it,—that the poison was put into the cup at the time in question in pursuance of a deliberate scheme. *Com. v. Kennedy*, 170 Mass. 18, 48 N. E. 770.

In *Ford v. State*, 34 Ark. 649, the court held that, although, as a general rule, when a man is charged with one crime it is not competent to prove that he has committed others, yet, it being proved in this case that the murder with which defendant and his coconspirators were charged was committed in an attempt by them to commit robbery, which made the killing murder in the first degree, and that all present, aiding and abetting, were principals, it was held competent to prove the whole plan or purpose of the conspirators, to plunder the store of deceased and also of others, although it did not appear that they executed their plan or purpose except as to deceased.

Carroll v. Com. 84 Pa. 107; *Campbell v. Com.* 84 Pa. 187; *Hester v. Com.* 85 Pa. 139; *McManus v. Com.* 91 Pa. 57; and *Duffy v. Com.* 6 W. N. C. 311,—are all cases growing out of the doings of an order or band of men, having its

been shown that the defendant was advised of his rights at that time, and had not been warned of his rights by the coroner. What were the defendant's rights at the inquest? If the defendant, when he attended the inquest, was under arrest or formal accusation for the murder of Mrs. Adams, he was entitled to be informed of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings were had. Code Crim. Proc. § 188. This section is, in terms, applicable only to examinations before a magistrate. It is, however merely a codification of the common-law rule, and this court has held that when a person is called upon to testify at a coroner's inquest, convened to inquire into a crime, for the com-

mission of which such person is then under arrest, or upon which he has been formally accused, he occupies the same position and he has the same rights, as though he were before an examining magistrate. *People v. London*, 103 N. Y. 211, 57 Am. Rep. 709, 8 N. E. 496. So, on the other hand, if the person who testifies at the inquest does so simply as a witness, he has none of the rights or immunities of a party. This is the foundation of the rule, which is now firmly established in this state, that when a person testifies at an inquest as an accused or arrested party his testimony cannot be used against him upon a subsequent trial of an indictment growing out of the inquest, unless his testimony has been voluntarily given, after he has been fully advised of all

origin in Europe, extending into the United States, and spreading by ramification throughout the coal region of Pennsylvania, each minor division governed by a body-master of its own locality to whom the secret pass words, signs, and tokens of recognition, called "goods," were transmitted through a descending grade of officers from the head of the order to the body-master, and by them distributed to the members. In all the cases above referred to the commonwealth undertook to prove, and did prove, that these men traded in blood, taking life for life by compact, burning houses, mills, breakers, and valuable structures at the instance of each other, and banded together to shield each other from punishment, by means of concealment, murder, and perjury. When the death or injury of a person or his property had been determined upon by a number of members of one of the divisions of this order, such determination was communicated to the body-master of another division, who thereafter detailed members of his division to commit the murder or other injury. The men so detailed were generally unknown to the victim, and nonresidents of his locality, and therefore not likely to be suspected because having no motive to commit the crime, and it was for this reason that the transactions were carried on in this way. The division which had appealed to the other for instruments to commit its crime by the rules and regulations of the main order thereby incurred a debt to the other division which it was bound to repay in kind on request or demand. In the Carroll Case a man was shot while in the act of extinguishing a lamp, by two men who were strangers to him, and resided 8 miles distant from him, and no motive such as ordinarily influences men to commit so great a crime was shown to exist in either party. In the Campbell Case a man was killed by two young men, entire strangers to him, and without a grudge against him. In both cases the men murdered lived in a locality over which different divisions of the order mentioned claimed or exercised jurisdiction, and evidence was given in each case of the murder committed in the other, and that in each case the men who actually committed the act were sent from one division to the other to do so, being, as before stated, in each case strangers to their victim. The defendants in each case were members of the order, who had no actual participation in the killing, but who had procured and promoted the same by having the

body-master of the other division send members there to do the actual killing. Proof of all these facts was offered by the commonwealth, and admitted over the objection of the defendant. It was held that in each of these two cases the evidence of the origin and history of this criminal organization, its operations to effect the killing or injury of persons obnoxious to any of its members, the manner of effecting the same, by persons who could not be supposed to have any desire for the killing or injury of the victim, and all the operations to accomplish these objects, were properly received in evidence. The Hester, McManus, and Duffy Cases were all similar to the Carroll and Campbell Cases, in respect to the subject under consideration, and were practically affirmations of those two. In most of the opinions written in these cases the position seems to have been taken by the writer that the rule that, on the trial for one crime, evidence cannot be given of a distinct and separate offense, did not apply; but in the Hester Case the judge delivering the opinion made the statement that the testimony was not designed to be used to establish the commission of any independent crime.

Where the defendant and others were indicted for killing a person in the night, and it appeared that all the indicted persons belonged to a certain band, and that the person killed and his relatives and friends were obnoxious to the members of the band, or some of them, evidence that, immediately after the shooting, the defendant came out of the house where the homicide was committed and hallooed to a man who was walking up the railroad in the direction of where the killing was done and ordered him to stop, is admissible, as defendant's halting the person was an act the character of which not only illustrated the character of the principal act in the tragedy, as part of a system of criminal acts, but was so intimately connected with it as to make it a part of that very transaction, and to identify the defendant as an actor therein. Upon such a trial, evidence is also admissible that, some time preceding the killing, one of the persons who was killed at the same time as the person for whose murder the defendant was being tried was taken out by a body of men and whipped, and that defendant was one of that body, as such evidence tends to show that the crime in question was one of a system of criminal acts, and implicated the defendant in that crime; and this evidence tended to prove that

his rights, and has been given an opportunity to avail himself of them. *People v. Chapleau*, 121 N. Y. 267, 24 N. E. 469. The logical and necessary corollary of that part of the rule stated is that when a person testifies simply as a witness, and not as a party, his testimony can be used against him, even though he is afterwards indicted and tried for the commission of the crime disclosed by the inquest. *Hendrickson v. People*, 10 N. Y. 14, 61 Am. Dec. 721; *Teachout v. People*, 41 N. Y. 7. What was the situation at the coroner's inquest held upon the death of Mrs. Adams? It appears that the inquest was commenced on the 9th day of February, 1899. The defendant attended the inquest, was sworn, and testified pursuant to a subpoena issued to him by the coroner on the 10th day of February, 1899. The inquest

was concluded on the 27th day of February, 1899, and the defendant was arrested at its close upon a warrant charging him with the murder of Mrs. Adams. When the defendant's counsel, upon the trial, interposed the preliminary objection to the admission of evidence of the testimony given by the defendant at the inquest, the learned trial court very properly allowed an examination into the proceedings at the inquest for the purpose of determining whether the defendant had testified as a party or as a witness. *People v. Fox*, 121 N. Y. 449, 24 N. E. 923. The ground of defendant's complaint in this behalf upon this appeal is that he was not given the opportunity to show that he was in fact an accused party at the inquest, and that his rights as such had not been recognized by the coroner. Many pages of the re-

he was concerned in the commission of this extraneous offense as a part of that system. *State v. Mathews*, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135.

Defendant and another were jointly indicted for murder, and the other was first tried, and was convicted. Upon the trial of the defendant such other person testified, in substance, that he and the defendant went to the old race track in or near Dubuque in the afternoon, and that they there planned to rob people who traveled the road; that it was agreed between them that they were to go on the opposite sides of the persons to be robbed, and, if either was stopped, the other was to shoot; that a man came along in a wagon, and the witness went on one side of him and the defendant on the other; that the latter presented his revolver and demanded money of the man; that he said he had none, and was told by the defendant to drive on and not to look back; that a woman in a wagon was the next one to appear; that the witness went on one side of her and the defendant on the other; that the latter ordered her to give him her money, but she would not stop; that the defendant ran after her and stopped the horse, when she threw down her pocket book, which was picked up by him; that they went to certain shops, and then over the hills to the place where the robbery of the person for whose murder the defendant was on trial was attempted, planning it as they went. It had already appeared that the person for whose murder the defendant was on trial was the driver of a street car in Dubuque, and that while he was on the front platform of his car the defendant suddenly stepped on to the platform from the left side, and, presenting two revolvers, demanded the driver's money. At the same time this witness ascended the platform from the right side, holding a revolver in his hand, and the car driver threw up one of his hands, and pushed away a revolver held by the defendant. At about that time one of them was discharged without effect, and a moment later a ball from the witness's revolver struck the driver and inflicted the wound which caused his death. Objection was made to the testimony of this witness in regard to the attempt to rob the man and the robbing of the woman near the old race track. The court said that they were of the opinion that it was properly admitted. That it was true, as a general rule, that evidence of one crime is not compe-

tent to prove another, but the time which elapsed in this case from the making of the alleged plan to commit robberies to the shooting of deceased did not exceed four hours. That the plan included several robberies, and all that was done was done in pursuance of that plan, either as originally made, or as it was modified during the afternoon and evening. That proof of what was done in the afternoon may have been wholly unnecessary to show the intent with which the attack on deceased was made, but the events of the day were so linked together that it was competent to show them all, in order that the causes which led to the shooting might be fully understood. *State v. Lee*, 91 Iowa, 499, 60 N. W. 119.

On the trial of an indictment for murder charged to have been committed by procuring another person to shoot members of a family, one of whom was shot and killed by such person, for the purpose of indicating a motive, and connecting the defendant with the commission of the offense, a number of witnesses were allowed to testify, over objection of defendant's counsel, regarding numerous threats that defendant had made concerning the family, and to the fact that a member thereof other than the one shot and killed had procured defendant's arrest, and caused him to be held to answer the action of a grand jury upon a charge of larceny. In holding that such evidence was admissible, the court said: "From a careful and cautious examination of all the evidence relating to the alleged threats and the charge of larceny, and from a consideration of the same in its relation to the charge upon which the defendant was being tried, we are convinced that such evidence was competent. . . . Evidence directly tending to establish the guilt of a person charged with a felony is not incompetent, for the sole reason that it tends to prove the commission of another offense, when it goes to the question of motive, or appears to be a part of a plan or scheme through which the accused procured a crime to be committed, and for which he is being tried as a principal." *State v. Phelps*, 5 S. D. 480, 50 N. W. 471.

Upon the trial of a woman for grand larceny in stealing a diamond ring, where it appeared that the accused had asked to be shown rings in the store of the prosecutor, and that, when his attention was called another way accused had taken the ring in question and substituted a

cord are filled with the proceedings in this regard showing that from the outset of the inquiry into this subject the district attorney objected to the questions of defendant's counsel; that many of these objections were sustained and that the court by frequent interventions, prevented defendant from completing the questions which he had started to frame. The sole purpose of this inquiry was to ascertain a few facts which were matters of record, and of which it was necessary for the court to become informed, to enable it to pass upon the admissibility of the testimony then offered in evidence. It is obvious that the facts to be ascertained were of paramount importance as compared with the method by which that was to be accomplished. Even if, as must be admitted, many of the questions of defendant's counsel

were wide of the mark, a few well-directed suggestions or questions from the court would speedily and clearly have elicited the desired information, and thus have avoided the tedious and confusing proceedings which mark this portion of the record. Notwithstanding all this, however, it is plain that the defendant was not under arrest or accusation when he testified before the coroner. It appears that Cornish had testified on the opening day of the inquest. In the course of his testimony he referred to an interview with Capt. McClusky, during which he stated to the latter his suspicion that the defendant had sent him the poison package. Without the support of other facts which came to light later in the inquest, this suspicion, expressed by Cornish, could not have been a sufficient basis for

cheaper one for it, evidence that she then went to another jewelry store and procured a still more valuable ring, substituting the one which she had stolen from the prosecutor for it, is properly admissible, as the last transaction was a part of the whole transaction. On such trial evidence is also admissible that, two days after the larceny of the ring for the stealing of which she was indicted, accused was in another city in another state, and that she there selected a small, inexpensive ring, ordered a name put on it, and left her gold spectacles to be repaired; and that she never came back for the spectacles or the ring, and that, within a day or two thereafter, a solitaire diamond ring was missed from the tray shown defendant; such evidence being competent to establish the guilty knowledge of the defendant, and to show a part of a particular system of committing crime, the extraneous misconduct being of the same character and by the same artifice and stratagem as the one under consideration. *Links v. State*, 13 Lea, 701.

Defendants and others were charged in an information with the larceny of a set of double harness. On the trial it was proved, over the objection of the defendant, that they were all occupying a cabin near which were two haystacks, so constructed that there was ready, though hidden, access to the interior of them, which was hollow, and that inside of these stacks were found various articles of property belonging to different owners. It was held that the testimony of the finding of this property, although it tended to prove a number of other distinct offenses committed by somebody, was admissible to prove the defendant an accessory before the fact,—counseling, aiding, and abetting the others in the felonies, if not himself the actual perpetrator of the act charged; as it all showed a guilty knowledge and combination between the defendant and the others to carry on a general stealing business. *Lewis v. State*, 4 Kan. 296.

On the trial of an indictment for burglary the state proved another burglary and theft from the house of another person 8 miles east of the house for the burglary of which defendant was on trial, and also proved the theft of a saddle the property of still another person, which was committed 4 miles northwest of said house. The first offense was committed in the daytime on the 7th of August, and the two latter on the night of that day, and property from the several places was found in defendant's possession. It 62 L. R. A.

was held that the evidence was properly admitted, as it appeared to have been part of a system embracing the offense charged. *Fleider v. State*, 40 Tex. Crim. Rep. 184, 49 S. W. 376.

Upon the trial of an indictment against the defendants for breaking and entering a banking house with intent to commit larceny therein on January 26, 1876, one of the defendants, who had turned state's evidence, testified that some of the defendants had told him that they had gone to the town where the bank was in August, 1875. He then testified as to other transactions all tending and looking toward the robbery of the bank, all of which were abandoned in September, nothing further being done until November. The defendants contended that the attempt to rob the bank in the summer of 1875 was abandoned, and that the evidence of that attempt was inadmissible. The government contended that the attempt was only temporarily suspended, and was resumed again in November. The trial judge admitted the evidence. It was held that it was clearly competent for the government to show the whole history of the robbery with which the defendants were charged, from the inception of the scheme by them to its final consummation. That the evidence excepted to tended to show the beginning of the plot or scheme of the robbery in the summer of 1875. That the fact of the general conspiracy formed before that time was so connected with this scheme as to make it competent. That it tended to explain and make intelligible the testimony of the witness as to the beginning of the scheme, as it accounted for the fact of his reporting to the defendants at another place, and furnishing them with means of duplicating the keys of the vault lock. That the evidence was competent as tending to prove the crime charged, and was not rendered incompetent because it also tended to prove the commission of other crimes. *Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 81.

Defendant was indicted for soliciting another to commit the crime of statutory arson. Upon the trial of the indictment, after proof was made as to the fact charged therein, three witnesses were permitted to testify that, about the date fixed by the witness named in the indictment as having been solicited by the defendant, they were likewise solicited, which was objected to by defendant's counsel on the ground that such evidence was inadmissible. The court said that undoubtedly the general rule is that evidence

charging the defendant with the commission of this crime. It further appears that the defendant attended the inquest, and testified thereat pursuant to a subpoena issued to him by the coroner, and that defendant was threatened with punishment for contempt if he refused to testify. The coroner had the right to issue a subpoena for defendant, and to punish him if he disobeyed it. Code Crim. Proc. § 776. The law presumes that a party who is called upon to testify as a mere witness knows his rights. He may decline to testify to anything that may tend to incriminate him. This the defendant could have done had he chosen to claim his privilege. Having failed to do so, he cannot now complain.

The record further discloses that the defendant sought to show that the district at-

torney, in his summing up to the coroner's jury, stated that he had from the beginning suspected the defendant of the commission of the crime, but had pretended to suspect Cornish, so as to lull the defendant into a sense of security, and thus get him to testify. This statement, if made, was after the defendant had testified. Whether it was true or not, or whether the district attorney's suspicions were well or ill founded, are matters of no consequence, for they could have had no influence on the status of the defendant when he testified. We therefore conclude that no material error was committed in respect to the general admission in evidence upon the trial of the defendant's testimony given before the coroner. We do not pass upon the separate objections to specific portions of this testimony, as

of an independent crime is inadmissible, but that in one sense the crime was not independent. That the objective point, the burning of the particular store building, was the same. The court said that system was established in this present instance between the offense for which the defendant was on trial, namely soliciting the person named in the indictment, and the solicitation testified to by the other witnesses. That, if the person named in the indictment was to be believed, defendant had in his heart a scheme, a plan, a system to have the store building burned. That his solicitation of that person was a part of said scheme; his solicitation of the other witnesses was another part of the same system. *Com. v. Hutchinson*, 19 Pa. Co. Ct. 360.

Upon a conviction of arson for having procured another person to burn the barn of the prosecutor, the state was permitted, against the exception of the defendant, to show that, about six weeks prior to the time when the barn was burned, the ell part of the prosecutor's dwelling house, on the same premises, was set on fire. This evidence was admitted in connection with other evidence on the part of the state tending to show that, before the fire in the ell part, the defendant had predicted that the prosecutor's buildings would burn, and had tried to induce and hire other persons to burn them. The evidence also tended to show that the fire in the ell part was of incendiary origin. It was held that this evidence, with that tending to show a motive on the part of the accused to commit the crime, had a tendency to connect him with the attempt, and, if believed, was pertinent upon the question of whether he participated in the burning of the barn,—as a part of his scheme to burn all the prosecutor's buildings; which scheme he had attempted to carry out in the unsuccessful attempt to burn the ell part. *State v. Hallock*, 70 Vt. 159, 40 Atl. 51.

Upon the trial of an indictment for arson in burning a certain salt block or building in a city, it appeared that the prosecutor owned three blocks in the city and three at a place in an adjoining town, and that the three blocks last mentioned were burned about 1 o'clock in the morning, and the salt block described in the indictment was burned about fourteen hours later. Objection was taken to the admission of the proof of the burning of the three blocks 62 L. R. A.

Other than the one mentioned in the indictment. It was held that the testimony was offered for the purpose of showing that the burning of those buildings, and the burning of the one charged in the indictment, were parts of one scheme, concocted and carried out by the defendant and his associates, and that, for that purpose, the testimony was competent. *Wright v. People*, 1 N. Y. Crim. Rep. 462.

Defendants were indicted for an assault upon a person with intent unlawfully, wilfully, and feloniously to steal from his person a diamond shirt stud. This was alleged and shown to have taken place at Rock Island on the day a public show exhibited there. Evidence that the defendants, acting under the leadership of a notorious pickpocket, were, on the day previous, at another place, where the show was then exhibiting, and followed the show to Rock Island, was held to be admissible. The court said: "It seems to be well settled that, where the offered evidence tends to prove the charge in the indictment, the mere fact that it may tend to prove another crime does not make it inadmissible. . . . Here the defendants were following a show from place to place, which daily attracted large crowds of people. They followed the show to Rock Island, where as was usual, the streets were crowded with people. The defendants were there for the purpose and with the intent of stealing and picking pockets. What they did at Rock Island that day was in pursuance of a common object and purpose. Their acts and conduct were all connected. No evidence was offered for the purpose, or with the view, to prove the commission of another crime, but the court allowed the people to prove the conduct and acts of the plaintiff in error and the other defendants who were indicted with him, before and after the attempted robbery for which they were indicted, as tending to prove the issue involved. While there may be some doubt in regard to the ruling of the court on the admission of the evidence complained of, and while we might be better satisfied with the verdict of the jury had the court excluded the evidence, yet the guilt of the plaintiff in error was so clearly established that we do not regard the ruling of the court on the admission of evidence sufficient ground to cause a reversal of the judgment." *Williams v. People*, 166 Ill. 182, 46 N. E. 740.

On a trial for a violation of the local-option

these may not be presented upon another trial.

Among the questions urged upon our attention, there are several which may be grouped together for the purpose of such brief consideration as we deem it necessary to give them. They are: (1) That the court erred in its charge to the jury and in its refusal to charge the requests submitted by counsel for the defendant; (2) that prejudicial error was committed in the opening and summing up of the district attorney; (3) that the trial court erred in admitting incompetent evidence, and excluding competent evidence, over the objection of the defendant; and (4) that the defendant did not receive that fair and impartial trial to which he is entitled under the law. The first and third of these points need not be

discussed. Many of the exceptions taken to the charge, the refusals to charge, and the rulings admitting or excluding evidence have been disposed of in the conclusions that the Barnet evidence was inadmissible, and that the rules governing expert evidence upon the subject of handwriting were not properly applied, and many other exceptions will be obviated by the different course which another trial of this case will necessarily take. The claims of defendant's counsel that "error was committed in the opening and summing up of the district attorney," and that "the defendant did not receive that fair and impartial trial to which he is entitled under the law," have been so urgently presented that we should be inclined to discuss in detail the many grounds of error assigned under these heads were it not impos-

law, where defendant denies a sale, testimony with reference to other sales than the one charged is admissible. All testimony tending to show that the transaction charged was a sale in accordance with the system pursued by defendant is admissible to be considered by the jury under proper instructions from the court limiting its purpose. *Pitner v. State*, 37 Tex. Crim. Rep. 268, 39 S. W. 662; *Myers v. State*, 37 Tex. Crim. Rep. 331, 39 S. W. 938; *Bennett v. State* (Tex. Crim. App.) 50 S. W. 945; *Wilson v. State* (Tex. Crim. App.) 55 S. W. 68.

Defendant, a sergeant at arms of a legislative body, presented an account for postage stamps, etc., furnished the members of the body, to the proper officers, by whom it was authenticated according to law. On his trial for forgery in altering and enlarging said account after it had been thus authenticated, the prosecution was permitted to put in evidence other accounts of the defendant of the same character, proved to have been altered, to which the defendant reserved exceptions upon the ground, among others, that they were not contemporaneous with the indicted account, but were too remote therefrom, and were not pecuniary obligations within the statute of forgery. It was held that the papers were properly admitted, and that they were not of contemporaneous date with the alleged forged paper was not a valid objection to them. That they were proper evidence to show a system of fraudulent acts on the part of the defendant to obtain money from the state, to which he was not entitled, and thus to show that, in the alteration of the particular instrument, he was actuated by such fraudulent intent; approving and following the rule laid down in *Wharton, Crim. Ev. § 38*, that, "when the object is to show system, subsequent, as well as prior, offenses, when tending to establish identity or intent, can be put in evidence. The question is one of induction, and the larger the number of consistent facts, the more complete the induction is. The time of the collateral inculpatory facts is immaterial provided they be close enough together to indicate that they are part of a system." *Hennessey v. State*, 23 Tex. App. 340, 5 S. W. 215.

On the trial of an indictment for using the mails for fraudulent purposes, which charged that the defendants had devised a scheme and artifice to induce the sending and intrusting of moneys to them by divers other persons, for the 62 L. R. A.

investment and employment thereof, for those persons respectively, in a pretended association or fund known as "fund W," it was held that evidence of fraudulent practices, by the same parties by means of certain funds known as "H" and "K," was admissible. *United States v. Flemming*, 18 Fed. 907.

Upon an indictment of two persons for swindling in obtaining money from the prosecutor by a trick or device, where it appeared that one of the defendants, while walking on the street with the prosecutor, with whom he had struck up an acquaintance, picked up a small padlock which could be opened only by pressing upon a secret spring, and that, upon the other defendant joining them and offering to bet that he could open the lock, the former borrowed, for the purpose of the bet, a sum of money from the prosecutor,—it was held that evidence that, while the defendant who proposed the bet was attempting to open the lock a third person came up, and, showing a police star on his coat, pretended to arrest the parties for gambling on the streets; and that, after having stated that they had been guilty of a serious offense, punishable by imprisonment and a heavy fine, and while pretending to take them to the police station, obtained from the prosecutor a check for \$50 upon agreeing to release the parties,—was admissible. Defendants contended that the crime, if any, for which they were indicted, was complete before the third man came upon the scene, and that what followed merely tended to prove the separate crime of extortion. But this contention was held to be without merit, the court saying that the evidence tended to prove almost conclusively that the three were confederated together for the common purpose of swindling prosecutor, and that all that was done from start to finish was done in furtherance of that purpose, and was all one transaction; and that what occurred after the appearance of the third man was competent for the purpose, if no other, of characterizing what had preceded. *State v. Wilson*, 72 Minn. 522, 75 N. W. 715.

One of the defendants, meeting the prosecutor driving home from a city, asked him to let him ride, and was permitted to do so. The other defendant afterward asked the same privilege, and was permitted to do so. The prosecutor testified that he was somewhat in fear of the two. One of the defendants, for some pur-

sible to do so fairly and impartially without a full and critical review of the 12,000 folios of this record for that sole purpose. Such a review would extend this opinion beyond all reasonable and useful limits, and, in view of the result reached, we deem it unnecessary to discuss or decide the questions raised as to the conduct of the recorder and the district attorney upon the trial. And, finally, counsel for the defendant contends that the verdict of the jury is not supported by the evidence. In view of the fact that a reversal of the judgment herein is required by the decision reached upon the two questions discussed in the earlier pages of this opinion, it would be obviously unprofitable and improper, in the face of the new trial which must be had, to express our views upon the weight of the whole evidence, and we

pose got out of the wagon and went away, and the other called the prosecutor's attention to the fact that he had dropped a paper and, getting out, picked it up and discovered in it a 5-cent piece, which he took out. The other defendant afterward returned, and, being told of the paper, said there was a 5-cent piece in it, and offered to bet that there was. The defendant who had taken out the 5-cent piece winked to the prosecutor, and finally induced him to put up his watch against \$40. The defendant who was offering to make the bet then took out a pocket-book, and, without showing any money, handed it to the prosecutor. He then tore open the paper, exhibited a 5-cent coin which had been concealed in it, snatched his own pocketbook and the watch from the prisoner, and walked off. The prisoner remained with the prosecutor a few moments, and then left him. On the trial a witness stated that he had seen the prisoner and the defendant who obtained the watch walking along the road before they came up with the prosecutor, and on the same day they had attempted the same trick upon the witness. The other defendant had dropped the card in the same way, and the prisoner had picked it up and taken out the coin, and wanted the witness to bet the other party that there was no coin in it. He also stated that he saw the prisoner attempting the same thing some days before. Another witness stated that he saw these two defendants, on two different occasions, two weeks before, arranging some cards for a like operation. It was held that the court did not err in admitting this testimony, but that, on the contrary, in such a case as this, involving, as it did, the previous connection of the parties and the necessity of showing a fraudulent combination between them, it was eminently right and proper. *Defrese v. State*, 3 Helsk. 53, 8 Am. Rep. 1.

Defendant was indicted for the crime of receiving bribes. He was convicted and brought error. It was insisted that the court erred in permitting the state to prove other separate and distinct acts of bribery which it was claimed were not connected with the principal contract alleged in the indictment and proved on the trial. The indictment charged the receipt of money by accused as an inducement to and consideration for allowing certain persons to carry on and prosecute their business of keeping gambling houses unmolested by him as city marshal, not only at the time at which the money

was received, but during a time in the future. The testimony of a witness showed that accused approached him, and gave him to understand that money would have to be paid or gambling houses would have to close up. The testimony showed, further, that the witness paid accused \$300, and at the same time it was agreed that the gambling houses might continue to carry on their business so long as they paid \$50 per month each; that the \$300 was only to pay up to a certain date, and after that date the business should continue providing the \$50 per month was paid. The testimony showed that the witness was in one sense the agent of accused in these transactions, as well as the representative of other gamblers. When accosted by them, defendant directed them to see the witness, who would tell them what to do, and when they went to pay him money in pursuance of the contract made with the witness he told them to do as they had done before,—see the witness. It was held that it was clearly shown that the agreement was a continuing one, and contemplated a system of payments to be made in the future, and for which the same course was to be pursued by accused as for the \$300. That he knew when the witness received the money, and no gambling house was molested after its share of the money had been paid. That accused was fully advised of what occurred in the workings, plans, and designs, not only at the time of the receipt of the \$300, but at all times, so long as the system under which they were working continued. This system was fully developed and exposed by the witness in his testimony. It was properly admitted as a part of the transaction by which the \$300 was paid by the witness to defendant. That the fact of the carrying out of this system was proper evidence for the purpose of corroborating the testimony of the witness and showing the purpose, understanding, and intent with which the money was received, as alleged in the indictment, and for the purpose of showing the system under which these several transactions were had. *Guthrie v. State*, 16 Neb. 667, 21 N. W. 455.

therefore pass defendant's fourth point without further mention.

In conclusion we desire to express our sense of obligation to counsel for both the prosecution and the defense upon this appeal for the fairness and ability with which the case was presented, and for the diligence in research and painstaking arrangement of details which have contributed so materially to lighten the labors of the court.

The judgment of the court below should be reversed, and a new trial ordered.

Bartlett and Vann, JJ., concur.

O'Brien, J., concurring:

There can be no doubt that the people were permitted upon the trial of the defendant, now under review, to give proof of the

shal, not only at the time at which the money was received, but during a time in the future. The testimony of a witness showed that accused approached him, and gave him to understand that money would have to be paid or gambling houses would have to close up. The testimony showed, further, that the witness paid accused \$300, and at the same time it was agreed that the gambling houses might continue to carry on their business so long as they paid \$50 per month each; that the \$300 was only to pay up to a certain date, and after that date the business should continue providing the \$50 per month was paid. The testimony showed that the witness was in one sense the agent of accused in these transactions, as well as the representative of other gamblers. When accosted by them, defendant directed them to see the witness, who would tell them what to do, and when they went to pay him money in pursuance of the contract made with the witness he told them to do as they had done before,—see the witness. It was held that it was clearly shown that the agreement was a continuing one, and contemplated a system of payments to be made in the future, and for which the same course was to be pursued by accused as for the \$300. That he knew when the witness received the money, and no gambling house was molested after its share of the money had been paid. That accused was fully advised of what occurred in the workings, plans, and designs, not only at the time of the receipt of the \$300, but at all times, so long as the system under which they were working continued. This system was fully developed and exposed by the witness in his testimony. It was properly admitted as a part of the transaction by which the \$300 was paid by the witness to defendant. That the fact of the carrying out of this system was proper evidence for the purpose of corroborating the testimony of the witness and showing the purpose, understanding, and intent with which the money was received, as alleged in the indictment, and for the purpose of showing the system under which these several transactions were had. *Guthrie v. State*, 16 Neb. 667, 21 N. W. 455.

Upon the trial of an indictment of a person for being a common gambler, it is competent for the prosecution to prove that the accused had, within the period mentioned in the indictment, set up and kept up faro banks and other gambling tables, on which money was bet and won and

commission by him of two distinct crimes, namely, the poisoning of Barnet and the poisoning of Mrs. Adams. The only crime charged in the indictment was the murder of the latter. We all agree that a vital part of the testimony with respect to the death of Barnet and its cause was merely hearsay and incompetent. Whether any proof bearing upon the sickness and death of Barnet, or the defendant's connection with it, was admissible upon the trial of the case at bar, is a much broader and more important question. The defendant was indicted for feloniously causing or procuring the death of Mrs. Adams; and the fact, if it be a fact, that at some other time and place he also caused the death of Barnet, is not admissible to prove the offense charged. That is certainly the general rule, established by

abundant authority, and founded upon the plainest principles of reason and justice. The only question upon which there is an opportunity for minds to differ is whether the events connected with Barnet's sickness and death are so related to the case at bar as to form an exception to the general rule, and thus bring the proof that was given at the trial within some one of these recognized exceptions. The issue in this case was whether the defendant was guilty of causing the death of Mrs. Adams, and not whether he was guilty of causing the death of Barnet. In a more specific sense, the issue was whether he sent upon its errand of death, through the mail, the package from which the deceased, through mistake, took the deadly poison that killed her; or, to be still more specific, the issue was whether the de-

lost, at places without the county in which he was indicted and was being tried. *Com. v. Hopkins, 2 Dana, 419.*

In *Hall v. State, 3 Lea, 552*, the prisoners had been convicted of arson. The court said: "Objection is made to the action of the court below in refusing to exclude certain testimony. The principal witness is a confessed accomplice, who testified that he and the prisoners had in December previous to the burning, which occurred on the last night in February, organized themselves into a company to rob and burn houses, described the form of swearing in, and stated their agreement to help each other, if caught, by money or fire. The same witness testifies that the agreement to burn the particular house was only entered into on the night of the fire. The objection to the evidence of the organization of the company and what then passed is, that they were not sufficiently connected with the act for which the parties were indicted. The witness himself says that the burning was in the pursuance of the original agreement. What he means is, that the conspiracy was to rob and burn generally, and that any subsequent burning would be in pursuance of the agreement, although the particular building was not then fixed upon. If there was such a conspiracy, and of this the jury were to judge, the evidence was clearly admissible as explaining the concert of action of the defendants."

Upon a prosecution for burglarizing a railroad car proof of similar burglaries committed prior and subsequent to the one for which defendant is being tried, and of the character and kind of articles taken from the cars, is admissible, where there had been a regular system of burglaries, committed almost nightly, carried on by defendant and others, the plunder being concealed on defendant's premises, where a large part of it was found, and the object of admitting such evidence of other crimes was clearly explained, and the jury were duly cautioned that, in passing upon defendant's guilt or innocence, they were limited to the burglary of the particular car charged in the indictment. *Dawson v. State, 32 Tex. Crim. Rep. 536, 25 S. W. 21.*

Upon the trial of a criminal prosecution for violating a local option law by the illegal sale of intoxicating liquors, where the testimony on the part of the state to prove the sale is of a circumstantial character, and the defendant denies that there was a sale, or that any money

was paid in the transaction, and it appeared by the evidence that the prosecutor gave another person money to purchase two bottles of whisky, and that person took a circuitous route, going to the house of the third person, who then went to a woman, and she to the residence of defendant, and came back through her own house and delivered the whisky to the person to whom the prosecutor had given the money, who subsequently delivered it to the latter,—evidence of other sales of intoxicating liquors, and that they were conducted in much the same way, is admissible for the purpose of showing system on the part of defendant in conducting his business and making sales of liquor. *Hollar v. State (Tex. Crim. App.) 73 S. W. 961.*

On the trial of an indictment against two for burglary and larceny in breaking into a store and carrying away the contents of the safe therein, where it appeared that about the same time the house of another person in the same township was robbed, and that one of the defendants was indicted therefor, to which indictment he had pleaded guilty, evidence that articles taken from the house were found upon the person of the defendant who had pleaded guilty to robbing the house, is inadmissible as against the other defendant, as, in order to make one apparently independent crime evidence upon the trial of an indictment for the commission of another, there must be a system between the offense on trial, and that introduced, to connect it with the defendant; and to make the one evidence of the other some connection must exist between them; and that connection must be traced in the general design, purpose, or plan of the defendant, or it may be shown by such circumstances of identification as necessarily tend to establish that the person who committed one must have been guilty of the other. In this case the only connection shown between the two offenses was the fact that they were committed in the same town on the same night, and that one defendant had confessed his guilt as to one of the felonies, and there was some proof as to his guilt as to the other. *Swan v. Com. 104 Pa. 218.*

On the trial of an indictment for committing a burglary in a schoolhouse evidence that the defendant, in a wagon, stopped in front of a new church which was being erected about 40 feet distant, and that a noise was heard by a witness as if someone was loading shingles, is

fendant wrote the direction upon the package with the felonious intent to transmit it by mail to Cornish. If the address upon the package was in fact written by the defendant, all the elements of the crime were to be deduced from the maxim, *Res ipsa loquitur*. The events constituting the history of Barnett's sickness and death did not prove, or tend to prove, the fact that the defendant wrote the address upon the poison package that eventually came to the hands of Mrs. Adams, and that was the material issue at the trial.

The death of Mrs. Adams resulted from poison administered by her own hand, but the real author of her death was the person who made use of the mail to transmit to someone the deadly substance that produced death. In any inquiry concerning the iden-

tity of the author of a great crime, where the evidence is purely circumstantial, the human mind instinctively adopts processes in arriving at results that are not sanctioned by the rules of evidence. The hardened and habitual criminal is more likely to be suspected that one who had never committed a crime before. If the party suspected committed a similar crime before by the same or similar means, or a series of such crimes, proof of these facts goes far to establish his guilt in the popular mind of the offense charged, and for which he is on trial; and yet nothing is better established than the rule that the vicious character of a person on trial for a specific offense cannot be shown, unless he himself makes his character or the events of his life a subject of inquiry by becoming a witness in the case.

Incompetent to show a system of crimes on the part of defendant. *Hunt v. State* (Tex. Crim. App.) 60 S. W. 985.

On the trial of an indictment for burglary the court permitted a witness to testify that he missed some wire and a cotton planter, which property he found at the house of defendant's mother, where defendant and his two brothers lived. It was held that the "evidence of other thefts, with which defendant was not connected, and of other articles of property and from other and different places, and no specific time as to when said other property was actually taken from possession of said witness, was not admissible for the purpose of showing" a system of crimes. *Ibid.*

On a trial for violating the local-option law, other sales of liquor than the one with which the defendant is charged, by him or in which he was engaged, are admissible as showing a system. *Peterson v. State* (Tex. Crim. App.) 70 S. W. 978.

In *Johnson v. State* (Tex. Crim. App.) 62 S. W. 755, which was a violation of the local-option law, it was held that evidence of a sale at a time other than that charged in the complaint was irrelevant, because not shown to be contemporaneous with the sale charged in the complaint, or indicating the existence of any system in violating the law.

Upon the trial of an indictment for bribery, where it appeared that the defendant, as superintendent of police of a city, accepted bribes through a third person as his agent, from the keeper of a disorderly house, for which he agreed to furnish police protection, evidence that other persons paid money to such third person in consideration of official protection in an unlawful occupation similar to that engaged in by the prosecuting witness was properly received, as it tended to connect the third person and defendant as being jointly concerned in the transaction; and to show that the third person was his agent in receiving the money; and also as tending to show a common scheme, plan, or system existing between the defendant and such third person to accept bribes from persons keeping such disorderly houses, and affording them police protection in consideration thereof. *State v. Ames* (Minn.) 96 N. W. 330.

People v. Hensler, 48 Mich. 49, 11 N. W. 804, *supra*, III. b. 2; *People v. Murphy*, 135 N. Y. 450, 32 N. E. 138, *infra*, VI. d; and *Leeper v. 62 L. R. A.*

State, 29 Tex. App. 63, 14 S. W. 398, *infra*, XVI. a, 1,—are also cases showing a common scheme, plan, or system on the part of the accused in committing the crime charged.

VI. To rebut special defenses.

a. General rule.

It sometimes occurs in a criminal trial that the case as made by the prosecution is not denied by the defense; but the endeavor will be made to avoid a conviction by introducing a special or affirmative defense. In replying to such a defense it may happen that the facts shown by the prosecution in rebuttal discover another crime, and, of course, the same discrimination must be exercised as to its admissibility as if it had been offered to make out the case in chief against the defendant.

Defendant was charged with the larceny of 5 head of cattle. At the trial the prosecution gave evidence tending to prove that the defendant was captured in the nighttime driving away the cattle, and also a steer belonging to another person. On his defense, the defendant gave evidence tending to show that he innocently came into the possession of the first-mentioned cattle by purchase from one who had them in pasture for the owner. In rebuttal, the court, against the objections of the defendant, admitted in evidence the testimony of the owner of the steer, to show that the steer which belonged to him, and was found in defendant's possession with the other cattle, was stolen. It was objected that this testimony was not admissible, because it was not rebuttal, and because it tended to prove a distinct offense from that for which the defendant was on trial. It was held that the evidence was admissible. *People v. Cunningham*, 66 Cal. 668, 6 Pac. 700, 846, 4 Pac. 1144.

On the trial of an indictment for stealing a book the defendant had testified that he had in his possession several books, among others a particular one (not the book he was charged with stealing), which he stated he had purchased at a particular place. The state was permitted, in giving evidence in reply, to prove by a witness that this book was stolen from him. It was held that the evidence was properly admitted; that, where the specific property charged to be stolen is found in the possession

No matter how notorious a criminal the party on trial may be, neither his general reputation nor other specific offenses can legally be proved against him as evidence of his guilt of the offense charged. That such proof is persuasive, and has great influence, when introduced, upon courts and juries, cannot be doubted; but the law does not permit it to be given upon the trial of an issue concerning the guilt or innocence of the party on trial for a specific offense. The reason is that such proof does not bear upon the issue in the case, and hence it is misleading, since it does not follow that a party who has committed one crime, or many, is guilty of some other crime for which he is on trial. It is said that the evidence culminating in Barnett's death tends to identify the defendant as the author of the death of Mrs.

Adams; but that is only another way of asserting the general proposition that the commission by the defendant of one crime tends to prove that he committed another crime, and, no matter in what form or how often that proposition is asserted, or how persuasive and plausible it may appear, it is erroneous and misleading, since it violates a salutary principle of the law of evidence, which should be applied in all cases without regard to the question of actual guilt or innocence. If the guilty cannot be convicted without breaking down the barriers which the law has erected for the protection of every person accused of crime, it is better that they should escape, rather than that the life or liberty of an innocent person should be imperiled. I think the evidence relating to Barnett's sickness and death

of the accused, in connection with other property, and the possession of the property is attempted to be accounted for, it is proper for the state to show that the account given was untrue. And that the authorities, indeed, go farther, for it is held that in cases of larceny it is competent to show the possession of other stolen property. *Turner v. State*, 102 Ind. 425, 1 N. E. 869.

b. Insanity.

One of the affirmative defenses frequently advanced in criminal cases is insanity; and evidence which properly tends to show that the accused is of sound mind will not be rejected because it also tends to prove another offense.

Upon the trial of a person for the murder of his wife the defense relied on was the insanity of the defendant, and the coolness and unconcern of the prisoner at the time he did the fatal act were made a prominent feature in the case, and inferences were sought to be drawn from it unfavorable to the people. It was held that it was proper to permit the prosecution to prove that, about thirty years before the commission of the crime charged, defendant had been engaged in a violation of the revenue laws of the country, by a career of smuggling goods and property to and from Canada, such evidence being in the nature of rebutting evidence on the point made. *Hopps v. People*, 81 Ill. 385, 83 Am. Dec. 231.

On a trial where the accused was charged with an assault with an intent to murder his wife, and the defense was temporary insanity produced by the recent use of intoxicating liquors, it was held that previous assaults, outrages, threats, and acts of cruelty and ill treatment towards his wife, extending back over a period of several years, were proper and legitimate evidence to meet defendant's theory of temporary insanity produced by the recent use of intoxicants, as well as to show malice, motive, ill-will, and intent on his part in making the assault. *Hall v. State*, 31 Tex. Crim. Rep. 566, 21 S. W. 368.

Proof that a defendant, upon trial for murder, had committed the crime of incest with his daughter, is admissible in rebuttal, where the claim of the defense is that the defendant had become insane through fear that the deceased

was trying to debauch defendant's daughter. *People v. Lane*, 101 Cal. 517, 36 Pac. 16.

c. Good character.

While the good character of the accused can hardly be said to constitute a defense, yet, as it is not matter of negation, and the issue as to it must always be tendered by the accused, the same rule as to the introduction and admission of evidence of other crimes to rebut it applies.

Upon a trial for murder the defendant introduced evidence which tended to prove that his character as a peaceable, orderly, and law-abiding person, before the occurrence, had been good. The state, in rebuttal, was permitted, against defendant's objection, to introduce evidence tending to prove that he had previously been involved in personal difficulties, and that on one occasion he had threatened to shoot a person with whom he had had a difficulty. It was held, upon the authority of *State v. Gordon*, 3 Iowa, 410, that the court erred in admitting this evidence. *State v. Sterrett*, 71 Iowa, 356, 32 N. W. 387.

In *State v. Gordon*, 3 Iowa, 410, it was held that the evidence must be confined simply to the general character or reputation, and neither party can ask questions as to particular facts or difficulties.

Where the defendant in a criminal action had given evidence of his good character, a witness testifying thereto may, on cross-examination, be asked in regard to certain particular matters tending to destroy his evidence as to the general good character of the defendant, even though such matters relate to other offenses. *State v. Crow*, 107 Mo. 346, 17 S. W. 745.

Where the defendant in a criminal prosecution has introduced evidence of his good character, it is not error to permit the government to show, on his cross-examination as a witness, that he had engaged in another transaction similar to the one charged, and to introduce evidence in rebuttal to show that such transaction was also criminal. *King v. United States*, 50 C. C. A. 647, 112 Fed. 988.

d. Accident or mistake.

Accident or mistake considered with regard to crime is the exact reverse of intent, the absence of one being indubitable proof of the pres-

would not for a moment be considered competent but for the fact that it creates a strong impression upon the mind that the author of his death must also be the author of Mrs. Adams' death, since in both cases death was caused by similar means. We may attempt to deceive ourselves with words and phrases by arguing that it is admissible to prove intent, or identity, or the absence of mistake, or something else, in order to bring the case within some exception to the general rule; but what is in the mind all the time is the thought so difficult to suppress, that the vicious and criminal agency that caused the death of Barnet also caused the death of Mrs. Adams. The rule of law that excludes the evidence for such a purpose may be, and probably is, contrary to the tendency of the human mind; but, since

ence of the other. From the nature of crimes and the means ordinarily used in perpetrating them the defense of accident or mistake, and sometimes of negligence, is more frequently made in cases of murder and the attempt to murder by poisoning, arson, forgery, and counterfeiting, embezzlement, and the receipt of stolen goods.

As a consequence of the nature of this defense, evidence that goes to prove intent on the part of the accused is admissible in rebuttal, notwithstanding the fact that it proves another crime.

Upon the trial of an indictment for cheating by false pretenses in obtaining money as a loan, and by falsely pretending that a forged certificate of stock was a good, valid, and genuine certificate of stock, evidence of the possession and use of other altered and false certificates by the defendant about the same time, whether before or afterwards, is competent to show that his possession of those, for the use of which he was indicted, was not casual or accidental. *Com. v. Coe*, 115 Mass. 481. The opinion, states, however, that they were admitted and allowed to be used only to show guilty knowledge.

On a trial for felony, where a felonious intent is an essential ingredient of the crime charged, and the act done is claimed to have been done innocently or accidentally, or by mistake; or the result is claimed to have followed an act lawfully done for a legitimate purpose, or that there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result, as tending to show guilty knowledge and the intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain. Therefore, on a prosecution for manslaughter in committing an abortion, where the proof of guilt is circumstantial, the theory of the defense being that the premature birth was due to accidental causes, evidence that the respondent had performed other abortions in the same house is admissible to show guilty knowledge and intent. *People v. Seaman*, 107 Mich. 348, 85 N. W. 203.

On the trial of an indictment for arson, where the first count of the information charged the burning of an insured stock of merchandise owned by the defendant, and the second charged the burning of a leased store building in which the property was kept, the court admitted evi-

the law was intended to curb the speculations of the mind, and to guard the accused from the result of error in its operation, I am for maintaining the law in all its integrity, and not for undermining it by qualifications that rest upon no reasonable or logical basis.

The cases cited to show that proof of Barnet's death was admissible to prove that the defendant wrote the address upon the package sent to Cornish have all been explained in the opinion of Judge Werner, and it is unnecessary to comment upon them further than to say that, in my opinion, none of them apply to the case at bar. When these cases, and all the considerations urged in behalf of the people, have been given due weight, it is still safe to say that the question as to the competency of the proof is by

dence tending to show that, on the night this building was burned, the defendant set out other fires in adjacent buildings, and this was assigned for error. It was held that the testimony was properly received, not for the purpose of showing the commission of distinct crimes, but to establish a criminal design on the part of the defendant. That the state was not only required to show that the defendant ignited the store building mentioned in the indictment, but it was required to go further, and satisfy the jury that the act was intentional, and not an accident. *Knights v. State*, 58 Neb. 225, 78 N. W. 508. This case would seem to be a departure from the rigidity with which the supreme court of Nebraska had clung to the general rule, appearing in the several cases upon the subject, decided by that court immediately preceding it.

See *Davis v. State*, 54 Neb. 177, 74 N. W. 599, *supra*, I.; *Cowan v. State*, 22 Neb. 519, 35 N. W. 405; *Berghoff v. State*, 25 Neb. 213, 41 N. W. 136; and *Morgan v. State*, 56 Neb. 896, 77 N. W. 64,—*supra*, c. 12, (b).

Upon the trial of a person for the murder of his wife, where a witness had testified that the defendant said to him, a few days before the shooting, that "the old folk and his wife were crowding him too much altogether, and they were trying to get the best of him in every respect, and he would put an end to them all some of these nights;" and the defendant had testified that, in the effort to defend himself against a person whom he had shot and killed on the same occasion, one of the shots which he had intended for that person had accidentally struck his wife and caused her death,—evidence that, immediately after the killing, the defendant drove for a distance of about 8 miles, arriving there within twenty minutes after the killing of his wife, got out of his buggy, went up on the porch where the father and mother of his wife were then sitting, and deliberately, without any word of warning, killed them both, is admissible, even though it might have the effect to establish another crime than that for which he was on trial. *People v. Craig*, 111 Cal. 460, 44 Pac. 186.

Upon the trial of a person as assistant city attorney for aiding and abetting his principal, the city attorney, in embezzling funds of a city, where evidence had been given as to false representations made by him in regard to assess-

no means clear, but at best is very doubtful; and therefore the accused, and not the prosecution, should be given the benefit of that doubt. It is so difficult for the human mind to discard false theories that assume the disguise of truth, and so easy to substitute suspicions and speculations for evidence of facts, that proof of the general bad character of the accused, or of participation in other crimes, which is practically the same thing, would no doubt be of great aid to the people in procuring a conviction for the specific offense charged in the indictment. Such proof, in a doubtful case, might turn the scale against the accused; but the law, for obvious reasons, does not permit it, and it is dangerous to subvert the rule upon the vague theory that it identifies the accused as the author of the offense charged, which

means nothing more than that it proves, or tends to prove, that he is guilty. If the defendant procured or caused the death of Barnett, he is liable to be indicted and tried for that offense; but it is contrary to the plainest principles of justice to require him, when accused of poisoning Mrs. Adams, to clear himself from all suspicion of participation in another crime of the same character. If the Barnett evidence was properly admitted in the case, it must follow that in every case proof of other crimes is admissible, since in every case it can be said, as it is said in this, that proof of the other crime identifies the accused as the real author of the crime charged. If the defendant wrote the address upon the poison package that was sent to Cornish, then he is identified; but proof that at another time he sent an-

ments not having been paid in, and the defendant had attempted to meet this evidence by explanation to the effect that, although he might have made mistakes, yet, if any of his statements were untrue, they were not made with intention to mislead or deceive, evidence as to the testimony given by him on his cross-examination on a former trial for the same offense, to the effect that he had personally received interest on deposits made by him of the city moneys, is competent to rebut the theory of his defense that he had not intentionally made the false representations, but that they were due to mistake on his part. And this, although the receiving of such interests by him constituted a separate offense from that with which he was then charged. *Com. v. House*, 6 Pa. Super. Ct. 92.

Upon the trial of an indictment for arson in setting fire to a barn, it appeared that the defendant had been in the employ of the owner of the burned barn as coachman and gardener, and had been discharged. A poisonous preparation had been kept in the barn. Defendant knew of this and had used it for the destruction of insects in the garden. The prosecution was permitted to prove, under objection and exception, that, upon the night of the fire, and before it occurred, certain animals in the barn, belonging to the owner, were poisoned with this preparation; that his carriages and cutters in the barn and in an adjoining one were cut and damaged, while carriages and cutters in the same barns, belonging to another, were not injured. It was held that the evidence was competent, as it tended clearly to prove that the fire was not accidental, and that its origin was instigated by malice; also that the fire and the malicious injury were part of the same criminal scheme, and that it was carried out by some person having an intimate knowledge of the surroundings; and so, it was properly received, although it may have tended to establish defendant's guilt of a crime other than the one set forth in the indictment. *People v. Murphy*, 135 N. Y. 450, 32 N. E. 138.

A boy twelve years of age was indicted for an assault with a pistol. Upon his trial he testified that he thought the pistol was empty. Thereupon the government called as witnesses two boys, eight and ten years old, who testified that the defendant shot at them the day before the assault for which he was indicted. It was 62 L. R. A.

held that the evidence was admissible as it was material to prove that the shooting was not accidental, but wilful; and in such a case other acts of the defendant of the same kind might be given in evidence to show that it was wilful. And that it was also admissible for the purpose of showing, in connection with the other testimony, that the defendant had such a knowledge of the nature of the acts as would make him criminally responsible. *State v. McDonald*, 14 R. I. 270.

On the trial of an indictment for an assault with intent to kill and murder, and in another count to maim and disable, and in still another to do the prosecutor some bodily harm, it appeared that the prosecutor was a game keeper and found the prisoner with a gun. That, after some talk with him, they walked along together, when the prosecutor went on before the prisoner towards his horse, and when he was at a short distance from the prisoner the latter fired at his back, but said nothing. The prosecutor afterwards got upon his horse, and was making his way home to a place about 2 miles off, and had got about half a mile on his road when he saw the prisoner again, and the moment he looked around at him the prisoner again fired his gun, the discharge from which beat out one of the prosecutor's eyes and several of his teeth. About a quarter of an hour elapsed between the first and second firing. In the course of the trial it was objected that the prosecutor ought not to give evidence of two distinct felonies, but the trial judge thought it unavoidable in this case, as it seemed to him to be one continuous transaction in the prosecution of the general malicious intent of the prisoner. Upon another ground, also, he thought such evidence proper, *viz.*, that the counsel for the prisoner, by his cross-examination of the prosecutor, had endeavored to show that the gun might have gone off the first time by accident, and the judge thought the second firing was evidence to show that the first, which had preceded it only one quarter of an hour, was wilful, and to remove the doubt, if any existed, in the minds of the jury. *Rex v. Voke*, Russ. & R. C. C. 531.

The prisoner, a female domestic servant of the prosecutor, was indicted for setting fire to a certain stable with intent to injure the prosecutor. It was proved on the part of the prosecution that the fire in question had been discovered at an early hour of the morning, and

other package to Barnet proves nothing in regard to the address. All it proves is that possibly he was capable of the wicked act charged in the indictment, and that is only another way of proving his general bad character, not even by reputation, but by a specific act, which all agree is not admissible.

While the chain of proof to connect the defendant with the poisoning of Barnet is fatally defective in that there is no competent testimony to show that he ever sent to him, by mail or otherwise, the bottle of Kutnow powders which it is said contained the poison, yet, if the missing link had been supplied, it would only make the proof all the more dangerous and incompetent. The defendant was required to answer the charge of causing the death of Mrs. Adams, and not the charge of causing the death of Barnet;

in a stable not far distant from the kitchen, where it was the duty of the prisoner to be; and, with the view of proving that it must have originated in the wilful act of some individual connected with the house, the prosecution proposed to call witnesses to show that on two former, but recent, occasions, not very far distant from each other, attempts had been made by someone from within the house to fire the warehouse and shop of the prosecutor, though there was no evidence to show that the prisoner, or any other individual in or out of the house, was in any way implicated in those attempts. The presiding justice, Sir F. Pollock, C. B., held that this was clearly evidence, and might be used at all events for the purpose of showing that the present fire, which was the third on the same premises within so short a time, could not have been the result of accident. He further said that this course of evidence was not without precedent and authority, for, on the trial of Donallan for the murder of Sir Theodosius Boughton by administering to him some poison, evidence was given that a certain tree which hung over a deep and dangerous brook near a spot where Sir Theodosius was accustomed to fish had been sawn almost in two by some unknown person. That this was proved to show that someone entertained a design against the life of Sir Theodosius, for he was accustomed to stand on that tree while engaged in fishing; and the natural presumption was, that whoever cut the tree did so with the design of precipitating the deceased into the water and endangering his life. These facts were given in evidence on the trial of Donallan for murdering Sir Theodosius afterwards, and were received, though quite unconnected with the prisoner, in order to show that someone entertained a felonious design on his life, and that the probability was that he had not come to a natural death, though his life had been actually terminated in a very different way. That act was not in any way connected with Donallan, but it was received in evidence at his trial, after objection taken to it. Counsel for the defense stated that, according to his recollection of that case, there was some evidence to connect the prisoner with the circumstance alluded to, to which the court rejoined: "Oh, no! I am confident there was no attempt to do so. If the prisoner had been shown to cut the tree, there could have been no doubt whatever of the recep-

tion of proof of that fact on his trial for poisoning the deceased. I have no doubt that this is legitimate evidence to prove the *corpus delicti*, and to negative the presumption of accident." Reg. v. Bailey, 2 Cox C. C. 311.

Comparison of a disputed writing with a writing shown to be genuine is allowed now by the statute. Laws 1880, chap. 36; Laws 1888, chap. 555. It is not very clear what the legislature meant in these statutes by the words "disputed writing," and, while I think the construction given to these acts by my brethren is quite liberal, notwithstanding the rule that statutes changing the common law are to be strictly construed, yet

tion of proof of that fact on his trial for poisoning the deceased. I have no doubt that this is legitimate evidence to prove the *corpus delicti*, and to negative the presumption of accident." Reg. v. Bailey, 2 Cox C. C. 311.

In Queen v. Geering, 18 L. J. M. C. N. S. 215, which is one of the most important cases on the subject treated therein, and one which is more frequently referred to—and nearly always with approval—than any other English case, it appeared that the prisoner was indicted for the murder of her husband in September, 1848, by administering arsenic to him. The prisoner was also charged in three other indictments with the murder of her son George by arsenic, in December, 1848, of another son James by arsenic, in March, 1849, and of an attempt to murder another son, Benjamin, in April, 1849, by arsenic. In April, 1849, Benjamin stated to the surgeon who attended him that his symptoms were precisely the same as those exhibited by his deceased father and his two brothers, and, this statement having been reduced to writing and read over to the prisoner, she said: "It is quite right." Evidence was tendered that the four parties during their lives lived with the prisoner, and formed part of the family; that she generally made tea for them, cooked their victuals, and distributed the same to them on their leaving the house to go to their work in the morning. This evidence was objected to by the counsel for the prisoner. The prosecution claimed that the evidence was admissible for the purpose of proving that the death of the deceased husband was not accidental. Pollock, C. B., who presided at the trial, said that he was of opinion that the evidence was receivable. That the domestic history of the family during the period that the four deaths occurred was also receivable, to show that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine as to whether such taking was accidental or not. That the evidence was not inadmissible by reason of its having a tendency to prove, or to create a suspicion of, a subsequent felony. The trial judge considered whether he ought to reserve the point for the consideration of the judges, and afterwards intimated to the prisoner's counsel that Alderson, B., and Talford, J., concurred with him in opinion, and that the point ought not to be reserved.

Upon the trial of an indictment for the mur-

I am disposed to concur in their view, since it is based on the ground that any other construction would render the legislation practically useless.

Parker, Ch. J., dissenting:

I vote for a reversal of this judgment on the ground that the court erred in receiving the testimony of Dr. Douglass to the effect that Barnet stated to him in his last illness that he had received a box of Kutnow powder through the mail. The declarations of Barnet under the circumstances disclosed by the physicians were not competent to show that Barnet received Kutnow powder through the mails. As the fact thus sought to be established was one of vast importance, the exception taken to the admission of the testimony requires a reversal of the judgment.

I dissent from that part of the prevailing opinion which, in effect, holds that, had the fact been established by competent evidence that Barnet had taken a dose of Kutnow powder containing cyanide of mercury, which he had received through the mails, nevertheless the evidence tending to show that the defendant mailed that Kutnow powder to him is inadmissible on the trial of the defendant for the killing of Mrs. Adams. Of course, it is not admissible unless it tends to prove that Molineux is responsible for the death of Mrs. Adams. If it does tend to prove such responsibility, then it is admissible, although the facts proved establish that the defendant committed another crime. It is often carelessly said that the people cannot, upon trial under an indictment, prove facts showing that the defendant committed another crime,—a statement which is incor-

der of a woman by poison, it appeared that between September, 1859, and February, 1860, three other persons who had been living with her successively sickened and died after a very short illness under symptoms exactly similar to those under which the woman afterwards died. She had long been ill, became worse, and so continued until June, when she died. During her illness suspicion was awakened as to its cause, and on her decease the body was opened and a post-mortem examination made, and the result was that, although she had been suffering from cancer of the coecum, there were found, in addition, traces of a sufficient quantity of antimony to have caused death. Upon this being discovered inquiries were made as to the other deaths. The other bodies were exhumed, and were all found to be saturated with antimony. Before the trial the counsel for the prosecution intimated to the prisoner's counsel that he proposed calling evidence on the indictment for the murder of deceased which would have reference to the other three deaths. Martin, B., the trial judge, after consulting Wilde, B., determined not to admit the evidence. *Reg. v. Winslow*, 8 Cox C. C. 397.

A man and his wife were indicted for the murder of the husband's mother. Some little time before the mother's death the wife had expressed jealousy of a woman, and in the beginning of December the latter's children were seized with violent sickness, followed by great thirst, after tasting some milk which had been sent to their mother by the accused woman. The mother gave the rest of the milk to another woman; and all the persons in that woman's household who partook of it were affected in the same way. The following day a girl of the first-mentioned woman, who went to the prisoner's for milk, was told by the latter to take a particular can out of two standing together. She took the other one while the accused's back was turned; and on that day her mother's children were not affected, but several persons who were dining in the accused's house, and who had all partaken of rice pudding made with the milk, were seized with sickness followed by violent thirst. The husband's mother had partaken of this pudding, and was taken ill like the others. She was attended during her illness by the wife, who prepared all her meals for her, and died on the 20th of December.

In the course of her illness she had shown constant symptoms of the presence of an irritant poison in her stomach. Two or three months after her death her body was taken up and was found on analysis to contain arsenic sufficient to cause death. The body of the husband's first wife was exhumed at the same time, and was also found to contain arsenic. She had died on the previous March after only a few days illness. All her food was prepared for her by the second wife, who then lived in the husband's house as a servant; and both the first wife and the woman who attended her, and who occasionally tasted of the food prepared for her, showed symptoms of poisoning by arsenic. During the whole continuance of the illness, the prisoners, who were the only other persons in the house, were not affected. The prosecution offered evidence of these facts touching the death of the first wife, for the purpose of showing that his mother, for whose murder he and his second wife were on trial, died from poison wilfully administered to her by the prisoners, and not taken by accident. After hearing the argument the court decided that the evidence was admissible for the purpose stated. *Reg. v. Garner*, 3 Post. & F. 681, 4 Post. & F. 846.

Upon the trial of a man for setting fire to his house with intent to defraud an insurance company, after proof of circumstances tending to show that the prisoner had set fire to the building, it was proposed on the part of the prosecution, for the purpose of showing that the fire was not the result of accident, to prove that he had previously occupied two houses in London, in succession, both of which had been insured; that fires had broken out in both, and that he had made claims upon, and been paid by, the insurance companies in respect of the loss caused by each fire. Willes, J., the trial judge, after consulting Martin, B., admitted the evidence, and refused to reserve the point for the consideration of the court for Crown cases reserved. *Reg. v. Gray*, 4 Post. & F. 1102.

On the trial of an indictment for having feloniously set fire to a rick of wheat straw, it appeared that the rick was set on fire by the prisoner's having fired a gun very near to it; and it was proposed on the part of the prosecution to go into evidence to show that the rick had been on fire the day previous, and that the

rect without the addition of the qualification,—unless the facts establishing the other crime also tend to establish the commission by defendant of the crime for which he is being tried. There is no controversy in this court—nor out of it, so far as I know—touching the general rule that evidence of the commission by him of other crimes is not admissible upon the trial of a defendant charged with crime. It is only on rare occasions that proof of the commission of another crime by a defendant is either necessary or helpful towards establishing the crime with which he is charged. Hence, the evidence is ordinarily irrelevant, while at the same time its admission would necessarily operate to so prejudice a jury against a defendant as that in a doubtful case it might control the verdict. Therefore the courts long ago decided that a defendant should

not be prejudiced by the admission of evidence of other crimes committed by him which in no wise tends to establish that he committed the crime for whose commission he is on trial. But it has never been held by any court of responsible authority that the people cannot prove the facts constituting another crime, when those facts also tend to establish that the defendant committed the crime for which he is on trial. Such a holding would accomplish the absurd result of permitting a rule intended to prevent a defendant from being prejudiced in the eyes of the jury because of his life of crime to so operate in certain cases as to prevent the people from proving the facts necessary to convict him of the crime charged. The interests of justice, which require alike the conviction of the guilty and the acquittal of the innocent, make it the duty of courts to

prisoner was then close to it with a gun in his hand. The prisoner objected to the evidence, claiming that it was seeking to prove one felony by another; and was, in effect, asking the jury to infer that the prisoner set fire to the rick on one day because he did so on the other, and that the firing of the rick on the previous day, if wilfully done, was a distinct felony. Maule, J., in deciding to receive the evidence, said: "Although the evidence offered may be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable. In many cases it is an important question whether a thing was done accidentally or wilfully. If a person were charged with having wilfully poisoned another, and it were a question whether he knew a certain white powder to be poison, evidence would be admissible to show that he knew what the powder was because he had administered it to another person, who had died, although that might be proof of a distinct felony." *Reg. v. Dossett*, 2 Car. & K. 306, 2 Cox C. C. 243.

Upon the trial of an indictment for murder, by the prisoner, of the son of her late husband by poisoning, after evidence had been given tending to prove the case of the prosecution, by an analytical doctor who had given evidence in regard to the stomach of the deceased, it was proposed by the counsel for the prosecution to ask him if he had subsequently received several other jars containing the viscera of other persons, and had examined them. This was objected to, and, after extended argument for and against the admission of the evidence, the trial judge, Archibald, said he would consult Baron Pollock, which he did; and on his return he said that he had considered the point very carefully with his learned brother Pollock, and, on the authority of *Reg. v. Geering*, 18 L. J. M. C. N. S. 215, *supra*, and *Reg. v. Garner*, 3 Fost. & F. 681, 4 Fost. & F. 346, *supra*, he thought he ought to receive the evidence. Counsel for the prisoner then asked that the case be reserved for the consideration of the court of criminal appeal, as there were conflicting authorities. His lordship said he must decline to do so, having made up his mind on the point. Evidence was then given that two other children of the prisoner and a lodger in her house had died pre- 62 L. R. A.

vious to the present charge from the same poison. *Reg. v. Cotton*, 12 Cox C. C. 400.

The prisoner was indicted for the murder of her infant child by poison. Upon the trial, after evidence tending to show that the child died by poison, in order to show that the poisoning was not accidental it was proposed to prove that another daughter of the prisoner had died in the March previous, and had, immediately before her death, unaccountably suffered from violent vomiting, purging, cramps, and convulsions, and other similar symptoms to those noticed in the illness of the second child on the third of October and just preceding her death. Also that such daughter, in fact, died from arsenical poisoning. No objection was raised to the introduction of this evidence. It was also proposed to further strengthen the theory for the prosecution by showing that the prisoner's mother came to visit the family on the 3d of November (subsequent to the death of the child for whose murder the accused was on trial), and that the next day she, also, was inexplicably seized in exactly the same way as the two children who had died by poison,—that she, in fact, also died from it. The question arose as to whether evidence of a subsequent poisoning could be given as well as a previous one, and Lush, J., admitted the evidence upon the theory of *Reg. v. Dossett*, 2 Car. & K. 306, 2 Cox C. C. 243, *supra*. *Reg. v. Heeson*, 14 Cox C. C. 40, 20 Moak, Eng. Rep. 384.

Two women, F. & H., were jointly indicted for the murder of the husband of H. Upon the trial, after proving that the husband had died from arsenic, and had been attended by the prisoners, the prosecution, in order to establish that his death was due to arsenical poisoning, and that not accidentally taken, but intentionally administered by some person, proposed to give evidence that three other persons (to whom the prisoners had access) had died within the last three years exhibiting similar symptoms to those of deceased, and that an examination of their exhumed bodies afforded evidence of their deaths being due to arsenical poisoning. In deciding to receive the evidence the trial judge said that the question was whether, on an indictment for murder by the administration of poison, evidence might be given that the deaths of other persons than the one of whose death

preserve this rule in its entirety, for by it a defendant will be protected from the prejudice resulting from the evidence of other unrelated crimes committed by him, while the people will not be prevented from proving the facts of another and related crime, which tend to establish the commission by the defendant of the crime charged. There are many cases both in England and in this country where the people were permitted to prove the commission of another crime by defendant because it tended to prove him guilty of the one for which he was standing trial. Among them may be found the following: *People v. Place*, 157 N. Y. 585, 52 N. E. 576; *People v. Van Tassel*, 156 N. Y. 561, 51 N. E. 274; *People v. McLaughlin*, 150 N. Y. 365, 386, 44 N. E. 1017; *People v. McClure*, 148 N. Y. 95, 42 N. E. 523; *People*

v. Harris, 136 N. Y. 443, 33 N. E. 65; *People v. Murphy*, 135 N. Y. 451, 32 N. E. 138; *People v. Dimick*, 107 N. Y. 13, 32, 14 N. E. 178; *People v. Everhardt*, 104 N. Y. 591, 11 N. E. 62; *Pontius v. People*, 82 N. Y. 339; *Hope v. People*, 83 N. Y. 418, 38 Am. Rep. 460; *Mayer v. People*, 80 N. Y. 364; *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524; *Coleman v. People*, 58 N. Y. 555; *Copperman v. People*, 56 N. Y. 591; *People v. Zuck-er*, 20 App. Div. 363, 46 N. Y. Supp. 766, Affirmed in 154 N. Y. 770, 49 N. E. 1102; *Stout v. People*, 4 Park. Crim. Rep. 132; *Haices v. State*, 88 Ala. 37, 7 So. 302; *People v. Otto*, 4 N. Y. Crim. Rep. 149; *People v. Wood*, 3 Park. Crim. Rep. 681; *Com. v. Jackson*, 132 Mass. 16, 44 Am. Rep. 299, note. *Com. v. Bigelow*, 8 Met. 235; *Com. v. Stone*, 4 Met. 43; *Heim's Case*, 1 N. Y. City Hall

the original inquiry is made, could be given with a view of showing that those deaths resulted from poison of the same or a similar nature; that, where the authorities are at all in conflict, the safest rule to be guided by is one's common sense, and that he could not conceive that on a charge of this nature it was consistent with common sense to exclude such evidence; after citing *Reg. v. Geering*, 18 L. J. M. C. N. S. 215, *supra*, and stating what was decided in that case,—namely, that in a case of poisoning by arsenic evidence of the deaths of people other than the one whose death was the subject-matter of the particular inquiry might be given, with a view to showing, not that the prisoner had feloniously poisoned the person with whose murder he is charged, but that such person had, in fact, died by poison administered by some one; that that was the extent to which that authority went, and that to that extent the court had no hesitation in saying he would admit evidence as to the other deaths in this case; that there was one matter against which he wished to guard himself; that he did not think there was any authority, neither did he think it clear that it would be altogether consistent with reason and good sense, to admit such evidence as evidence of motives; and, with that safeguard, he had no hesitation in saying that it was competent for the Crown to tender the evidence in question. *Reg. v. Flannagan*, 15 Cox C. C. 403.

In a comparatively recent English case in the privy council it was held that, where prisoners had been convicted of the wilful murder of an infant child, which the evidence showed they had received from its mother on certain representations as to their willingness to adopt it, and upon payment of a sum inadequate for its support for more than a very limited period, and whose body the evidence showed had been found buried in the garden of a house occupied by them, evidence that several other infants had been received by the prisoners from their mothers on like representations and on like terms, and that bodies of infants had been found buried in a similar manner in the garden of several houses occupied by the prisoners, was relevant to the issue which had been tried by the jury. The Lord Chancellor, in delivering the judgment of their lordships, among other things, said: "In their lordships' opinion the principles which must govern the decision of the case 62 L. R. A.

are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offense for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed, or accidental, or to rebut a defense which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other."

Several of the leading authorities on this subject decided by the English courts are considered at length in the opinion, with a substantial approval of the rule laid down in *Reg. v. Geering*, 18 L. J. M. C. N. S. 215, *supra*, and with a statement that the same had been practically approved by Maule, J., in *Reg. v. Dossett*, 2 Car. & K. 306, 2 Cox C. C. 243, and *Reg. v. Gray*, 4 Fost. & F. 1102, *supra*, and that in the latter case Willes, J., after deciding to admit the evidence, consulted with Martin, B., and thereafter refused to reserve the point for the consideration of the court for Crown cases reserved. The opinion states further that the fact that Willes, J., adhered to his decision after consulting with Martin, B., is significant and important for the reason that, in *Reg. v. Winslow*, 8 Cox C. C. 397, *supra*, which case it certainly seemed difficult to reconcile with *Reg. v. Geering*, Martin, B., was supposed to have retained and expressed different views, but that in view of the circumstances to which attention had been called (*viz.*, that Willes, J., declined to reserve the point for the consideration of the court for Crown cases reserved, after consultation with Martin, B.), it could not be regarded as certain that Martin, B., had, in *Reg. v. Winslow*, deliberately dissented from the view which was adopted in *Reg. v. Geering* and other cases. The opinion also states that their lord-

Rec. 46; *Smith's Case*, 1 N. Y. City Hall Rec. 49; *Coffey's Case*, 4 N. Y. City Hall Rec. 52; *Dougherty's Case*, 4 N. Y. City Hall Rec. 166; *Com. v. Johnson*, 133 Pa. 293, 19 Atl. 402; *Com. v. Russell*, 156 Mass. 196, 30 N. E. 763; *Reg. v. Colclough*, 15 Cox C. C. 92; *Reg. v. Garner*, 3 Fost. & F. 681; *Reg. v. Cotton*, 12 Cox C. C. 400; *Reg. v. Geering*, 18 L. J. M. C. N. S. 215; *Reg. v. Heesom*, 14 Cox C. C. 40; *Makin v. Atty. Gen.* 17 Cox C. C. 704; *Reg. v. Roden*, 12 Cox C. C. 630; *Reg. v. Flannagan*, 15 Cox C. C. 403; *Goersen v. Com.* 99 Pa. 388; *People v. Seaman*, 107 Mich. 348, 65 N. W. 203; *Hester v. Com.* 85 Pa. 139; *Kramer v. Com.* 87 Pa. 301; *Brown v. Com.* 76 Pa. 319; *People v. Foley*, 64 Mich. 148, 31 N. W. 94; *People v. Rogers*, 71 Cal. 565, 12 Pac. 679; *Com. v. Choate*, 105 Mass. 451; *Rea v. Cleaves*, 4

Car. & P. 221; *Com. v. McCarthy*, 119 Mass. 354; *Com. v. Miller*, 3 Cush. 244. It is unnecessary to refer to these cases in detail, as it is sufficient for my present purpose to say that each one of them presents a case in which proof of the facts tending to show the commission of another crime by the defendant on trial was admitted for the purpose of aiding in establishing the fact that he committed the offense charged. Indeed, no one denies that this has often happened, nor questions that in the future it will and should happen again and again; but, instead, it is said in effect that this case is not within the rule as interpreted by those cases. In other words, that the facts of this case do not bring it within the exceptions (so called) created by those cases. The argument proceeds upon the assumption that the excep-

ships did not think that the judgments in *Reg. v. Oddy*, 2 Den. C. C. 264, *Temple & M.* 592, 20 L. J. M. C. N. S. 198, 15 Jur. 517, 5 Cox C. C. 210, III. c. 16, *supra*, at all conflicted with the judgment in *Reg. v. Geering* and the other cases referred to. *Makin v. Atty. Gen.* [1894] A. C. 57, 63 L. J. P. C. N. S. 41, 6 Reports, 373, 69 L. T. N. S. 778, 17 Cox C. C. 704, 58 J. P. 148.

On a trial for murder in causing the death of a single woman by strychnine, it appeared that while the defendant, an unmarried woman, was an inmate of a certain family, the wife died in spasms and convulsions, manifesting symptoms of strychnine poisoning. That for several hours preceding her death she was in the exclusive care of her son ten years of age and the defendant. That among other things kept in the house was a small bottle containing strychnine with an ordinary cork, which any person could remove without difficulty, and which had been purchased to poison rats and other vermin, and that the husband had taken this bottle and prepared some strychnine and cheese to poison rats in the presence of defendant and his little son. That after the death of the wife the defendant continued a resident of the family, and by various acts and conversations evinced a desire to become the wife's successor. That she became possessed of the idea that the deceased was likely to become the second wife instead of herself, and the claim of the state was that they had shown in connection with these circumstances, others tending to show that the defendant had taken the life of the last-named person by administering to her strychnine from the before-mentioned bottle. It was held that evidence tending to show that the death of the wife was caused by strychnine poisoning was competent, and, upon such evidence being admitted, that a charge to the jury that, if they should be convinced beyond a reasonable doubt that at the time of the death of the wife the family consisted of several members, of whom the defendant was one, and that none of the others were poisoned, the fact of her death might be considered by them in determining whether the death of the woman for whose murder the defendant was on trial was chargeable to accident or not, and that to convict they must be convinced beyond a reasonable doubt that the latter did not die from strychnine accidentally taken. The supreme court held 62 L. A.

that there was some doubt as to the materiality of the evidence, as there was no testimony whatever in the case having the least tendency to show that deceased took the strychnine poison, of which she no doubt died, accidentally, but that the instruction, however, if material, was clearly correct. *Zeldoske v. State*, 82 Wis. 580, 52 N. W. 778. It was contended by counsel for the defendant that the effect of such testimony should have been strictly limited to the question of motive and intent. In answer to this contention the court said: "The cases cited in support of this view hold only that such evidence is competent on this question. They are none of them cases of murder by poison, and they do not hold, or assume to decide, that in such a case such evidence, while it is proper evidence of motive and intent, may not be used, as it was in this case, to show that the deceased did not take the strychnine poison, of which she died, accidentally. The correctness of the charge is abundantly sustained by many authorities, and we know of none to the contrary."

Where, on the trial of an indictment for murder, the defendant, by his testimony, presented the theory of accidental homicide, the evidence of the killing of another person by defendant, which he also claimed to have been done accidentally, is not admissible to show a system, where it does not appear how the killing of the other person occurred, as the court cannot presume, as against defendant, that it occurred in the same manner as the homicide for which the defendant was then on trial. *Barkman v. State* (Tex. Crim. App.) 52 S. W. 69.

On the trial of an indictment for embezzlement in which a single offense was charged, evidence of several conversions of rent occurring each month was held to be admissible upon the one charge, for the purpose of showing acts of a similar nature, to establish guilty knowledge, to exclude the possibility of accident or mistake in the accounting, and to show the felonious intent. *Edelhoff v. State*, 5 Wyo. 19, 36 Pac. 627.

The following cases also show when evidence of the other crime is admissible to repel the defense of accident or mistake: *Wallace v. State*, 41 Fla. 547, 26 So. 713; *Goersen v. Com.* 99 Pa. 388, 106 Pa. 477, 51 Am. Rep. 534, — *supra*, III. b, 1; *Com. v. Birriolo*, 197 Pa. 371, 47 Atl. 355, *supra*, III. c, 1; *State v. Plunkett*, 64 Me. 534; *State v. Neagle*, 65 Me. 468, — *supra*, III. c, 6; *Com. v. Bradford*, 126 Mass.

tions are not to be added to, but that as large a number had been created when this trial began as should be tolerated, instead of treating these decisions as establishing the principle that the facts of another crime may be proved by the people whenever their tendency is to prove the commission of the crime charged.

Wharton, Crim. Ev. 9th ed. § 48; Underhill, Ev. § 58; Abbott, Trial Brief, Crim. Causes, § 598,—are cited in support of the statement that: "Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish: (1) Motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish

the others; (5) the identity of the person charged with the commission of the crime on trial." This list of exceptions has been extended in terms in some of the opinions in the cases cited *supra*, but it is of sufficient length for the purposes of this discussion. The argument then proceeds with an attempt to show that evidence authorizing a finding that Molineux killed Barnet is not within any of the exceptions, and hence it is assumed that it is not competent. I think the real test in such cases is, Does the evidence of the other crime fairly aid in establishing the commission by defendant of the crime for which he is being tried? And that test, and none other, is fairly established by the authorities. It is conceded that cases have arisen where another crime was permitted to be proved for the purpose

42, *supra*, III. c. 9; Reg. v. Fraincis, L. R. 2 C. C. 128, 12 Cox C. C. 612, 43 L. J. M. C. N. S. 97, 30 L. T. N. S. 503, 22 Week. Rep. 663, *supra*, III. c. 12, (b); Stanley v. State, 88 Ala. 154, 7 So. 273; Reeves v. State, 95 Ala. 31, 11 So. 158; Reg. v. Balls, 12 Cox C. C. 96, L. R. 1 C. C. 328, 40 L. J. M. C. N. S. 148, Moody C. C. 470, 24 L. T. N. S. 760, 19 Week. Rep. 876; Reg. v. Stephens, 16 Cox C. C. 387, 58 L. T. N. S. 766, 52 J. P. 823,—*supra*, III. c. 15; People v. Rando, 3 Park. Crim. Rep. 335, *supra*, III. c. 16.

VII. When other crime is part of the *res gestæ*.

a. Murder.

Where the crime stated in the indictment or information is so connected with another offense that evidence of the commission of the former cannot be given without tending to prove the latter, such evidence is competent because it is said to be part of the *res gestæ*, and should be admitted regardless of the fact that it is evidence of another distinct crime.

Where two persons are killed at the same time and place, and apparently in the same transaction, or approximately so, evidence as to the circumstances of the killing of one is admissible on the trial under an indictment for the killing of the other. The court said that there was in the present case a more cogent reason for the introduction of the proffered testimony, *viz.*, that the two persons were living in the same house, in an apparently isolated place, and were left there by defendant, alive and well, according to his statement; that under these circumstances it might have appeared quite probable to the jury that it was the other person, and not the defendant, who killed the person for whose murder the defendant was indicted, and threw his body in the river; and that this was met by showing that the other person, too, was killed, and his body also placed in the stream. People v. Smith, 106 Cal. 74, 39 Pac. 40.

Upon the trial of an indictment for murder it was claimed that the trial court erred in permitting the people to prove the killing of another person and an assault upon still another. The court held that the charge against the defendants was the murder of the person named in the indictment, but that one of the other persons was killed and the other assaulted and cut 62 L. R. A.

with a knife in the same fracas; and, as the evidence in reference to the two latter was inseparable from the evidence in relation to the killing of the person for whose murder the defendant was on trial, it was admissible as a part of one and the same transaction. Hickam v. People, 137 Ill. 75, 27 N. E. 88.

In People v. Pallister, 138 N. Y. 601, 33 N. E. 741, defendant was indicted upon a charge of murder, it appearing that, after a quarrel and fight between him and a friend and the victim of the murder and a party of his friends, the defendant went off with his friend, and soon returned with a knife, and attacked the deceased and his companions, inflicting a wound upon the former from which he afterwards died, and followed the others, who were running from him, stabbing another man three times. It was argued that it was error to admit the testimony as to the prisoner's stabbing the second man, inasmuch as it occurred after the offense of which the defendant stood indicted, and constituted no part of the *res gestæ*. It was held that the exception was untenable; that the stabbing of the other man was something which occurred in the same affray as the killing with which defendant was charged, and was sufficiently connected therewith, as an incident, to make it admissible; that it was one of those surrounding circumstances which related to, and illustrated, the principal fact, and therein lay the principle of its admissibility.

On a trial for murder it appeared that accused had assumed to be a spiritualistic medium, and had induced the victim to make and wear a certain belt, containing gold coins, for the purpose of developing power as a medium, and that deceased, when found, was without such belt and coins, and his clothing was in a condition indicating that the belt had been torn from his body. It was held that it was competent for the people to show that accused was dealing dishonestly with deceased, and attempting to get his money dishonestly and by false pretenses; that all of defendant's dealings with his victim were admissible as part of the *res gestæ*, to show knowledge that the latter had the gold in his possession, and as bearing upon the question of motive; and further, that, for the purpose of showing these facts, evidence was admissible to show that on two previous occasions the accused had assumed to be a medium, and had advised his dupes to get a belt and put a

of establishing a motive for the crime for whose commission defendant is on trial,—just that and nothing more. Motive is an important element, it is true, in certain cases, but it is only one element; and yet, if it is necessary to establish that the defendant had a motive in committing the crime charged, proof of another crime may be permitted for that purpose. Intent is another essential element which must be made out before there can be a conviction for a crime, and, if the commission of another crime by a defendant tends to establish a guilty intent on his part in the case on trial, the other crime may be proved. So, if a defendant claims that the killing was due to mistake or accident, the facts of another crime may be proved by the people if those facts tend to show that there was neither mistake

nor accident on the part of the defendant. Other cases may be found where evidence of another crime has been received simply because it tended to identify the person on trial. Judge Peckham, in *People v. Sharp*, 107 N. Y. 427, 468, 14 N. E. 319, 344, refers to a "class of cases in which the facts show the commission of two crimes, and that the individual who committed the other crime also committed the one for which the defendant is on trial. Evidence is then permitted to show that the defendant was the person who committed the other crime, because in so doing, under the circumstances and from the connection of the defendant with the other crime, the evidence of his guilt of such other crime is direct evidence of his guilt of the crime for which he is on trial." In *People v. Murphy*, 135 N. Y. 451, 32 N. E. 138,

considerable quantity of gold in it, with a view to develop power as a medium, and that on one occasion, by sleight of hand, he substituted nickles for gold pieces, and retained the gold. That while the general rule is that proof of another distinct offense may not be given in evidence for the purpose of convincing the jury that it is more probable that the offense charged has been committed, an exception is made when a particular intent is to be proved; and it has been held in many cases that, where a charge of false pretenses is made, proof of similar false pretenses practised upon others is admissible. *People v. Ascher*, 126 Mich. 637, 86 N. W. 140.

Where the killing of one person was preceded by an attack upon another in his company, who fired his pistol at the assailants and fled, whereupon they pursued him for a short distance and then returned to the place of the attack, and, as was inferred from the circumstances, killed the person with whose murder they are charged, it is competent upon the trial for the state to show the attack upon the other person, as immediately connected with the killing charged, and as constituting part of the same transaction. *Doghead Glory v. State*, 18 Ark. 236.

Upon the trial of an indictment against two persons for the murder of a third, evidence of the killing of another person at the same time and place, by one of the accused, was held, in *State v. Vines*, 34 Ia. Ann. 1079, to be admissible as part of the *res gesta*, the general rule in homicide cases being that all that occurs at the time and place of the killing is admissible as *res gesta*. The court said that, while proof of a different crime from the one charged is generally objectionable, it is nevertheless admissible when both offenses are closely linked or connected,—especially in the *res gesta*; and also when such proof is pertinent and necessary to show intent.

Where three persons were attacked at the same time, one being instantly killed, while another was killed and the third wounded in attempting to escape, the whole transaction lasting about two minutes, evidence of all that occurred was held to be admissible upon the trial of a woman charged as being present aiding and abetting another in the murder of the person first killed, including what happened after such killing as well as what took place before. The court said that the facts in question were 62 L. R. A.

substantial ingredients of the general occurrence, that the affair was incapable of being separated into distinct onsets, that the parts were a connected cluster of events and reciprocally served to color and characterize each other, and that the fact that evidence of what occurred after the killing charged would prove a distinct offense could be no ground for rejecting it. *People v. Marble*, 88 Mich. 117.

Upon the trial of a man for the murder of one of his twin children evidence of the murder of the other child is admissible, it being impossible to give the circumstances concerning the death of the child named in the indictment without detailing those connected with the death of the other child, where both occupied the same bed, died the same night, and were found dead together, bearing upon their bodies similar marks of violence, which in the opinions of several physicians produced death. *People v. Foley*, 64 Mich. 148, 81 N. W. 94.

Evidence of the character of the wounds on the body of a murdered person is admissible in evidence on a prosecution for the murder of another; where the killing of the two men was part of one and the same transaction; all that took place and all that was said at the time of the killing being competent to go to the jury in determining the guilt or innocence of the accused and the degree of the crime with which he is charged. *People v. Wright*, 89 Mich. 70, 50 N. W. 792.

Upon the trial of an indictment for the murder of a person spoken of during the trial as Police Corporal Fitzgerald, a witness on the part of the state was asked: "Were any of the prisoners at the bar,—were either of the parties that he refers to, at the shooting he speaks of, and which he fixes to be half an hour before the shooting which resulted in the death of Police Corporal Fitzgerald?"—which question was objected to because anything that took place half an hour anterior to the shooting which resulted in the death of Corporal Fitzgerald could have no bearing on the case, and was not part of the *res gesta*. The objection was overruled, and the affirmative answer of the defendant to the question, admitted. Upon appeal the statement of the district judge was produced, that "the proof in the case established that the crowd, among whom were some of the accused, had been engaged in discharging their pistols in the market, and its immediate

the evidence of another offense was held admissible because it had been shown to be "a part of the same criminal scheme" as the main offense. An examination of the cases cited *supra* discloses still other situations in which the proof of another offense has been sanctioned, and those cases show that almost every element essential to a conviction for crime either has been established, or the evidence tending to prove it has been supported and strengthened by proofs of the commission of another crime by the same party. In not one of those cases is it suggested that there is any element of a crime that may not be proved in that way, and this court long ago distinctly laid down the rule, as it seems to be established by the authorities generally, as follows: "Evidence tending to prove any fact constituting an element of a

crime charged in an indictment is competent, although it may tend to prove the prisoner guilty of some other crime." *Weed v. People*, 56 N. Y. 628. And this conclusion has been followed in this court recently in three cases by expression quite as comprehensive. In *People v. Van Tassel*, 156 N. Y. 561, 565, 51 N. E. 274, 275, where it is said: "Evidence of other transactions, otherwise material or relevant, is not inadmissible merely because it tends to prove another crime;" and in *People v. Place*, 157 N. Y. 584, 598, 52 N. E. 576, 581, where the court carefully stated the rule in its entirety in two sentences, as follows: "It is an elementary principle of law that the commission of one crime is not admissible in evidence upon the trial for another, where its sole purpose is to show that the defendant

vicinity, and that of these shots two were fired by one of these defendants, Donelon. That this shooting commenced about half an hour before the killing of Corporal Fitzgerald, and was what caused the officers to come upon the scene and attempt the arrest of one of the defendants, and that it was during the attempt to convey him to the patrol box, and to hold him there to await the coming of the patrol wagon, that the attack was made upon the officers which resulted in the killing of officer Fitzgerald. The proof is that from the arrival of the officers on the scene until the firing of the shot which resulted in the death of Fitzgerald, the officers were engaged in the attempt to arrest and in repelling the assaults upon them, that the whole was one continuous, uninterrupted transaction, all of the *res gestæ*." It was held that, under this state of facts, there could be no reasonable doubt of the evidence sought relating to the *res gestæ*, notwithstanding a half hour intervened between the shooting to which the witness's attention was directed, and at which one or more of the defendants were supposed to have been present, and the time at which the homicide happened. *State v. Donelon*, 45 La. Ann. 744, 12 So. 922.

On a certain night a farmer of reputed wealth, and his wife, were murdered on his farm. She was found on the next morning lying across her bed, unconscious and partly undressed, but afterwards became conscious, and able to state some of the circumstances of that night, and died some eight days afterwards. Her son, living away from home, who first found her, on his way to give the alarm discovered the dead body of his father lying at a distance of about 300 yards from the house. Near him was found a heavy oak club covered with blood and hair. The wounds on the head of both husband and wife were such as this weapon would probably make, and were of a fatal character. A chest, bureau, and desk in the house had been broken open, and evidence that the perpetrator of the murders had been in pursuit of plunder. On the trial of the defendant for the murder of the wife evidence of finding the body of the husband 300 yards from the house, the condition of the chest, bureau, and desk, and the fact that a large sum in silver and gold was known to the defendant to be in the house, was admitted in evidence under objection. Upon a writ of error to review a con-

viction of murder of the wife, the supreme court held that the commission of a distinct offense, even similar in character, cannot be given in evidence against the prisoner, as was held in *Shaffner v. Com.* 72 Pa. 60, 13 Am. Rep. 649, 11, 2, (a), *supra*, but that when two persons are murdered at the same time and place, and under circumstances evidencing that both acts were committed by the same person or persons, and were part of one and the same transaction or *res gestæ*, and tend to throw light on the motive and manner of the murder for which the prisoner is indicted, the case is different. And that such was the case here, the club found near to the husband being the probable instrument of the death of the wife also, and the motive, to wit, robbery, being one and the same, which led to the murder of both at the same time. Being parts of the same *res gestæ*, they, together, tend to throw light on each other, and that there was no reason that the truth should be thrown out by excluding the evidence objected to. *Brown v. Com.* 76 Pa. 319.

Defendant had been convicted of the murder of his wife. Upon his trial therefor the state was permitted to prove that, immediately after killing his wife, and within forty steps of her dead body, the defendant shot and killed another person. It was held that the evidence was clearly admissible as *res gestæ*. *Wilkinson v. State*, 31 Tex. Crim. Rep. 86, 19 S. W. 903.

Upon a trial for murder evidence was received, over the objection of defendant, tending to show that defendant and another had been in the business of horse stealing; that they had stolen quite a number of horses from different persons; and that they, when they believed they were in danger of being arrested, resorted to their arms. Several fights were introduced in evidence under circumstances showing, evidently, that they were determined not to be arrested under any circumstances. Evidence was introduced tending to show that, after the homicide, they did not propose to be arrested, and that to prevent this they would resort to deadly weapons to prevent even a legal arrest. It appeared in evidence that the defendant and the other person mentioned were in possession of stolen horses, and the sheriff of the county, and the deceased, at the request of the sheriff, went to examine some horses to ascertain whether they were the stolen property; that,

has been guilty of other crimes, and would, consequently, be more liable to commit the offense charged. But, if the evidence is material and relevant to the issue, it is not inadmissible because it tends to establish the defendant's guilt of a crime other than the one charged." And *People v. McLaughlin*, 150 N. Y. 365, 386, 44 N. E. 1017, is to the same effect. Here we have a broad and comprehensive test—one that looks towards justice: Do the facts constituting the other crime actually tend to establish one or several elements of the crime charged? If so, they may be proved. Measured by this test, it was competent for the people to show that Barnett came to his death through cyanide of mercury contained in a dose of Kutnow powder taken from a box received by him through the mails, in view of the facts and

circumstances proved, tending strongly to show that one mind conceived and one hand executed all of the details of both crimes. But I shall not discuss the evidence from that point of view, for it is my purpose to attempt to show that, even if we assume the contention to be sound that the people can prove facts constituting another crime only when they are within one of the exceptions enumerated, the Barnett evidence is clearly within the fifth enumerated exception, in that it tends to establish "the identity of the person charged with the commission of the crime on trial." There are features of the evidence that bear upon two of the other exceptions, but for the sake of brevity only the one named will be considered.

In the prevailing opinion, after a preliminary discussion of the facts relating to the

while they were looking at the horses, the defendant and the other person mentioned came up, and, as the latter was about to get on his horse, the sheriff walked past the defendant and halted the other man. Just as he did so he turned and saw deceased falling. It was held that, under the circumstances, all the evidence before mentioned was competent. *English v. State*, 84 Tex. Crim. Rep. 190, 30 S. W. 233.

Where a man and his wife were shot at the same time, the wife being instantly killed and the husband mortally wounded, evidence of the killing of the wife is properly admitted on a prosecution for the murder of the husband, as part of the *res gesta*. *Crews v. State*, 34 Tex. Crim. Rep. 533, 31 S. W. 873.

A constable and a companion having been killed in an attempt to arrest a third person, evidence of the killing of the constable is admissible as part of the *res gesta* on a prosecution for the murder of his companion, both killings being part of the same transaction and having occurred within a short time of each other; and it is also proper to admit evidence describing the wound on the body of the constable, from an examination made hours after the killing and after the body had been removed from the place where he was killed, since, if proof of the shot that killed him was proper, a description of the wound made by the shot was also proper. *People v. Coughlin*, 13 Utah, 58, 44 Pac. 94.

On the trial of an indictment for murder it is proper for the counsel for the prosecution in opening to state to the jury that the circumstances of the whole transaction would show that the killing of the person named in the indictment and of two other young men occurred at one time, and as one transaction; that all three of the boys met their death at the hands of the defendant, at about the same time; that it would be impossible to separate the proof of the killing for which defendant was on trial from the killing of the other two young men; and that the prosecution would show the killing of the three as part of one transaction,—which statement was objected to by defendant's counsel, who also objected to any other evidence being admitted, except as to the killing of the person for whose murder the defendant was on trial. The objection was overruled. Thereupon testimony showing the whole transaction was admitted as a part of the *res gesta*. Upon 62 L. R. A.

this subject the court held that the testimony was properly admitted. *State v. Hayes*, 14 Utah, 118, 46 Pac. 752.

On a trial for murder, where the defendant, immediately after slaying his victim, proceeded to take, chase, threaten, and endeavor to kill the mother of the deceased, who was present and witnessed the killing, such subsequent threats and acts of the defendant are admissible in evidence as part of the *res gesta*, and to show the *animus* of the defendant. *Killins v. State*, 28 Fla. 313, 9 So. 711.

Upon a trial for murder of a woman by defendant it appeared from the evidence that the infant child of the deceased was murdered at the same time, and evidently by the same hand that destroyed the mother's life, and it was contended on the part of the defendant that the court erred in admitting evidence of the killing of the babe. It was held, after stating the general rule, that this general rule admits of many exceptions, and that one of these exceptions is that where two crimes are connected both may be proved. *State v. Craemer*, 12 Wash. 217, 40 Pac. 944.

Upon the trial of an indictment for killing a deputy sheriff who at the time of the homicide was attempting to arrest the accused, a person who accompanied the officer may testify that the defendant, immediately after shooting the deputy sheriff, attempted to shoot him also, and knocked him down with his gun; these acts constituting a part of the *res gesta*. *Seams v. State*, 84 Ala. 410, 4 So. 521.

Where two men were wounded by the defendant, such wounding occurring in the same encounter, and being done with the same weapon, and being almost simultaneous, on the trial of the defendant for assault with intent to murder one of them, evidence of a witness that he saw prosecutor's brother, just after the cutting, lying on a snowdrift alongside the road with a gash somewhere upon him, and the prosecutor standing between him and their buggy with a cut on his temple, is properly admitted. *Starr v. State* (Ind.) 87 N. E. 527.

On the trial of a person for the murder of a woman, where it was shown that the prisoner had stated that he would kill two persons that night if he came across them, and it appeared that a witness for the prosecution, who lived in the house with the defendant, was on terms of intimacy with the woman who was killed,

death of Mrs. Adams, it is said: "The next and final step in the case of the prosecution would have been to prove the defendant's connection with the handwriting of the address upon the poison package." This done, it is conceded that a *prima facie* case would have been established on the part of the people. Evidence to that effect was given by three lay witnesses and also by a number of handwriting experts. But the people were not obliged to stop there. If there were other evidence tending to show that the defendant sent the poison package to Cornish, it was the duty of the prosecuting officer to present it to the court and the jury. Of course, no one saw the person who sent the package mail it, and, aside from the proof of the handwriting, resort had necessarily to be had to circumstantial evidence to

prove who was the sender. The package sent to Cornish contained a bromo seltzer bottle filled with bromo seltzer in which had been put cyanide of mercury, and Mrs. Adams, on taking a dose from that bottle for sick headache, obtained such a quantity of cyanide of mercury as to lose her life. Cornish also took a small dose, but it did not prove fatal. Cyanide of mercury is a rare and unusual poison, not kept on sale by druggists generally, as strychnine and many other poisons are, and the books of the medical and chemical professions record only five cases, prior to these, of death by that poison. Dr. Phillips, a physician who was called to see Cornish, suspected that he had taken cyanide of mercury because of the similarity between the symptoms displayed by him and those exhibited by Barnet, whom

and that this was displeasing to the defendant, evidence by such witness to prove that the prisoner shot him with a pistol very shortly before the woman was killed, and all the circumstances attending that shooting, is admissible as being part of the circumstances and of the *res gestæ*. *Heath v. Com.* 1 Rob. (Va.) 735.

A man, his wife, and son were murdered one morning at their home. The object of the murder was robbery. The evidence showed that on that morning the defendant, by means of a piece of gas pipe from 18 to 24 inches in length, and weighing about 2 pounds, killed all three of the persons mentioned. He had planned the murder of this family some time before, and on that morning he went to their residence, and, upon pretense that they had a sick horse at the barn, induced them to come from their house to go to the barn. The son was the first one to appear, and he was struck several blows on the head with the gas pipe, until he was dead. The father came next, and was disposed of in the same manner; his wife, hearing his outcry, ran into the yard and was killed in like manner. The defendant was indicted and tried for killing the son. The third assignment of error was because the jury were permitted to hear the evidence of the witnesses as to the murder of the father and mother when he was not on trial for the murder of either of them. It was held that there was no merit in this assignment. The homicides were all committed in rapid succession, and were really one and the same occurrence. That it would have been impossible to try this case, so closely were the killings connected with each other, without admission of some evidence of the murder of the father and mother; and that there was no error in the ruling of the court below in this regard. *State v. Perry*, 136 Mo. 126, 37 S. W. 804.

Defendant being on trial upon an indictment charging him with the murder of a man, and there being two other indictments against him charging him with the murder of a brother, and also a woman who was the housekeeper of the person for the killing of whom he was then on trial, the government offered the testimony of a physician who had made an autopsy at the same time on the three bodies. The defendant objected to the autopsy of the woman, but it was admitted by the court. In overruling the exception to the admission of this evidence, the supreme judicial court said there was evi-

dence tending to show that three persons were killed at the same time, by the same weapon; that the government had the right to lay before the jury the whole transaction of which the murder of the person for the killing of whom the defendant was on trial was a part; and that, for this purpose, the testimony of the physician as to the autopsy of the woman was competent. *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401.

On a trial for murder committed by defendants while attempting to escape an arrest for a previous burglary, evidence that, after the wounding of deceased, the defendants undertook to escape, and in doing so seized one or more teams to aid them in their flight, and of their final capture, is competent and admissible, as part of the *res gestæ*. *State v. Phillips* (Iowa) 92 N. W. 876.

Upon a trial for murder a state's witness said "that accused raised a stick, just prior to the difficulty with deceased, and attempted to strike (naming another person)." The defendant's counsel objected to the statement on the ground that it tended to establish a different offense from that for which he was being prosecuted and tried, and to prejudice the minds of the jury against the accused. The court declined to sustain the objection, "because it was part of the *res gestæ*, and offered as such, and not to prove an independent substantive offense, and could not be excluded, because it was so inseparably connected with the homicide that the facts of the one included the other." It was held that this ruling was correct. *State v. Fontenot*, 48 La. Ann. 305, 19 So. 111.

Upon a trial for murder it appeared that the defendant, at the time of the homicide, was a constable, and that late at night he went to a house of prostitution for the purpose of arresting the deceased and one Coleman for residing in a house of ill fame, taking two men whom he found upon the street as posse to aid him in making the arrest. After the shooting of the person with whose murder defendant was charged, and after Coleman discovered the wound, he started to find a physician, and on the trial was permitted, against the objection of defendant, to testify as follows: "When I started, the defendant had gone out of the house. I went out of the front door. I went down, ran down the steps, and I got a short distance away when there were two shots fired.

he had treated a little over a month previous. The fact that an attempt had been made upon the lives of two persons within so brief a period by this rare and unusual poison naturally suggested to those whose duty to the state it was to find the murderer, if possible, that it would quite likely appear that one person sent both packages. The autopsies showed that both Barnet and Mrs. Adams died from that poison, and in the Kutnow powder of which Barnet told his physician he had partaken was found cyanide of mercury. On May 27, 1898, a letter box was hired from one Heckman in the name of H. C. Barnet. Barnet did not rent it, and Heckman positively identified the defendant, Molineux, as the man who did rent it and gave his name as H. C. Barnet. To that letter box was sent, among

other things, patent medicines, to which other reference will be presently made. Someone in the name of Barnet wrote to the Marston Remedy Company a letter, inclosing \$5, with a request that he be sent one month's treatment for impotency, and the address of the letter box which Molineux had rented in the name of Barnet was given. In reply the Marston Remedy Company sent a blank diagnosis sheet, addressed to H. C. Barnet at that private letter box, as requested, with directions that the questions thereon be answered. The author of the answers to the questions in that diagnosis blank gave the following description of himself: (1) Single man; (2) thirty-one years of age; (3) chest measurement 37 inches; (4) waist measurement 32 inches; (5) there had been consumption in his fam-

I heard this defendant say, 'There is the . . . I want,' and someone with him replied in a low tone to him (I don't know what he said. I did not see him); and immediately after saying that, as quick as possible, I heard the click of the gun, and I dropped. I threw myself on the ground to get out of range. There were two shots fired. They both went over me or by me." The time between the first shooting and the firing of the shots outside the house was variously estimated by the witnesses from two to ten minutes. It was held that the evidence of the shooting at Coleman was inadmissible, and should have been rejected; that such shooting was not part of the *res gestæ*; that the thing in litigation was the killing of deceased during a struggle in the house; that the fatal wound had been given, the struggle ended, and the defendant had left the house; that how long a time had elapsed, whether three minutes or ten minutes, was immaterial; and that what occurred outside the house was no part of the transaction which occurred in the house. It was held further, that, if the evidence as to what occurred in the house made it clear that defendant, of his wilful, deliberate, and premeditated malice, murdered deceased, no necessity existed to prove the subsequent shooting at Coleman; while, if it did not make it clear that the killing was the result of the deliberate, wilful, and premeditated malice of defendant, the verdict finding defendant guilty of murder in the first degree was wrong, unless the jury could find from the subsequent occurrence that the killing of deceased was deliberate and premeditated; and that no one except the jurors could tell whether the deliberation and premeditation which the jury found to have existed were based upon the one set of facts, or the other, or upon both. *People v. Lane*, 100 Cal. 379, 34 Pac. 856.

b. Assault with intent to murder.

Upon a prosecution for assault with intent to commit murder, where the facts show that defendant was in possession of a certain lot of hogs held for trespass, the property of the person assaulted, and that, upon the owner, in company with another person, driving up to the corral where the hogs were confined and alighting and engaging in conversation with defendant, words passed between them, where-

upon the owner was struck by a club in the hands of defendant, who immediately thereafter attempted to assault the other person, who at once drove away, though pursued some distance by defendant, evidence of the second assault was held to be properly admitted as being part of the same affray and *res gestæ*. *People v. Teixeira*, 123 Cal. 297, 55 Pac. 988.

On the trial of an indictment for an assault with intent to murder charged to have been committed with a knife, evidence offered by the state, that, during the fight, the defendant seized a gun, is admissible as a part of the *res gestæ*, but not for the purpose of establishing an assault with the gun. *Weaver v. State*, 24 Tex. 387.

Defendant was indicted and on trial for an assault with intent to kill. In making proof of the transaction the state proved by a witness that he and another person, who was killed in a subsequent altercation with the person whom it was claimed the defendant had assaulted, had a difficulty. That thereafter the person assaulted interfered, and the defendant procured and gave to the person with whom witness was in difficulty a gun. The court said that the defendant was charged with an assault with the intent to murder the person named in the indictment, and that it was claimed that all she did and said of an inculpatory character was said and done before the person whom she was alleged to have assaulted became a participant in the difficulty, and that the prosecution should be more limited by the charge to proofs of intent toward that person alone. It was held that this position was fully answered by the fact that the difficulty between the witness and the person killed, and the shooting between the latter and the person alleged to have been assaulted by the defendant, resulting in the killing of the former and wounding of the latter, were parts of one entire transaction,—were circumstances and *res gestæ* indissolubly linked together, and necessary to elucidate and explain the transaction; and that, being connected parts of one entire transaction, the evidence was admissible. *McMahon v. State*, 16 Tex. App. 357.

After the conviction of the defendant of the crime of assaulting another by wilfully shooting at him, where the trial court had propounded to the prosecuting witness the question whether the accused had made an assault upon him with

ily; (6) business sedentary; (7) contemplating matrimony; (8) eyes and complexion "yellowish;" (9) seeking treatment for impotency. This in no respect described the real H. C. Barnet, who was a large man, weighing 180 pounds; but, according to the people's evidence, it described Molineux with perfect accuracy. He was single; was thirty-one years of age in the very month the letter was written; his tailor had measured him less than two months before, and testified his chest measurement was 37 inches and his waist measurement 32 inches; the death certificate of his maternal grandmother showed that she died of consumption; his business was sedentary; he was contemplating matrimony; the jury had an opportunity to observe his eyes and complexion, which the people contend are "yellowish;"

and he was seeking a remedy for impotency, for on June 1, 1898, Molineux wrote a letter to Dr. James Burnes, signing his own name, inclosing 25 cents, and directing that a remedy be sent to his Newark address. Both the letter and the envelope were put in evidence, and it was shown that the remedy was for impotency. There was also evidence that the diagnosis blank was in the handwriting of the defendant, and it needs no argument to support an assertion that the jury had the right to find from all this evidence that Molineux was the man who used this letter box, and used the name of Barnet for his own purposes. According to the claim of the people, then, Molineux positively identified himself as the renter of the letter box and the seeker after remedies for impotency in the Barnet case, and Heckman

a knife just previous to the shooting, which was answered in the affirmative, and the trial judge had stated, in the bill of exceptions to his ruling admitting the testimony, that it was part of a continuous act; that the evidence showed that the assault made by the accused on the prosecutor with the knife immediately preceded the assault made by him on the prosecutor by wilfully shooting at him,—the supreme court, in affirming the conviction, said the narrative of the trial judge in the bill of exceptions brought the ruling within the exception to the general rule that evidence of another offense than that charged can be admitted as laid down in the jurisprudence of Louisiana. *State v. Porter*, 45 La. Ann. 861, 12 So. 832.

In a prosecution for assault with intent to murder, by the defendant upon his divorced wife, after evidence had been introduced, which was held to be competent, of prior assaults by defendant on the prosecutrix, the state was permitted to prove that, one night, he shot at her and beat her; and, when she got away by running around the table, he took a slat from the bed and beat her mother, who was interceding for her, so that the latter was laid up for several days in bed. The same facts were also proved by the mother of the prosecutrix, who testified that on one occasion while he was beating prosecutrix, and when she ran behind the bed and witness begged defendant to desist, he took a bed slat and beat witness with it until she was compelled to go to bed. It was held that the assault upon the mother, occurring contemporaneously with the assaults upon the prosecutrix, was *res gesta*. *Hamilton v. State* (Tex. Crim. App.) 56 S. W. 926.

In *Piela v. People*, 6 Colo. 843, the indictment charged defendant with the crime of assaulting a person with intent to murder him. The evidence showed that defendant delivered several blows with a knife, and at the same time also wounded another person. A number of witnesses for the prosecution, in describing the transaction, made statements concerning the injury inflicted upon such other person, and the admission of these statements was one of the errors assigned. It was held that the evidence was proper; that the striking of the blow which wounded the other person might be termed a part of the *res gesta*, and that it would be difficult for witnesses to describe the transaction without speaking of this act.
62 L. R. A.

c. Other assaults.

Defendant was indicted for an aggravated assault with a deadly weapon,—a pistol; and, on the trial, the state offered to prove by the person assaulted that the defendant had previously got an ax and tried to commit an assault upon him. Defendant excepted to this evidence, but the court permitted it to go to the jury, not to prove an assault other than that charged to have been made with the pistol, but to show the unlawful purpose of the defendant; the purpose to use the ax being immediately followed, and closely connected with, the supposed assault with the pistol. The court held that the evidence was admissible as being part of the *res gesta*, and also to show the intent with which the defendant presented the pistol at the witness. *Richards v. State*, 3 Tex. App. 428.

Upon the trial of an information charging defendant, as an adult male, with making an aggravated assault upon a female by cutting her with a knife, defendant was convicted of simple assault. He objected to the admission of testimony regarding an assault on another female both before and after the alleged assault on the female named in the information. The assaults were all parts of the same transaction. Defendant assaulted the other female at the residence of the one named in the information, whereupon the latter interfered, and was, in turn, assaulted by him. She fled, and then defendant continued the assault on the other female, who also fled from the house. It was held that the assault on the other female was a part of the *res gesta*, and was evidence pertinent to show the *animus* of the defendant in his assault on the prosecutrix, and to show how such assault came about. *McCray v. State*, 38 Tex. Crim. Rep. 609, 44 S. W. 170.

d. Rape.

On the trial of a person charged with rape, it is proper for the state to prove, as part of the *res gesta*, that, when the girl upon whom the crime was committed was being assaulted, she cried and called to her mother, and that the latter went to her, and was struck by the defendant. *Oakley v. State*, 135 Ala. 15, 33 So. 28.

Where a party is indicted for a rape, and a complete, detailed narrative of that offense by

identified him as positively. The identity of Molineux in the Barnett case being established, the people were at liberty to show that the facts and circumstances in the Barnett case and the Cornish case were of such a character that they must necessarily have resulted from the action of a single mind. To have shown that would necessarily have identified the defendant as the criminal actor in the attempt to poison Cornish. It turned out that before the attempt to poison Cornish was made someone hired a private letter box in his name, and, as in the Barnett case, it was not hired by Cornish, nor for him. Now, while Molineux personally hired the box in Barnett's name at Heckman's, he did not personally hire the box at Koch's, at 1620 Broadway, which was hired in Cornish's name. But it seems that Koch, in

addition to renting private letter boxes to persons who had personal and confidential correspondence which they wished to keep out of the regular channels of their mail matter, sent out a publication called the "Studio," and on December 31, 1897, about a year before the death of Mrs. Adams, Molineux wrote a letter to "Editor 'Studio,'" in which he asked for a copy of the paper. About six months later Koch sent Molineux some circulars relating to his business, and one of them described his private letter boxes. Between December 12 and 17, 1898, Molineux called on Koch at his place of business, and talked about the letter boxes, but said he was not prepared to make an arrangement for one, as he only called for a friend. A few days later, and on December 21st, another man called, and rented a

the witnesses involves a recital of another rape upon another female, it is not error to permit them to complete the detailed narrative of the offense for which the party is indicted, notwithstanding the recital of an offense for which he was not indicted. *Parkinson v. People* (Ill.) 24 N. E. 772.

So, on a trial for rape committed on a little girl when she was with another girl, evidence that defendant also committed rape on the other girl is admissible when it is impossible to give a detailed account of the offense charged without showing what the defendant did to the other girl. *Ibid.*

On a trial for rape where it appeared that the defendant, by force and the use of a pistol, compelled the prosecutrix and her male escort to go to the place where the offense was committed, and there tied the male escort, the latter while on the stand as a witness was asked by the prosecuting attorney if the defendant got anything from him, and he answered, "He got ten cents." This was assigned as error because tending to prove a distinct offense from that charged in the indictment. It was held that the answer was clearly admissible as part of the *res gestæ*; and in such a case it was not incompetent because it tended to show defendant guilty of robbery, as well as rape. *State v. Taylor* (Mo.) 22 S. W. 806, 118 Mo. 153, 24 S. W. 449.

Upon the trial of an indictment for rape the injured party was allowed, over objection of defendant, to tell the jury that her father-in-law was knocked down by defendant,—remained on the ground bleeding and helpless,—and that after the occurrence she got him into the house, and that he was then dead. It was held that the evidence was *res gestæ*, and germane to the accusation for which the accused was on trial. *Thompson v. State*, 11 Tex. App. 51.

In *Davis v. State* (Tex. Crim. App.) 23 S. W. 685, the appeal was from a conviction of rape. The offense charged in this case was perpetrated at the same time as, or, rather, immediately preceding, the robbery in *Davis v. State* (Tex. Crim. App.) 23 S. W. 684, VII. h, *infra*. The questions involved in such appeal were substantially the same as in said cause, and, for the reasons indicated in the opinion in said cause, the judgment herein was affirmed. 62 L. R. A.

e. Larceny.

It is competent for the state, on a trial for theft, to prove the theft of other property at the same time and place as that of the property in question, if such proof conduces to establish identity in developing the *res gestæ*. *Conley v. State*, 21 Tex. App. 495, 1 S. W. 454.

On the trial of an indictment for larceny evidence that, on the night previous to the taking of the horse for the stealing of which defendant was on trial, he stole a mule from another person, is admissible, where it appeared that the defendant and another person, who was indicted with him, afterwards disposed of both animals and another mule, which had been taken from the prosecutor at the time of taking the horse, to different persons in another state; as the stealing of the prosecutor's horse and mule, the stealing of the other person's mule, the flight, the sale of the stock, the pursuit and recovery of the property, and subsequent capture of the offenders, were all parts of one transaction, and so entirely connected that proof of the whole was admissible, as proof in regard to one part threw light upon the other. *Sartin v. State*, 7 Lea, 679.

On the trial of an indictment for larceny in stealing a quantity of wheat it appeared that the defendant had borrowed a wagon for hauling grain, and afterwards returned it with pieces broken off and a new singletree on it. The tracks of a wagon in which the grain had been taken were followed to a place where the wagon had broken down, and where were found pieces of a broken singletree belonging to it. It was held that, under the circumstances of this case, evidence that a horse, singletree, and shovel were stolen at night from a farm near where the wagon was broken down, and that the horse was afterwards sold by defendant, was clearly admissible as part of the *res gestæ*. *State v. Halpin* (S. D.) 91 N. W. 605.

On a trial for larceny in stealing a horse, the owner of the animal, after testifying where he found the animal, and where he found and arrested the defendant, and that, when he brought him back to where he turned the animal loose, he went out in a bush and got the bridle with which he said he had ridden the animal, was permitted to state, against the objection of the defendant, that the bridle belonged to another man, from whom the defend-

box in the name of H. Cornish; but Koch testified when Cornish stood up in court that he (Cornish) was not the man who rented the box. After the hiring of the box, some one wrote for Kutnow powders in the name of H. Cornish, and directed that they be sent to the letter box at 1620 Broadway, which the stranger had hired, and the letter was written on the same kind of blue paper, with a tricescent emblem at the top, as Molineux used in his letter to Dr. James Burns on June 1st, asking for a remedy for impotency. The Kutnow powders were sent to 1620 Broadway, in pursuance of the request, but by mistake were placed in the wrong box. A letter was also written on the blue stationery with the tricescent emblem, as in the other cases, to Von Mohl & Co., of Cincinnati, requesting a five days'

trial of their remedy for impotency, the address given being 1620 Broadway. This letter was not written by Cornish. "Calthos" was the name of the remedy of Von Mohl & Co., and a box of it was sent to H. Cornish at 1620 Broadway. Some person other than Cornish, but in his name, sent a letter, also written on blue paper with the tricescent emblem, as in the other instances referred to, to Frederick Stearns & Co., of Detroit, Michigan, concerning one A. A. Harpster, in which the address of H. Cornish was given as 1620 Broadway. I shall not refer further to the Harpster incident, which is one of considerable importance, as disclosed by the record, other than to say in passing that Harpster was a great friend of Cornish, and had taken sides with him in Cornish's controversy with Molineux, thus arousing the

ant had stolen it. It was held that, while, generally speaking, it is not competent to prove a man guilty of one felony by proving him guilty of another, yet, where several felonies are connected together, and form part of one entire transaction, then one is evidence to prove the character of the other. *Dove v. State*, 37 Ark. 281.

Where the "collateral offense" is of the same character as, and connected with, that charged, and tends to prove the guilty knowledge of the defendant, when that is an essential element of the crime, and especially when the evidence adduced to establish it constitutes a part of the *res gesta*, proof of it is admissible. Therefore, on the trial of an indictment for the larceny of a hog, where the prosecutor testified that he identified the property as his, in an enclosure of the defendant, and demanded its delivery to him, it is competent for the state to prove, by the testimony of another witness, that at the same time and place, and in the presence of the prosecutor and defendant, such witness said that the other hog therein was his, and that he then and there claimed and demanded it of defendant. *State v. Murphy*, 84 N. C. 742.

On appeal from a conviction of the theft of a gelding it was contended, on the part of the defendant, that the court should have withdrawn from the jury evidence of confessions by defendant, after his arrest, as to the saddle with which the stolen horse had been ridden, and also as to the taking of another horse about the same time, on the ground that he was not on trial for such offenses. It was held that the question was not affected by the fact that defendant was not on trial for the theft of the saddle and the second horse, since these two offenses were directly connected with the offense for which he was indicted, were parts of the *res gesta*, and links in a chain of circumstances proving his guilt of the theft with which he was charged; that, independently of any confessions by accused, these facts might have been proved as any other facts and circumstances in the case. *Speights v. State*, 1 Tex. App. 551.

Upon the trial of an indictment for theft of a mare, there was evidence that the mare, before she was missed, was running on her owner's range with her colt and a grey ridgeling owned by another man; that, at the time the mare was missed, the colt and grey ridgeling al-

so disappeared from the range. On the trial it was proved that these animals were all found in another county, having been sold there by the defendant, who called himself by, and was passing under, another name. This evidence was directly connected with the main fact, and as such was properly admitted. The court said that evidence of continuous crimes is admissible when it is necessary to establish identity in developing the *res gesta*, or in making out the guilt of the defendant by a chain of circumstances for the crime of which he is on trial. *Satterwhite v. State*, 6 Tex. App. 609.

In a prosecution for stealing a horse, evidence of the stealing of a saddle at the same time is admissible as part of the *res gesta*. *Robinson v. State* (Tex. Crim. App.) 48 S. W. 176.

In *Bonnors v. State* (Tex. Crim. App.) 35 S. W. 650, which was an appeal from conviction of the theft of a horse and two mules, the court said: "There was no error in admitting the testimony of the Tuckers as to the sale of the 'smut-colored horse' to one of them, although the indictment was not for the theft of this horse. He was stolen by the defendant on the same night, and said evidence was a part of the *res gesta* of the offense charged against the defendant, and was legitimate testimony to identify the transaction, and to show the intent of the defendant. The court in its charge limited the purpose of this testimony. The limitation was not exactly proper, but it was more liberal in favor of the defendant than the law authorizes, and he cannot complain."

Under an indictment for theft of silver money specifically described, and also of gold, and paper money, the specific coins and bills not being stated, it was held that, if defendant stole the silver, he was guilty of felony, whether he took the gold and paper money or not; and that evidence that he committed the theft of the gold and paper money, whether alleged in the indictment or not, was admissible to prove the theft of the silver, all the money having been taken by one act. *Davis v. State*, 32 Tex. Crim. Rep. 377, 23 S. W. 794.

On an indictment for theft of money and a gold watch from a guest at a hotel, evidence of a person other than the prosecutor, who occupied a room at the hotel on the same night, that he was disturbed by someone attempting to open his door, is admissible, not for the purpose of

enmity of Molineux, who took other steps looking to his injury besides writing the letter referred to asking for confidential information in relation to Harpster from his former employers, if he did write it. Cornish received through the mails a bottle of bromo seltzer containing cyanide of mercury, a dose of which resulted in the death of Mrs. Adams, Molineux was a chemist, and a manufacturer of dry colors, and kept large quantities of Prussian blue and other dry colors, from which cyanide of mercury can be made. Three lay witnesses, who were familiar with the handwriting of Molineux, testified that the letters signed "H. Cornish," to which reference has been made, as well as the Barnett letters and the answers in the diagnosis blank, were in the handwriting of Molineux. And the testimony of a number of promi-

nent experts in handwriting is to the same effect. But, aside from that testimony, there is to be gleaned from the letters themselves and the circumstances surrounding and attending their writing very strong evidence that one brain conceived and carried out both schemes. In each case the letter box was hired in the name of the intended victim; in each, remedies for impotency were written for in the name of the intended victim; both the Cornish and the Barnett letters were undated; both series of letters, as well as the address on the poison package, contained misspelled words; in each case a rare poison—cyanide of mercury—was employed; in both cases the mails were used to convey the poison to the intended victims; in both cases samples of Kutnow powder were written for, and were received at both

establishing another and distinct felony, but as being a part of the same transaction. *Burr v. Com.* 4 Gratt. 534.

On the trial of a person for obtaining bank notes of the prosecutor by false pretenses, it appeared that the defendant falsely pretended that he had a warrant against the prosecutor for passing counterfeit money, and, by means of threats and promises in regard thereto, extracted bank notes from the prosecutor in a certain county; and on the next day defendant again pursued the prosecutor into an adjoining county, and falsely pretended that he had stolen his overcoat, and by means thereof extracted from the prosecutor articles of clothing. The indictment charged the defendant with obtaining bank notes by falsely pretending that the prosecutor had passed counterfeit money. It was held that the evidence of the transaction in the adjoining county was admissible to sustain the charge in the indictment, as it was part of the *res gestæ*. *Britt v. State*, 9 Humph. 31.

On a trial for stealing a horse, evidence that the defendant, on the same night and contemporaneously with the theft of the animal in question, took the two horses of the prosecutor, and, about a mile from the place of the first theft, took three horses belonging to another, and carried all of these horses together to another place, where he and another person arrived early on the following morning, and there disposed of all of the horses,—is admissible for the purpose of developing the *res gestæ* of the transaction. *Glover v. State* (Tex. Crim. App.) 78 S. W. 465.

l. Receiving stolen property.

Where the prisoner was indicted for receiving 25 pounds weight of tin, knowing the same to have been stolen, and there were also two other indictments against the same prisoner, the one for stealing iron, and the other for receiving brass knowing it to have been stolen, it was proved by a constable on the trial, that, on his going to search the premises of the prisoner under a search warrant for stolen iron, he read the warrant over to the prisoner, and he was going to state what the prisoner said, when counsel for the prisoner objected that the witness should confine his statement to what was said respecting the tin. The court held that he must hear the whole that was said, both the 62 L. R. A.

part relating to the iron and also that relating to the tin,—if not it would be garbling the statement, and the jury would not be able to understand it; and the evidence was given. It was further proved that the constable, on going into the prisoner's warehouse at the time of the search, saw him with some brass in his hand, which he was endeavoring to conceal in some sand. This being objected to, the court held that it was all one transaction, and that all that took place upon the search was admissible. *Reg. v. Mansfield*, Car. & M. 140.

On the trial of an indictment charging the defendant with having received stolen goods, knowing them to be stolen, and which described the goods as cigars, cigarettes, and packages of tobacco of certain brands, where the proof tended to show that this property was stolen from a railroad car while in transit to the consignees of the property, evidence that dry goods owned by other persons, and consigned to other parties, in the same car with the property described in the indictment, were stolen from the car at the same time and by the same person and delivered to the defendant, is competent and admissible, since it would be difficult, if not impossible, to separate the transactions, as all the goods were in the same car, and the circumstances were such that the jury had the right to find, or infer, that all were taken therefrom by the same person. *People v. McClure*, 148 N. Y. 95, 42 N. E. 523, Reversing 88 Hun, 505, 34 N. Y. Supp. 974.

On the trial of an indictment for receiving stolen goods which were claimed to have been taken by the person who sold them to the defendant, by burglary and theft, evidence of two other offenses of burglary and theft from another party, committed ten and eighteen days, respectively, subsequent to the burglary and theft charged in the indictment, is inadmissible, as it is no part of the *res gestæ* of the offense charged, or any part of a system showing that the person who sold the goods to the defendant, because he committed the subsequent thefts, committed the theft in question. *Bismark v. State* (Tex. Crim. App.) 73 S. W. 965.

g. Burglary.

Defendant was indicted and convicted for breaking and entering a dwelling house in the nighttime, armed with a dangerous weapon,

boxes; calthos, a remedy for impotency, was also received at both boxes; Barnet and Cornish were members of the same club, and the poison sent to each was contained in a simple headache remedy in ordinary use. These facts and circumstances, standing wholly uncontradicted and unexplained, as they do, in this record, force the mind almost irresistibly to the conclusion that the same man desired the death of both Barnet and Cornish, and plotted and worked to accomplish it. Certainly a jury are at liberty to draw that inference, and, if they do, the conclusion will necessarily follow that Molineux was the criminal actor in the Cornish case, because he was positively identified as the actor in the Barnet case, both by the testimony of Heckman and by Molineux's de-

scription of himself in the diagnosis blank. The evidence in the Barnet case therefore tends to identify Molineux as the sender of the poison package in the Cornish case, thus supporting the evidence of the lay and expert witnesses who testified that the address on the poison package sent to Cornish was in the handwriting of Molineux. The Barnet evidence, therefore, is strictly within one of the exceptions referred to in the prevailing opinion. It is said in *People v. Dimick*, 107 N. Y. 13, 32, 14 N. E. 178, that the people have the right, when it is material, to give proof of the facts constituting another crime, and have it submitted to the jury under proper instructions, although such proof may be inconclusive; and, if this view of a unanimous court in that case should be fol-

with intent to steal, rob, and kill. On the trial of the indictment the evidence of the prosecuting witness was that the accused attempted to kill him by shooting him. The trial judge admitted the testimony as part of the *res gesta*, to prove the intent to steal, rob, and kill. It was held that the evidence of intent to kill was pertinent to the charge brought, and the prosecuting witness could testify, to prove that intent, that he was actually shot while the defendant was in the act of committing the crime alleged. That the incidents immediately and directly associated with the act are part of the *res gesta*, and, as such, are admissible to prove the intent. That evidence is competent where offenses are of a like sort, or are closely connected, and the proof is pertinent and shows intent. And that here, not only the offenses are of a like sort and closely connected, but the intent to kill was an element of the crime charged. *State v. Desroches*, 48 La. Ann. 428, 19 So. 250.

On a trial for burglary testimony in regard to the contemporaneous theft of other property at the time of the alleged burglary is admissible in evidence, notwithstanding the items were not alleged in the indictment, as a part of the *res gesta* of the transaction, to aid in developing the *res gesta*, and as evidence to establish the intent of the party in committing the offense charged. *Hayes v. State*, 36 Tex. Crim. Rep. 146, 35 S. W. 983.

Where the defendant was indicted for burglary with an attempt to commit larceny, testimony was admitted tending to show larceny on the part of the alleged burglar, and it was said that only an attempt to commit larceny was charged in the information; that larceny was not, under the larceny laws of the state, an essential ingredient of burglary; that an unlawful entry with an intent to commit any crime constitutes burglary, and the intent is presumed from the entry. It was held that, conceding this to be true, the proof offered did not prejudice the case of the defendant, because, if the presumption of larceny attached no weight, he was not wronged by proof of the larceny; and that in any event this evidence was competent as being part of the *res gesta*, for the purpose of showing that an entry was made, and the circumstances attending the entry. *State v. Burton*, 27 Wash. 528, 67 Pac. 1097.

On the trial of an indictment for burglary 62 L. R. A.

of a schoolhouse the court permitted evidence to be given of the theft of some wire and a cotton planter from another place, which property was found at the house of defendant's mother, where defendant and his two brothers lived. This was held to be error on the ground that evidence of other thefts, with which defendant was not connected, and of thefts of other articles of property, and from other and different places no specific time as to when said other property was actually taken from possession of said witness being given, could not be admitted as a part of the *res gesta*. *Hunt v. State* (Tex. Crim. App.) 60 S. W. 985.

h. Robbery.

Upon a trial for robbery, the person whom it was alleged the defendant had robbed, upon his examination as a witness, after stating how he was made to give up his watch and money, was asked what occurred after he had given all the property he had, and answered that the defendant then turned his attention to another person, who was his, witness's, companion, and pointed his gun at him. This testimony was objected to on the ground that it was irrelevant and incompetent because it tended to show the commission of another distinct offense. The objection was overruled, and an exception reserved. It was held that there was no error in this ruling; that the robbery of both parties was practically one act, and the testimony was admissible as part of the *res gesta*. *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006.

Upon an appeal from a conviction of robbery it was urged by accused that, because the indictment failed jointly to charge the offenses of robbery and rape, the court erred in admitting evidence showing that he slapped the assaulted party, "choked her down," and committed a rape upon her, immediately before committing the robbery with which he was charged. It was held that the objection was not tenable. The testimony was *res gesta*, and so closely connected and interwoven with the robbery that, if excluded, an intelligent relation of the facts establishing such robbery could not be made. The indictment is sufficient to charge the offense of robbery, and is not subject to the criticisms sought to be imposed upon it by the motion to quash. *Davis v. State* (Tex. Crim. App.) 23 S. W. 684. See *Davis v. State* (Tex. Crim. App.) 23 S. W. 685, VII., 4, *supra*.

lowed, the Barnet evidence would be competent, although direct proof of the sending of the Kutnow powders through the mails should not be made out on the retrial.

This argument, however, has proceeded on the assumption that, in order to justify the retention of the evidence relating to the Barnet crime, it is necessary to establish every element relating thereto, which necessarily includes the receipt by Barnet of Kutnow powders through the mails. Hearsay evidence to that effect was admitted by the court, and its admission was error; but we cannot assume that on the new trial which is about to be ordered the people will not be able to establish that fact by competent evidence, and great care should be taken not to close the door against such evi-

dence, if it exists, for that justice which the safety of society requires and the law demands has not as yet been meted out to the murderer of Mrs. Adams.

Haight, J., concurs.

Gray, J., dissenting:

I think the judgment of conviction should be reversed, and that the defendant should have a new trial, for error in the admission of testimony relating to declarations made by Barnet to his physician of his having received through the mail Kutnow powders, of his having taken a dose of them, and of his condition being due to that fact. In any view, such evidence was quite incompetent, and, of course, prejudicial to the defendant.

1. Forgery.

Upon the trial of an information for forging a power of attorney purporting to convey authority to transfer real estate, evidence that the power of attorney and a deed purporting to be executed by the attorney named therein were both in the handwriting of another person, who was concerned with the defendant in the fraud which was perpetrated by means of the two documents together, is admissible as constituting part of the *res gestæ*. *People v. Marlon*, 29 Mich. 81.

On a prosecution for the forgery of a written instrument requesting a certain person to permit the defendant to have a bureau on the credit of the purported maker of the instrument, evidence that defendant also obtained, on the faith of the instrument, a bedstead was held to be admissible, notwithstanding defendant's objection to it on the ground that the paper alleged to have been forged did not name the bedstead, and did not appear to have been written to obtain a bedstead. The court said that the sale and delivery of the bedstead and the bureau, and the presentment of the writing, were in point of time coincident, forming part of the same transaction; that if, through the medium of the writing, defendant obtained credit for the bedstead, that fact could properly be shown as indicative of the motives for its false making; that while, as a general rule, it is not permissible on a trial for one offense to prove that accused has committed another and different offense, yet, if the two form parts of the *res gestæ*, the one is not excluded as extraneous; it may be important as indicative of notice or of the *scienter*. *Hobbs v. State*, 75 Ala. 1.

2. Arson.

In *People v. Jones*, 123 Cal. 65, 55 Pac. 608, on a prosecution for arson in burning a dwelling house, evidence of the burning of other buildings at the same time was admitted, over defendant's objection, for the purpose of proving the *corpus delicti*, and also in corroboration of the confession of the defendant that his codefendant, after setting fire to the house, set fire to one of the other buildings.

In *Rex v. Long*, 6 Car. & P. 179, the prisoner had been charged on oath before a magistrate, by an accessory before the fact, with having set fire to three hay ricks belonging, respectively, to three different persons. When the prisoner

was apprehended she was told that there was a very serious oath laid against her by the accessory, who had sworn that she had set fire to the ricks of the three different persons. The prisoner then made a statement which the trial judge allowed to be given in evidence upon the trial of the indictment. There were three indictments against the prisoner, one for firing each rick. The ricks were all set on fire, one immediately after the other, and were within sight of each other. The strongest evidence being as to the last, that indictment was tried first. The confession, however, related to all three, and the evidence of the accomplice as to all was admitted, as all constituted part of the same transaction.

Upon an indictment charging the prisoners with having feloniously, voluntarily, and maliciously set fire to a certain house, evidence was offered to prove that the prisoners were present in the house and implicated in the case by the finding of a bed and blanket in their possession, which had been taken out of the house at the time it was fired, and concealed by them from that time. Buller, J., doubted, as first, whether such evidence of another felony could be admitted in support of this charge; but, as it seemed to be all one act, although the prisoners came twice to the house fired, which was adjoining their own, he admitted this among other evidence. *Rickman's Case*, 2 East P. C. 1035.

3. Other crimes.

Defendant was indicted for the manslaughter of his wife by seizing and dragging her by the hair of her head and throwing her with force and violence upon a sofa giving her a mortal wound, of which she died. On the trial the government was allowed to prove acts of violence by defendant upon the deceased, other than those which it was claimed caused her death. It was held that the evidence was admissible; that, while it was undoubtedly true that neither proof of another distinct felony, nor proof of another distinct assault upon the deceased, was admissible, the evidence in this case was not of that description, being limited to acts of violence on the same evening, and only a short time before her death. *State v. Pike*, 65 Me. 111.

In *Gallagher v. State*, 101 Ind. 411, it was held that, upon the trial of an indictment for a riot, it is competent to prove what was said and done by persons during the time they were engaged

With respect to the evidence relating to the death of Barnett, with some hesitation I have reached the conclusion that it was admissible, within the recognized exceptions to the rule which excludes proof by the prosecution of another crime. Unless the evidence was relevant to connect the defendant with the commission of the crime charged in the indictment, it was immaterial, and its effect could not have been other than prejudicial to his case. But it is well established that evidence of facts which show, or tend to show, the commission of another crime, is not, for that reason, inadmissible against the defendant, if they tend to prove his guilt under the indictment. If these other damaging or criminating facts throw any light upon motive or intent, if they establish the absence of mistake or accident, if they ex-

hibit a scheme involving the commission of several crimes, or if they may become a means of identification of the person charged with the commission of the crime on trial, they become admissible for the purpose. The theory of the prosecution was that the defendant had caused Barnett's death by poison from motives of jealousy, and had attempted to poison Cornish from motives of hatred, provoked by personal conflicts and quarrels. It is plain that there could be no common motive, and the theory of the prosecution could only become serviceable if the evidence relating to the commission of a former crime would identify the defendant as the common perpetrator of both crimes. In my opinion, all of the exceptions to the general rule of evidence mentioned may be eliminated as of useless con-

in the riot, as constituting part of the *res gestæ*; and that, if the violent or disorderly conduct of the rioter results in injury to property, and the act causing the injury is committed during the riot, the state may prove the act which caused the injury. That this evidence is not admitted for the purpose of establishing another offense, but because it is part of the occurrence which constitutes the riot, and tends to show that the conduct of the defendant was riotous and violent.

Defendant and another were indicted for a conspiracy to induce a firm of retail liquor dealers to violate the revenue law by sale of a larger quantity of liquor than such dealers were allowed to make, for the purpose of extorting money from them. It was held that, on the trial of the indictment, it was competent to admit in evidence that, at the same time and place that the complaint was made against the persons named in the indictment, complaint was made by the same party against another firm for a violation of the same law, since the two complaints were so closely connected that in proving one it was almost impracticable to avoid mention of the other. The court said further: "But, even if it had been practicable, we do not think it was essential. . . . The two were so inseparably associated in time, and doubtless in motive also, that each may properly be said to have been intimately connected with the *res gestæ* of the other, and therefore admissible in evidence with the other surrounding circumstances." *People v. Saunders*, 25 Mich. 119.

Where defendant was charged with having conspired with a person named and others unknown to raise insurrections and obstruct the laws; and it was proved that the accused and the person named were members of a chartist lodge, and that they were at the house of the latter on a certain day; and that the defendant directed the people there assembled to go to a race course at a certain place, evidence that the person named in the indictment with defendant had, at an earlier part of the day, directed other persons to go to the same race course was properly received; and, it being proved that such person and an armed party of the persons assembled went from a certain inn, evidence was admissible of what such person said at the inn, as all of these facts were

part of one transaction. *Reg. v. Shellard*, 9 Car. & P. 277.

On a trial for unlawfully carrying a pistol, it is legitimate, as *res gestæ*, to prove that defendant presented his pistol at a person with whom he was engaged in a quarrel. *O'Neal v. State*, 32 Tex. Crim. Rep. 42, 22 S. W. 25.

The cases here cited are additional authorities as to when evidence of the other offense is admissible as *res gestæ*: *Cross v. People*, 47 Ill. 152, 95 Am. Dec. 474; *People v. Kemp*, 76 Mich. 410, 43 N. W. 439; *Jones v. State*, 14 Tex. App. 85; *Jacobs v. State*, 28 Tex. App. 79, 12 S. W. 408; *Barton v. State*, 28 Tex. App. 483, 13 S. W. 783; *Leeper v. State*, 29 Tex. App. 63, 14 S. W. 898; *Morris v. State*, 30 Tex. App. 95, 16 S. W. 757; *Fielder v. State*, 40 Tex. Crim. Rep. 184, 49 S. W. 376; *State v. Eastwood*, 73 Vt. 205, 50 Atl. 1077.

VIII. Relevancy.

a. Murder.

The reasoning of the court in *State v. Nugent*, 71 Mo. 136, was that, as the defendant was indicted for murder in the first degree, the state had the right to introduce any evidence to show that the killing was of that degree. That, if the evidence complained of was admissible to show wilfulness, it was impossible to see why it was not also competent to show deliberation, which, no less than wilfulness, is one of the constituent elements of murder in the first degree. That, if what transpired when the homicide was committed only shows murder of the second degree, evidence of the state tending to show the higher grade of offense with which the defendant is charged cannot be excluded. That if this were not so, the slayer could seek the opportunity to kill when nothing could be shown but the intentional killing, and thus secure the exclusion of all evidence of previous threats, malignity, and attempts upon the life of the deceased, and defy the state to prove the murder of which he is guilty as charged. That, if the fact of the commission of a former crime has no tendency to prove the commission of the one for which the accused is on trial, or any essential ingredient of the latter, it is, of course, inadmissible for any purpose; and this is as far as any case has gone in that direction. But that, if the commission, or attempt to commit,

sideration, except that which makes all legal evidence admissible for the identification of the defendant. I cannot perceive its relevancy for the purpose of proving intent, or the absence of mistake, or accident. The defendant was shown to be familiar with the use of chemicals, and to have all the opportunities to concoct the particular poison which Cornish received through the mail, and from the taking of which Mrs. Adams subsequently died. If the evidence showed that he had sent this bottle containing its poisonous compound to Cornish, the felonious intention would be evident, and there would be no room for the idea of ignorance, mistake, or accident. It would be unnecessary to enter upon the proof of the other criminating facts in order to supply those elements of a case. Neither is it conceiv-

able that the Barnet evidence would be admissible to prove a scheme which involved the commission of further crimes in connection with the killing of Barnet. There was no pretense of that. But there may be sufficient in the circumstances of Barnet's death to furnish support for the theory that the same person committed both crimes, and, with other circumstances testified to, to tend to an identification of the defendant. The rarity of the deadly drug used within a few weeks in both cases, its concealment in the same kind of powders as taken by Mrs. Adams and as found in Barnet's room after his death, and the use of the mail by the sender of the poison, in connection with the evidence showing, or tending to show, that defendant made use of the names of Barnet and of Cornish in the hiring and use of pri-

another crime tends to establish the commission of the crime in question, or any fact which is one of its constituent elements, it is admissible, just as any other evidence, to establish the fact; and the state cannot be deprived of such evidence because it proves the accused guilty of another and distinct offense.

On a trial for murder it appeared from the evidence that the defendant attempted to cut his victim with a knife during the night preceding the evening on which he murdered her; and that on the morning of the day on which she was killed she went into the room of an acquaintance near by and exhibited a cut in her dress near the left thigh. The court stated: "This person testified to seeing the deceased, at the time stated, with a dress on which had the appearance of having been cut with a knife. What the deceased said at that time was excluded by the court; what the witness saw was admitted, and we think properly. The defendant could not be connected with the cut in the dress by the statements of the deceased; but it would have been competent to connect him therewith by other evidence, direct or circumstantial." *State v. Lewis*, 80 Mo. 110.

On the trial of a person for the murder of his wife, evidence tending to show that the defendant did not entertain a proper regard and affection for his wife; that he had previously, and more than once, committed brutal assaults upon her when he was excited by ungovernable passion; that he had struck and kicked her, even when she was sick, without any apparent provocation,—is competent, because it shows how the defendant had treated his wife, and how insensible he was at times to her welfare, and was evidence, together with the other facts and circumstances, from which an inference could be made as to the truth and probability of the main charge, and was, therefore, proper to be considered by the jury. *Boyle v. State*, 61 Wis. 440, 21 N. W. 289.

Upon the trial of an indictment for murder it appeared that the victim was shot and killed by the defendant on the day of a municipal election; and on the trial the prosecution was permitted to prove, among other things, that the defendant and his confederates were engaged in open, notorious, and outrageous violations of the election law by openly and unlawfully voting and procuring others to vote upon the names of other persons at the election; and 62 L. R. A.

that the deceased was killed while interfering to prevent such violations of the election law. The court of appeals, in affirming a conviction and an order denying a motion for a new trial, held that evidence which is relevant to the issue by tending, for example, directly to explain or characterize the act which is in question, on a criminal trial has never been held incompetent or inadmissible because it also tends to, or does, prove the accused guilty of another crime; and that the evidence in question, of the commission of crimes against the election law by the defendant, came under the latter rule. *People v. Shea*, 147 N. Y. 78, 41 N. E. 505.

The facts upon which defendant was convicted as being an accessory to a murder were that, after the homicide, and after the principal had mounted a horse and disappeared, the defendant charged the only two other witnesses present to testify on the inquest to an untruthful statement fabricated by himself for the purpose of favoring the acquittal of the principal. It was held that such facts would constitute the defendant an accessory within the purview of the statute, and that the circumstance that such facts, if proved, would constitute the crime of subornation of perjury would not prevent the prosecution of the accused as an accessory to murder. *Blakely v. State*, 24 Tex. App. 616, 7 S. W. 233.

Upon a trial for murder evidence of the larceny of a pistol of the same caliber as the bullets which caused the homicide is admissible. *People v. Ebanks*, 117 Cal. 652, 40 L. R. A. 269, 49 Pac. 1049.

On the trial of an indictment for murder, evidence that the shooting which resulted in the death of the person killed was done at the time of, or just after, an altercation between the accused and his victim in regard to a post which defendant had set in the public highway, which was the cause of the altercation mentioned, the act of the defendant in setting the post in the highway being a misdemeanor, a separate and distinct offense, wholly foreign and irrelevant to the cause then in hand, is incompetent and inadmissible; as is also testimony showing that, some years before, the defendant had drawn a knife upon a witness in the case,—as the only effect of testimony of this character was to distract the attention of the jury from the real issues in the case, and to fill their minds with 21

vate letter boxes for various purposes, including the procuring of patent medicines, all of these facts would, if competently proved, have a tendency to show a unity or similarity of mental plan and operation, and bear upon defendant's identification, however inconclusive in themselves. While, for the reasons I have briefly assigned, I think the evidence relating to Barnet's death was not inadmissible for the prosecution's case, the admission of the testimony of the physicians as to what Barnet told them about the reception and the taking of the powders was distinct error, and, in view of the nature of the case made, one which cannot be overlooked. It was objectionable as being hearsay evidence, and as not told for the purpose of treatment. Without that testimony there was no evidence that Barnet received any Kutnow powder containing the poisonous admixture through the mail, or that he took any of it, except as might be inferred from the autopsy performed upon his body some time after Mrs. Adams' death. If those material facts should be competently proved upon another trial, I am of the opinion that the circumstances of Barnet's death would

be within the province of the jury to pass upon as determining, in connection with all the other facts and circumstances, whether the same person poisoned Barnet and attempted to poison Cornish, and whether they pointed conclusively to the defendant as the criminal agent.

As to the handwriting evidence, I concur with Judge Werner's construction of the statutes; but, while conceding the admissibility of opinion evidence as to handwriting, I am, nevertheless, indisposed to concede to it such evidentiary character and strength as, like a fact, to constitute a link in the chain of circumstantial evidence upon which a capital conviction shall depend. Such evidence is entitled to be considered by the jury as corroborative of other evidence connecting the defendant with the commission of the crime.

In view of the responsibility imposed upon this court in capital cases, I think that the circumstances relied upon to support the defendant's conviction should be such as, when considered with the opinion evidence, to convince the mind of its absolute correctness.

prejudice against the accused. *State v. Parker*, 96 Mo. 382, 9 S. W. 728.

b. Rape.

The prisoner was indicted for having committed a rape upon the person of his granddaughter, a child under the age of ten years. It having appeared, on cross-examination of the little girl, that the act for which the prisoner was indicted had not caused her any pain, it was proposed, on re-examination, to ask the witness whether her grandfather had done the same thing to her on previous occasions. Counsel for the prisoner objected to this question as leading to the admission of evidence which would support another indictment for a distinct felony. The court admitted the evidence as tending to explain the circumstance that the act in question had not occasioned any pain. *Reg. v. Chambers*, 3 Cox C. C. 92.

See *People v. Fultz*, 109 Cal. 258, 41 Pac. 1040, XVI., a, 1, *infra*.

Defendant and another were charged with the offense of rape. After giving evidence of the commission of the offense on the 5th day of June, 1870, the prosecuting witness was then asked to state fully the particulars of what occurred on the 9th of December previous. This was objected to, but allowed, and she stated the facts of a rape which she said was committed upon her on that day by the defendant, and added that she immediately communicated the particulars to two women, whom she named, but, by their advice, refrained from mentioning it further. This rape was accomplished by threats of personal violence. It was held that the evidence was admissible as explaining, to some extent, the fear the witness was under, and as tending to account for her submission to the will of the defendant on the occasion charged in the information. In submitting it to the jury the judge had instructed them that they were to regard it for that purpose only. *State v. Parker*, 96 Mo. 382, 9 S. W. 728.

pose only. The prosecutrix had testified, in relation to the offense charged in the information, that she had submitted through fear occasioned by threats of the defendant to take her life in case she did not. *Strang v. People*, 24 Mich. 1.

Evidence of larceny from a person other than the prosecutrix, committed in a room adjoining that in which the rape for which defendant is being tried was committed, is incompetent. *Dabney v. State* (Miss.) 33 So. 973.

c. Larceny.

On a prosecution for stealing sheep, evidence of the larceny of a large number of sheep of another person, which had previously been herded together with the sheep alleged to have been stolen from the prosecutor; and that all the sheep were found by such other person after the larceny of his own and the alleged larceny of the prosecutor's sheep, still together, in the possession of the same parties,—is admissible as a circumstance which may be taken, in connection with other evidence, to establish the larceny of the prosecutor's sheep, as it is not evidence of a distinct felony committed by the same parties at a different time. *People v. Robles*, 34 Cal. 591.

A servant in the employ of the prosecutor was indicted for stealing a half penny. Having some suspicion, the employer marked a quantity of pence and half pence, and put them into a bureau, which he locked and took away the key. On the 9th of July he missed one half penny, and on the 13th of the same month others were taken. When the prosecutor had proved the loss of the one half penny, he was going to prove the loss of the others, when counsel for the prisoner objected, contending that, having proved all that was laid in the indictment, the prosecutor could not give evidence of another taking, at another time, as that must form the subject-matter of a separate charge.

The prosecution claimed that the latter evidence was necessary for the support of the charge on which the prisoner was then being tried, whereupon the court said that, if that was the case, he should admit the evidence, since it did not matter that it might apply to another charge, if it be relevant and necessary for the support of this. *Reg. v. May*, 1 Cox C. C. 236.

In *State v. Daubert*, 42 Mo. 242, the court, after reversing the case for other reasons, said: "As this case will be remanded for another trial, or further proceedings, we deem it only necessary to glance at one or two remaining points. The court erred, palpably, in admitting testimony of different acts of larceny, when they were entirely disconnected with the offense charged in the indictment, and had no real tendency to prove the same. Upon the trial of an indictment for larceny, evidence of the commission of a separate and distinct larceny from that charged is inadmissible. *State v. Goetz*, 34 Mo. 85 [*supra*, III. a, 1]. But where the evidence offered directly tends to prove the particular crime charged, it is to be received, although it may also tend to prove the commission of another separate and distinct offense. *State v. Harrold*, 38 Mo. 406 [*supra*, V. a, 4]."

Upon the trial of an indictment for the larceny of a shilling, after it was proved that a constable had taken the prisoner into custody, and had found upon him a marked shilling which had been put into the till of the prosecutor, it was proved that the prisoner, upon inquiry if he had about him any more of the prosecutor's money, produced some half crowns, and, the witness being about to testify as to a statement made by the prisoner, the receipt of the statement was objected to as it related to a different felony. The counsel for the prosecution thereupon claimed that it was a statement accompanying an act done by the prisoner while in custody on charge of the offense for which he was indicted; that it was part of the whole transaction, and could not be severed from that which preceded and followed it; and that, if nothing more, it was evidence to show the prisoner's access to the prosecutor's till. The prisoner's counsel stated that, if the half crowns were stolen, the taking of them was a distinct felony; and, if they were not stolen, the statement could be of no value. The court said: "I think this evidence is inadmissible. I shall reject the statement." *Reg. v. Butler*, 2 Cox C. C. 132, 2 Car. & K. 221.

On trial of an indictment charging accused as accessory after the fact to a grand larceny alleged to have been committed by another person, the state was permitted to prove, by the person whose property was stolen, a declaration of the principal as to defendant's participation in the theft of a horse belonging to another person, stolen about the time that the witness's mare was stolen. It was held that this testimony should have been excluded; that the defendant was indicted, not for stealing that horse, or as an accessory after the fact to that theft, but as an accessory after the fact to the stealing of the witness's mare; that there was no such intimate connection between the two crimes that, in proving the one, the evidence necessarily tended to prove the other. *State v. Reed*, 85 Mo. 194.

Where several felonies are parts of the same transaction, evidence of all is admissible on the trial of an indictment for any of them. This rule, however, does not apply to a case where a 62 L. R. A.

charge of larceny alleged to have been committed on one day is attempted to be established by proof of another larceny committed on a different day, although from the same party and under the same employment. *Snapp v. Com.* 82 Ky. 173.

Upon a trial for stealing a horse it is improper for the district attorney to ask a witness in regard to a certain mule claimed to have been stolen, as the testimony in regard thereto, even if the defendant was connected with the taking of the mule, was not pertinent or relevant to the case. *Tijerina v. State* (Tex. Crim. App.) 74 S. W. 913.

d. False pretenses.

An indictment alleged that the defendant obtained money from persons named, by falsely pretending to them that a certain great fund had been left under a legacy for the establishing of a charitable institution of deposit for a certain class of people; that such an institution had been established and carried on; that there was a branch department of such institution in a certain city; and that the defendant was the president of such branch department. There was evidence at the trial that the defendant's assignee in insolvency told the defendant that there was a deficiency of property to a large amount, and urged her to tell him if she had any means to make up this deficiency, and about the circumstances of the institution and in regard to its directors; and that the defendant refused to give him any information as to any of these particulars. It was held that evidence was admissible to show that the defendant had received from other persons than those named in the indictment a sum larger than the deficiency, and had given notes and deposit books therefor; and that this evidence, coupled with the defendant's refusal to give the information desired by the assignee, and proof that the sum received had mostly disappeared, and that no trace of such institution or of the disposal of the property could be found, tended to show that the defendant's representations in regard to the existence of the institution were false. *Com. v. Howe*, 132 Mass. 250.

Upon the cross-examination of one defendant on the trial of an indictment against two for obtaining money by false pretenses, several letters written by the other defendant to the defendant witness were put in evidence by the government, under the objection of the defendant who wrote them. Some of the letters had reference to the transaction with the prosecutor. It was held that the government could show the entire history of the fraud perpetrated on the prosecutor from the conception of the scheme by the defendants to its consummation. That this evidence by the letters was competent as tending to prove the offense charged; and, if they also disclosed the fact that other similar crimes had been committed, or that attempts had been made to commit them, this did not render the letters incompetent. *Com. v. Blood*, 141 Mass. 571, 6 N. E. 769.

On the trial of an indictment for obtaining money under false pretenses, the evidence showed that the prisoner, in July, called upon the prosecutrix and made false representations relative to a benefit club, but failed on this occasion to obtain any money. In August fol-

lowing he again called relative to the club, and referred to the previous conversation. The jury found that the money was obtained by reason of the false pretenses made in the several conversations. It was held that, if the two conversations were connectible, it was competent for the jury so to connect them, and the prisoner was properly convicted. *Reg. v. Welman, Dears. C. C. 188, 22 L. J. M. C. N. S. 118, 17 Jur. 421, 1 Week. Rep. 361, 6 Cox C. C. 153.*

Where, on the trial of an indictment for obtaining money on false pretenses, the charge being that the defendant had collected money belonging to a firm after revocation of his authority to do so, evidence of declarations of defendant relative to the loss of a sum of money by him at a house of ill fame, long before the act complained of in the indictment, which testimony was offered to show why the defendant was dismissed from the service of the firm, was held to be admissible to prove the revocation of his authority, and notice to him of that revocation, and the time and manner of its taking place. That, although evidence of one offense is not admissible for the purpose of proving the charge of another, yet it may be so connected with the proof of a relevant and material fact that its introduction cannot be avoided. *Com. v. Call, 21 Pick. 515, 32 Am. Dec. 284.*

e. Burglary.

On a trial for house breaking and larceny, the prosecutor when on the stand was permitted to testify, against the objection of counsel for the defendants, that one of the defendants admitted to the prosecutor that he had previously robbed the store, while he was in the employment of the prosecutor, for which he was discharged. It was held that, where the evidence tends to show that the series of offenses are so connected together as practically to constitute a continuous transaction, then it is competent to receive evidence of such continuous offenses; and that, in view of the fact that defendant had been discharged from the service of the prosecutor on account of these previous robberies, and especially in view of the fact that he had declared that he did not intend to work, and that, if he did not make his support out of the prosecutor, he would make it out of somebody else, it could not be said that the evidence objected to was incompetent as to him. *State v. Weldon, 39 S. C. 318, 24 L. R. A. 126, 17 S. E. 688.*

In *Mason v. State, 42 Ala. 532*, the court said that, although evidence offered in support of an indictment for felony be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable. In this case the conviction of the prisoners depended entirely upon circumstantial evidence. The indictment was for burglary, and the trial court had admitted evidence of circumstances in regard to two other distinct burglaries. The court held that any indications of guilt arising from the conduct, demeanor, or expressions of the parties were legal evidence against them; that in making inquiry as to these indications, the circumstances pointing to a connection of the prisoners with three other burglaries, were so intermixed that it was proper, if not a necessity, to hear the evidence relating to them all; and that to have excluded the evidence in the present case, relating to the burglaries for which the prisoners were not on

trial, would have broken the chain, formed of links more or less perfect, connecting them with the one which constituted the subject-matter of the trial.

Two cottages had been burglarized, and property had been taken from each. The defendant was indicted and tried for burglary and larceny committed at what was stated in the case to be the Smith cottage. Upon his trial the witness, to prove a confession made by him, was asked, after testifying that he said that he and others went to the Smith cottage; what he said they did there, and the answer was, "Took the goods out." He was then asked the question, what he said about the Lewis cottage, which was objected to as incompetent, improper, and immaterial, and on the ground that the prosecution could not prove the commission of another crime to convict the defendant on this indictment. The court said that it would take all that he said on that occasion, to which the defendant excepted. The witness then stated what the defendant told him that they did at the Lewis cottage. It was held that the confession consisted of one conversation and one disclosure on the part of the defendant, and the fact that it included a statement as to the Lewis cottage did not require a reversal of the judgment of conviction. *People v. Loomis, 76 App. Div. 243, 78 N. Y. Supp. 578.*

f. Forgery.

On a prosecution for forging a note for \$160, where it appeared that the accused, wishing to procure a loan from a bank, presented the note and obtained the money thereon, and that later, wishing to increase the loan to \$200, he presented a paper signed by the same men whose names appeared on the note, requesting the bank to let accused have the \$200; but, upon the cashier refusing to accept the paper, and requiring a note in regular form, he procured a note for \$200 signed by the same parties,—both the \$200 note and this paper, which are shown to be forgeries, were held to be admissible in evidence, because so closely connected with the original transaction as to be really a part thereof. *Harding v. State, 54 Ind. 359.*

Upon the trial of an indictment for forging and uttering a check upon a bank, evidence that the firm whose name purported to be signed to the alleged forged check had no funds or account with the bank which was the drawee of the check is inadmissible, since it is not a necessary element that the drawer of the check or bill of exchange shall, at the time of drawing it, have funds with the drawee, and the check or draft is not therefore void. The evidence was inadmissible as it tended to prove a different crime from that charged in the indictment, *viz.*, the crime of false pretenses, in obtaining property by the issuing of a check upon a bank where the drawer and purchaser had no funds or account, in order to obtain from the person to whom the check was delivered the possession of the property; and had no relevancy to the crime charged in either count in the indictment. *Watson v. People, 64 Barb. 130.*

g. Robbery.

Upon the trial of a slave for robbery, it was proved by the prosecutrix, as a witness, that he assaulted her with the intent, as supposed, to ravish her, and that, to induce him to release her, she promised to give him money. He fol-

lowed her home, and, through fear, as she testified, she gave him a dollar. The prisoner had been tried for assault and battery with intent to commit a rape, and convicted of an assault and battery only, and punished therefor. Upon the trial for robbery testimony as to the prisoner's conduct previous to the taking was admitted in evidence, and, upon a motion for a new trial, it was held that this testimony, although it might show an offense distinct from the one with which accused was charged, was properly admitted as evidence of other transactions referable to the point in issue; just as evidence of an outrage upon another female, for which the prisoner had been punished before the day of the offense alleged, would have been admissible to show the true motive, meaning, and efficiency of equivocal acts, which actually did excite fear and constrain the delivery of money. In denying a motion for a new trial the judge stated that he would take the opinion of the court of appeals. After full argument the case was heard in that court, and it was thereupon held that the evidence concerning the general transaction which was in proof on the first trial, for assault, being referable to the point in issue on the second trial, for robbery, was properly admitted. *State v. Nathan*, 5 Rich. L. 219.

On the trial of a prisoner for robbing the prosecutor of a coat, after proving that the prisoner, by means of threats of charging the prosecutor with a detestable crime, induced the prosecutor to give the prisoner his coat and other property, evidence that the prisoner on the following evening, by similar threats, made another, but ineffectual, attempt to obtain a £1 note from the prosecutor, is admissible over the objection, by the prisoner, that evidence of an attempt to commit another similar offense could not be admitted. *Rex v. Egerton*, Russ. & R. C. C. 375.

h. Arson.

Upon the trial of an indictment against a ship-joiner for burning a building which was set on fire by means of a box, evidence of the finding of a similar box at a fire in the rear of another building, and also showing that both boxes had been built in the shop of defendant, and that he there had the tools with, and the materials from, which they were made; and an anonymous letter to the city marshal, proved to be in the handwriting of the defendant, which spoke of the writer and others having been engaged in other fires,—are all properly admissible in evidence, as they are pertinent to the point in issue, and, being so, are not to be rejected because they also tend to prove the commission of other crimes. *Com. v. Choate*, 105 Mass. 451.

On a prosecution for arson in burning a dwelling house it is competent to show that a wine cellar and tank house in the immediate vicinity of the dwelling were fired at the same time, although the burning of these buildings was not charged in the information; the three buildings being so close together as to warrant the belief that the burning of any one would cause the destruction of all,—especially as there were no appliances to extinguish the fire, and the distance from the neighbors would make it out of the question for them to reach the scene in time to be of much, if any, service. *People v. Hittel*, 131 Cal. 577, 63 Pac. 919. 62 L. R. A.

l. Violation of liquor law.

Evidence tending to show that the defendant kept ale for sale in his house at a certain time is competent on the question whether spirituous liquor, which he kept there at the same time, was kept for sale. *State v. Gorman*, 53 N. H. 77.

Defendant being charged with keeping a common nuisance by selling intoxicating liquor in violation of the prohibitory law, evidence of sales other than those charged in the information, and other than those of which the prosecuting witness had knowledge, may be given, where the offense of keeping a common nuisance is clearly proved by the testimony filed with the information. *State v. Wheldon*, 6 Kan. App. 650, 49 Pac. 780.

Where the conviction of a husband is sought on a sale of liquor without license, made by his wife in his presence and with his knowledge, evidence of similar sales made by her in his presence, although not proof to convict him, is admissible to illustrate the character of the sale in the particular case, and to show that it was made by the authority of the husband. *Hensley v. State*, 52 Ala. 10.

On a trial for violation of the local option law, where defendant, as a witness in his own behalf, had testified that he had never sold anything except Peruna since local option went into effect, except on prescription, and he was asked, on cross-examination, if he had not sold liquor to three different persons, naming them, other than the prosecuting witness, and without prescription, to which he answered that he had sold them no liquor except Peruna,—it was held that, inasmuch as he had injected that issue into the case, the state had the right to prove, in rebuttal of his testimony, by the three persons named, that they had each bought intoxicating liquors from him. *Gilmore v. State*, 37 Tex. Crim. Rep. 178, 39 S. W. 105.

In a prosecution for violation of the local option law, evidence of other sales than that alleged in the indictment is admissible to show the character of business in which the accused was engaged. *Matkins v. State* (Tex. Crim. App.) 58 S. W. 108.

On the trial of an indictment for selling beer without a license, a witness testified that he did not recollect having bought, or having seen anyone buy, beer at defendant's house within one year previous to the finding of the indictment. The state then asked the witness: "Have you ever seen, in your whole life, any beer bought at the defendant's house?" This question was objected to, but the objection was overruled, and the witness answered the question in the affirmative. It was held that the evidence was incompetent and inadmissible, and the obvious effect of the answer was to prejudice the defendant's cause by the introduction of such improper evidence; that it was convicting him of one offense by proving that he had previously committed a like offense. *State v. Fierline*, 19 Mo. 380.

j. Treason.

On the trial of Algernon Sidney, 9 How. St. Tr. 818, which was a trial for high treason, the chief justice, said, in charging the jury: "If it were an indictment only for the levying of war, there must be an actual war levied; but this is an indictment for compassing the death

of the King; and the other treason, mentioned in that act of Parliament [25 Edw. III.] for the levying war, may be given in evidence to prove the conspiracy of the King's death; for it is rightly told you by the King's counsel that the imagination of a man's heart is not to be discerned; but if I declare such my imagination by an overt act, which overt act does naturally evince that the King must be deposed, destroyed, imprisoned, or the like, it will be sufficient evidence of treason within that act."

In the Case of Ambrose Rookwood, *Fost. C. L. 245, 13 How. St. Tr. 139, 1 East P. C. 121*, who was indicted for compassing the death of the King, two of the overt acts charged were, that he and others met and consulted the proper means for waylaying the King, and attacking him in his coach; and also that they agreed to provide 40 men for that purpose. The counsel for the Crown offered to give evidence that the prisoner produced to one of the conspirators a list of the names of a small party which was to join in the attempt, and of which the prisoner was to have the command, with his own name (not his real name, but one which he had assumed) at the head of the list as their commander. This evidence was opposed by the prisoner's counsel because the circumstance was not charged in the indictment. But the court said that this circumstance, if proved, amounting to a direct proof of the overt acts which were laid, *viz.*, the meeting and consulting how to kill the King, and their agreeing to provide 40 men for that purpose, and falling under the same species of treason, was very proper to be given in evidence.

And in *Major Lowick's Case, 1 East P. C. 122, Fost. C. L. 245, 13 How. St. Tr. 267*, upon the same charge, the court declared that, even if the circumstance of providing 40 men had not been laid in that indictment, the evidence would still have been admissible; for it was a direct proof of the first overt act laid,—the meeting and consulting on the means of killing the King.

In *Layser's Case, 16 How. St. Tr. 93*, which was a trial for high treason arising out of the Rebellion of 1745, and the effort there made to set up the Pretender; evidence was offered tending to show that the defendant was at Rome and corresponded with the Pretender and had conferences with him, and letters purporting to be receipts for sums of money to be signed by the Pretender as a foundation to oblige him to make repayment were admitted in evidence,—the being at Rome and corresponding with the Pretender to show the probability of the prisoner's receiving those receipts. It was claimed for the prisoner that there was an act of Parliament in the last year of King William, whereby the Pretender was attainted, which made corresponding with the Pretender or any of his adherents high treason; and that, therefore, the proving of such facts was the proving of another overt act not laid in the indictment. The Lord Chief Justice held that the prosecution might show how far the prisoner had been engaged with the Pretender and his accomplices as further evidence of the overt acts which were laid in the indictment, and in doing so said further: "Do not trouble yourself as to that; no use shall be made of that to charge you with the treason, made so by another act of Parliament, about corresponding with the Pretender; for evidence it is proper 62 L. R. A.

here, and it neither can, nor shall be, made use of to any other purpose."

In *Deacon's Case, Fost. C. L. 9, 18 How. St. Tr. 363*, a case arising out of the Rebellion of 1745, counsel for the prisoner objected to receiving the evidence of a witness, a printer, touching the prisoner's obliging him to print the Pretender's manifesto at Manchester, and his publishing it there, while the rebel army was in town; and also to the reading of the manifesto. They insisted that this ought not to be given in evidence, because it was an overt act not laid in the indictment. But it was answered by the court (Lord Chief Justice Willes, Justice Abney, and Justice Foster) that an overt act not laid may be given in evidence, if it be a direct proof of any of the overt acts that are laid.

And in the case of Sir John Wedderburn, *18 How. St. Tr. 425, Fost. C. L. 22*, indicted for high treason for participation in the same Rebellion, the King's counsel called witnesses who proved that the prisoner was appointed by the Pretender's son collector of the excise; and that he did actually collect the excise in several places where the rebel army lay, by virtue of that appointment, for the use of the rebel army. The prisoner's counsel insisted that this sort of evidence ought not to be admitted; for, though collecting money for the service of rebels is an overt act of high treason, yet, it not being laid in the indictment, no evidence ought to be given of it; and they relied on the statute of 7 King William III. But in this case they were overruled upon the reasons given in the Case of Deacon.

On the other hand, in the Case of Captain Vaughan, *Fost. C. L. 246, 13 How. St. Tr. 485, 1 East P. C. 123*, upon an indictment for adhering to the King's enemies on the high sea, in which the overt act laid was his cruising against King's subjects in a vessel called the *Loyal Clencarty*, the counsel for the Crown offered evidence to prove that he had, some time before, cut away the custom-house barge, and had gone a cruising in her. This evidence was opposed by the prisoner's counsel, and, after some debate, rejected by the court. For were it true, it was no sort of proof that the prisoner had cruised in the *Loyal Clencarty*; which was the only fact he was then to answer for, the Lord Chief Justice holding that evidence of a distinct act that has no relation to the overt act mentioned in the indictment, though it should conduce to prove the same species of treason, could not be given in evidence. Continuing, he said further: "I cannot agree to that, because you go not about to prove what he did in the vessel called the *Loyal Clencarty*; but that he had an intention to commit depredation on the King's subjects; so he might, but in another ship. Now because a man has a design to commit depredation on the King's subjects in one ship, does that prove he had an intention to do it in another?"

Upon a trial for high treason after an overt act was proved to have been committed in the county where the indictment was laid and tried, it was ruled that evidence might be given of an overt act committed in another county. *Respublica v. Mallin, 1 Dall. 33, 1 L. ed. 25.*

k. Miscellaneous.

Evidence tending to prove any fact constituting an element of a crime charged in an indictment is competent, although it may tend

to prove the prisoner guilty of some other crime. *Weed v. People*, 56 N. Y. 628, 3 Thomp. & C. 50.

At the trial of an indictment alleging the possession by defendant of certain tools and implements named, designed and intended to be used by him for burglarious purposes, evidence that other tools and implements than those named in the indictment, designed for the purposes alleged, were found, with those named, in the possession of the defendant, at the time and place named in the indictment, is admissible to show the character of the possession of tools and implements mentioned in the indictment. *Com. v. Day*, 138 Mass. 186.

Where defendant was indicted with others for the commission of a crime, but he was tried separately, and the crime was clearly established, evidence which tended to show that defendant and those connected with him were familiar associates and confederates for the commission of crime, and which tended to connect defendant with the crime, was admissible. *State v. Stevens*, 87 Iowa, 557, 25 N. W. 777.

A statute of Maryland (Act of 1864, chap. 38) provides that "any evidence of facts or reputation proving that" a person indicted under that act for being a common thief "is habitually and by practice a thief, shall be sufficient for his conviction, if satisfactorily establishing the fact."

Upon the trial of an indictment charging the accused with being a common thief the record of the conviction of the accused of the larceny of a watch, within a year before the prosecution was begun, is a link in the chain of evidence, admissible *per se*, as tending to prove the issue. Its legal effect is a question for the jury to determine. *World v. State*, 50 Md. 49.

On the trial of an indictment charging the prisoner with feloniously stealing 6 shillings, after the prosecution had given evidence tending to prove that the prisoner had taken 2 shillings from the till of the prosecutor, the prosecution was proceeding to prove other acts of the prisoner in going to the till and taking money, which was objected to on the ground that evidence of one felony had already been given, and that the prosecution ought not to be allowed to prove several felonies. The objection was overruled, and the prosecution was allowed to prove another larceny from the same till of 3 shillings 6 pence. Thereupon the counsel for the prosecution said that he relied upon the taking of the latter amount, and desired that the other takings might be excluded from the consideration of the jury. The prisoner was convicted, and, upon a rule to show cause, it was held that the evidence was properly received, and the conviction was affirmed. *Rex v. Ellis*, 6 Barn. & C. 145, 9 Dowl. & R. 174, 5 L. J. M. C. 1.

In *State v. Adams*, 20 Kan. 311, it was held that a defendant cannot be prejudiced before a jury by proof of general bad character, or particular acts of crime other than the one for which he is being tried. And that, on the other hand, it is equally clear, that whatever testimony tends directly to show the defendant guilty of the crime charged is competent, although it also tends to show him guilty of another and distinct offense. That a party cannot, by multiplying his crimes, diminish the volume of competent evidence against him. He may commit half a dozen distinct crimes, and the same facts, or some of them, may tend directly to prove his
62 L. R. A.

guilt of all; and on the trial for any of such crimes it is no objection to the competency of such facts, as testimony, that they also tend to prove his guilt of the others. By this rule, whatever is done, in preparation for a crime, or in concealing the fruits, is competent, although in such preparation or concealment is committed another and distinct offense.

In *People v. Doody*, 172 N. Y. 765, 64 N. E. 807, the defendant was indicted for perjury alleged to have been committed on the trial of an indictment against another person for falsely auditing an account against a city. The indictment against the other person had been tried, and he had been convicted thereon, but the judgment of conviction had been reversed. Upon the first trial of that indictment the defendant herein had testified to certain material facts necessary to be proved in order to convict the defendant in that indictment. He had also testified to the same facts before the grand jury which found that indictment. After the judgment of conviction had been reversed, as before stated, upon the second trial the defendant herein, being questioned as to the matters he had before testified to, swore that he could not remember them. Upon the trial of the indictment against the defendant for perjury the prosecution were permitted to put in evidence what the defendant had sworn to on the previous trial and investigation, to the effect that he had bribed several of the city officers. This testimony was not offered or admitted for the purpose of proving other offenses, but for the purpose of establishing the fact that he remembered and knew certain things which he swore that he did not remember or know; and the fact that the defendant in these statements, admissions, and declarations accused himself of being a party to the conspiracy to defraud the city did not change the nature or character of the proof which his previous acts and conduct furnished with respect to the truth of his statement that he did not remember these facts when called as an unwilling witness.

Upon the trial of an indictment against a police captain for extorting money from a person named, where the specific charge was that the defendant obtained \$50 in money from such person, who was engaged in demolishing a building, by means of a threat that, unless the defendant was paid \$50 he would obstruct and impede such person in his work, the final position taken by the people, and the proof tending to support it, was to the effect that the person mentioned paid the money to another person, who was the defendant's agent in collecting moneys improperly; and the prosecution undertook to show that the defendant made the threat, not in person, but by such agent, and that the latter was a party to a general scheme existing in the police precinct under which the extortion was practised by the defendant. The people were then allowed to prove similar transactions upon the part of the person charged to have been the agent of the defendant, some of which were with other persons, occurring in the years 1888, 1889, 1890, and 1891.

It was held that the evidence was not offered to prove that the defendant had been guilty of other crimes, but as tending to establish the agency of the person claimed to have been his agent, in the commission of the crime for which the defendant was on trial, and was not incompetent, even though it tended to show that defendant had been guilty of other similar of-

fenses. *People v. McLaughlin*, 2 App. Div. 419, 37 N. Y. Supp. 1005.

This case was afterward reversed by the court of appeals upon another ground (150 N. Y. 365, 44 N. E. 1017). The judge who wrote the opinion said on this subject: "Manifestly this evidence was not admitted to prove guilty knowledge, intent, motive, or notice; nor did the transactions thus proved have any relation to or connection with the transaction upon which the indictment was based. They were entirely distinct and separate, had with other persons, at other times, under different circumstances, and constituted different crimes. They formed no link in the chain of circumstances or facts which led up to the transaction involved, and were no part of it. We think this evidence did not fall within any exception to the general rule, and was, therefore, improperly received." On this question, as to the admissibility of the evidence of other transactions, three of the judges of the court of appeals expressed no opinion, and one, making with the three a majority of the court, dissented. The trial judge at the oyer and terminer (necessarily a justice of the supreme court), and the five judges constituting the appellate division, had concurred in holding the evidence admissible, notwithstanding it tended to prove other crimes. Under the circumstances, the suggestion seems fair, that what was said as above quoted by the judge who delivered the opinion in the court of appeals was purely *obiter*.

Defendant was indicted, jointly with inspectors of election constituting a board of registry, for a wilful violation of the provision of the election law which directs the inspectors to make three copies of the register of voters, and requires that the register and copies shall at all reasonable hours be accessible to the public for examination or for making copies thereof. Defendant was not a member of the board of registry, but was charged with wilfully and feloniously procuring, by his aid, counsel, command, and assistance, the inspectors to conceal the lists, and to refuse the public access thereto. Defendant was tried separately. Upon the trial no direct evidence was given that he committed or advised the inspectors to conceal the registry lists, but the prosecution attempted to show a criminal conspiracy on the part of the defendant and other public officials of the town for the purpose of casting a large fraudulent vote, and a concealment of the lists as a necessary part of the scheme. No conspiracy was charged in the indictment. It was held unnecessary, as the conspiracy, if shown, was evidence in support of the charge made. It was also held that evidence on the part of the prosecution as to the receipt of large sums of money by defendant as supervisor of the town was competent, and that the receipt of evidence of the sale of liquors on Sunday by the saloons in the town was not reversible error. *People v. McKane*, 143 N. Y. 455, 38 N. E. 950.

Under an indictment against a negro trader for exhibiting slaves for sale without a license (Pamph. Acts 1849-50, p. 8), after evidence has been offered of a particular act of sale within the time covered by the indictment, evidence of a previous act more than twelve months before the finding of the indictment is admissible for the state, as tending to show that the defendant was engaged in the business of negro trading. *Chambers v. State*, 26 Ala. 59.

Upon a trial under a complaint for being pres-

ent in a room kept by a person unknown, and then and there engaged in the business and employment of registering bets and selling pools, upon the results of certain trials and contests of speed between contesting horses, evidence that on numerous occasions defendant was present in the room, and engaged in doing certain specified things which tended to show that he was then and there engaged in the business named in the complaint is admissible and competent, and the government will not be required to elect a particular date upon which it would rely for conviction until all the evidence was in, where, after the evidence was in, the government elected a particular date upon which it would rely, and the court then instructed the jury that they should consider the evidence of what took place at different times from that named in the complaint and relied upon by the government, only as it related to the question whether the premises were kept for the purpose named in the complaint on a date named and relied upon by the government, and for that purpose alone. *Com v. Ferry*, 140 Mass. 203, 15 N. E. 484.

Defendant was convicted of keeping a gaming room, and the court had refused to strike out certain evidence tending to show that defendant kept a gaming room prior and subsequent to the time laid in the information. The court cited and approved *Bravaldo v. State*, 21 Fla. 789, IX. a, *infra*, and said that the rule stated in that case is applicable to all continuing offenses; and, where there is evidence of acts constituting the offense committed within the period laid in the indictment, evidence of acts committed prior or subsequent thereto, before the finding of the indictment, are admissible when they illustrate, explain, or corroborate evidence of acts shown to have been committed within the period named. *Toll v. State*, 40 Fla. 169, 23 So. 942.

On the trial of an indictment for vending medicines as an itinerant vender without a license from the commission of pharmacy, evidence of sales and professions made by the defendant, to other persons than the one named in the indictment, at or before the time charged, is competent to show that the defendant was an itinerant vender, and that his professions were public. *State v. Burk*, 88 Iowa, 661, 56 N. W. 180.

Upon the trial of an indictment for removing the dead body and remains of a human being from the grave with the intent and for the purpose of selling the same, and for the purpose of dissection, evidence of a conversation with defendant, in which he said he was working for a medical college, and that the college owed him; and of certain orders drawn by the medical college in favor of the defendant for various sums; and of another conversation with defendant, in which he told how they used a certain hook by opening a part of the grave at the head, then opening the box, and then taking the hook and pulling the corpse out with it,—is properly admitted as evidence tending to prove the accused guilty of an offense not charged in the indictment, if it tends to prove any fact constituting an element in the offense that is charged in the indictment. *State v. Lowe*, 6 Kan. App. 110, 50 Pac. 912.

Upon the trial of an indictment for placing obstructions upon the track of a railroad it appeared that on the same evening that the train struck the obstructions for which the indictment was found, and about forty minutes before

the train hit the obstructions, there was found upon the track, near a gas house about half a mile from the place where the train struck the obstructions mentioned in the indictment, an iron rail, apparently placed there for the purpose of obstructing the train; and that, about an hour after the train struck and passed along, other obstructions were found upon the track near where the train struck, which were placed there after the train passed. All the obstructions were placed upon the track after 6 o'clock that evening. The trial court instructed the jury, in substance, that, if they were satisfied that the prisoners, or either of them, placed the rail upon the track near the gas house, and the rails and stones upon the track after the train had passed, they might weigh these acts as evidence against the prisoner who placed them there, upon the question whether he also placed upon the track the obstructions for which he was indicted; and, upon review of a conviction, the supreme court held that the evidence was competent, and the instruction correct. *State v. Wentworth*, 37 N. H. 196.

Where, under a statute, it is made larceny to bring property stolen in another state or territory into the state, evidence that the property named in the information was taken and stolen in another state is properly admitted, as it is necessary, first, to prove the wrongful means by which defendant came into possession of the property, before he could be punished for its continued wrongful possession. *McFarland v. State*, 4 Kan. 68.

On the trial of an indictment for perjury, against an attorney for swearing, in an affidavit made by him to procure an attachment, that he was the attorney for the plaintiff, where the plaintiff in the attachment proceedings had testified that he had no claim, that he had never retained the attorney, and that the latter was in no wise his attorney and never had been; and the accused and some of his witnesses had testified that the plaintiff in the attachment proceedings was in accused's office at the time the attachment papers were made, and then and there signed the bond for the attachment in that action,—evidence of another person that he signed the bond in the office of the accused, and that the plaintiff named in those proceedings was not there, is competent on the question as to whether the plaintiff in the attachment proceedings signed the bond or not; as, if he did, it was a strong circumstance that the accused was his attorney, and, if he did not, it was a like strong circumstance to prove that the accused was not his attorney. And if the evidence tended to prove the commission of the crime charged it was not incompetent because it also tended to prove the commission of another crime. *State v. Madigan*, 57 Minn. 425, 59 N. W. 490.

The record of a conviction of a man for assault and battery upon his wife was held, in *Com. v. McPike*, 3 Cush. 181, 50 Am. Dec. 727, to be admissible in evidence, for the purpose of proving the fact of such conviction, on his subsequent trial for manslaughter because of the wife's death resulting from such assault, where the identity of the defendant, and of the assault of which he was formerly convicted with the one under inquiry, was fully established by other evidence. The trial court limited the competency of the evidence to the purpose of proving the former conviction, and stated that the 62 L. R. A.

record was no proof of an assault on the date alleged in the indictment for manslaughter, or that the assault stated in such record was the same offense for which defendant was being tried; and, on appeal, the upper court said that, as thus limited, the record was admissible, though it would be incompetent and inadmissible as evidence of a distinct offense committed by the defendant, or for the purpose of showing his disposition to engage in such assaults.

Upon the trial of one offense, evidence of an entirely distinct offense is inadmissible; but, if the evidence tends to prove the commission of the offense for which the prisoner stands indicted, it is no valid objection to it that it also tends to prove another and distinct offense. Thus, where the two offenses are committed at the same place and within a few minutes of each other, under such circumstances as, together, to constitute a single and continuous accomplishment of a fixed and common design, evidence of both is admissible upon a trial for one. *State v. Greenwade*, 72 Mo. 208.

In *State v. Braunschweig*, 38 Mo. 587, the court said: "There is no foundation for the position assumed by the appellant's counsel, that the evidence offered for the state, and admitted by the court, was illegal because it went to establish that the prisoner was guilty of a crime other than that charged in the indictment. The whole matter was so completely blended that the entire evidence was necessary to obtain a history of the particular transaction, and as such was perfectly admissible within the principle of the case of *State v. Harrold*, 38 Mo. 496 (*supra*, V. a, 4), decided at this term."

On the trial of a person for murdering his wife, evidence that for ten years previous to the trial the defendant had illtreated his wife and assaulted her is inadmissible. *Raines v. State*, 81 Miss. 489, 33 So. 19.

Upon the trial of an indictment for extorting money by means of threats to kill, evidence that the defendant had been arrested upon another charge, and fined upon the complaint of the person from whom the money was extorted; and that the defendant had demanded of the complainant payment to himself of the money to reimburse him for the amount thus paid out by him, and, upon complainant's refusal to pay, said to him: "If you think more of \$500 than you do of your life and your family's life, go ahead,"—is proper to show the relation which existed at the time and before the threats were made, for the purpose of characterizing the conduct of the parties and the language used by the defendant at the time it was claimed the money was extorted, as, if the defendant had threatened to kill complainant upon a former occasion unless he paid him money complainant would be much more easily terrorized, and part with his money much more readily, by reason of the subsequent threat than though the relation of the parties theretofore had been friendly: *Glover v. People* (Ill.) 68 N. E. 464.

IX. Sexual offenses.

a. General rule; previous acts.

In offenses involving carnal intercourse of the sexes, including adultery, fornication, seduction, rape, and incest, the exception to the general rule has been most liberally extended, and for a reason peculiar to those crimes.

The courts have almost invariably decided that evidence of mere opportunity afforded to

a man and woman to commit an act of sexual intercourse creates no presumption that they did so. But, if it is shown that they have actually committed the act, the presumption shifts; and proof of opportunity to repeat the act, with comparatively slight circumstances showing guilt, will be sufficient to justify the inference that criminal intercourse has actually taken place. *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110, *infra*. This as hereafter stated, was a civil action for divorce; but, as it overruled two, if not three, decisions of the same court in criminal cases, it is deemed fit to use it as an authority.

And so it has been repeatedly held that, upon a trial of a charge of having committed any of the crimes known as "sexual offenses," evidence of prior acts of the same character are admissible, although such prior act is, in and of itself, a crime.

The following cases exhibit the position of the various courts, as to when such evidence will be deemed competent or otherwise. It will be noticed that some of the cases hold that the evidence of the other crime is admissible, without saying whether it occurred prior to the act charged; others that evidence of prior crimes is admissible; and still others that evidence of prior crimes is admissible, but that evidence of subsequent ones is not.

In all cases, whether civil or criminal, involving a charge of illicit intercourse within a limited period, evidence of acts anterior to that period may be adduced in connection with, and in explanation of, acts of a similar character occurring within that period, although such former acts would be inadmissible as independent testimony, and, if treated as an offense, would be barred by the statute of limitations. *Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182.

While, as a general rule, testimony is not admissible which tends to prove a distinct and different offense from that for which the defendant is on trial, yet, in cases where incest or adultery is charged, prior acts of sexual intercourse between the parties may be proved. *People v. Patterson*, 102 Cal. 239, 36 Pac. 436.

Although a conviction cannot be had under an indictment for living in adultery, on proof of acts which occurred more than twelve months before the finding of the indictment, yet evidence of such acts is admissible for the prosecution, in corroboration of other evidence tending to show an adulterous intercourse between the parties within the period covered by the indictment. *McLeod v. State*, 35 Ala. 395.

Under an indictment for living in adultery, evidence having been adduced tending to show an adulterous intercourse between the parties during the period covered by the indictment, proof of acts or conduct prior to that time may be received, without regard to the sufficiency of the other evidence to authorize a conviction. *Cross v. State*, 78 Ala. 430.

Upon an indictment for living in an open state of adultery on a certain day and on divers other days and times since said date to the day of the finding of the indictment, evidence of acts anterior to such time are admissible in evidence as tending to illustrate or explain similar acts within the period alleged in the indictment, or to corroborate testimony of such latter acts, but not to convict of a substantive offense committed anterior to such period. *Brevaldo v. State*, 21 Fla. 789.

When, on a trial for fornication, there was
2 L. R. A.

evidence for the state tending to show that the accused and the other alleged guilty party were, on a designated occasion, in a position strongly indicating that the act charged in the indictment was being committed, it was competent for the state to supplement this evidence by proving lascivious conduct between these parties on a previous occasion, such proof being relevant as throwing light upon their relations toward each other, and as tending to illustrate the real nature of their conduct, upon the occasion first above mentioned. *Bass v. State*, 103 Ga. 227, 29 S. E. 966. Whether the conduct mentioned amounted to a crime is not stated. But the following would seem to indicate that it did, or the instruction stated would not have been given.

The state in such case having elected the occurrence which was the later in point of time, as the one upon which it would rely for a conviction, the court very properly instructed the jury that they could not convict the accused upon the evidence relating to the prior occurrence, but that this testimony was for their consideration "simply to show the relations between the parties, and as a mere circumstance in the case, in connection with other circumstances, to be considered" by the jury. *Ibid*.

On the trial of an indictment for living together in an open state of adultery, evidence tending to show continuous acts of improper intimacy between the defendants at different periods and places, before the commission of the offense alleged in the indictment, is competent to show the relation existing between the parties. *Crane v. People*, 65 Ill. App. 492. Nothing was said by the court in this case as to whether evidence of such acts between the defendants after the commission of the offense alleged in the indictment would be admissible.

The court, in a trial for adultery alleged to have been committed on January 6, 1890, directed the jury that they must find that defendant committed the act charged on or prior to January 6, 1890, and within eighteen months prior to the finding of the indictment; and that evidence of improper conduct on the part of defendant towards the woman with whom the act was alleged to have been committed, prior to that charged in the indictment, "was not to be considered as proof of any acts of adultery by defendant, but for the purpose of showing his intentions and disposition towards" the woman, "and as explanatory and corroborative of the particular offense charged." It was held that, if such instructions were error, they were favorable to defendant, and would not be reviewed on an appeal by him. *State v. Henderson*, 84 Iowa, 161, 50 N. W. 758.

Where, upon the trial of an indictment for adultery, one act of adultery committed by the defendant with the woman named in the indictment was proved by the testimony of a witness whose credibility the defendant attempted to impeach, it was held that other instances of improper familiarity between the defendant and the same woman, not long before the act of adultery proved as above mentioned, might be given in evidence to corroborate the testimony of the witness. *Com. v. Merriam*, 14 Pick. 518, 25 Am. Dec. 420, note. The case does not state whether the "other instances of improper familiarity" amounted to a crime.

Where it is shown that the parties accused had an opportunity to commit adultery at the time and place charged in the indictment, evi-

dence that they had been guilty of the offense more than eighteen months before the indictment was found, and at a later period, in another county, may be admitted to explain their conduct at the time in question. *State v. Briggs*, 68 Iowa, 410, 27 N. W. 358.

Upon the trial of an indictment for adultery with a married woman evidence is admissible to prove that, a year before the date named in the indictment, the defendant and the woman occupied the same room in another county than that wherein the crime was stated to have been committed in the indictment, as it is proof of the disposition of the parties towards each other, and, hence, is germane to their alleged act of adultery. Such testimony is in the same category with motive, intent, or preparation, and is in no wise related to the proof of a separate offense, or of a propensity to commit the crime in question, or crimes generally. *State v. Snover*, 64 N. J. L. 65, 44 Atl. 850.

In *State v. Hilberg*, 22 Utah, 27, 61 Pac. 215, the defendant was charged with having had unlawful sexual intercourse with a female over the age of thirteen and under the age of eighteen years on the 15th day of February, 1898. Upon the trial the prosecutrix was permitted, under objection, to testify to the first act of sexual intercourse as having occurred in April, 1897, about eleven months before the act charged in the information, and subsequently, under objection, she was permitted to testify to five several and distinct acts occurring thereafter. The prosecutrix made no election, and it was held that the law made the election, and that this election was made by the proof of the first act of intercourse as having taken place in April, 1897, and that no subsequent election could be made; nor could the prosecution prove any other act of the kind as a substantial offense upon which a conviction could be had, but it could prove the intimacy and improper relations of the parties prior to the acts shown in the month of April, 1897, but not afterwards. In this case *Bartch*, Ch. J., dissented, claiming that where, as in this case, there is a continuation of the relation of intimacy and illicit intercourse between the parties to the offense, evidence of improper familiarity and adulteries, both before and after the act charged, is admissible.

On the trial of an indictment for incest, after evidence of incestuous intercourse had been introduced, the state offered to prove prior acts of indecent familiarity and sexual connection between the parties for the purpose of strengthening the evidence already in. It was held that it was error to exclude the offered evidence. *State v. Markins*, 95 Ind. 464, 48 Am. Rep. 733. In this case the court said: "In *Lovell v. State*, 12 Ind. 18, *infra*, IX. b, it was held that evidence of acts of sexual intercourse subsequent to the time laid in the indictment, and identified by the evidence introduced by the state, was incompetent, and it is confidently asserted that the decision in that case governs the present. But the cases are very different. Previous acts of lascivious familiarity would tend strongly to show the commission of the specific offense charged by the state, for it is impossible to doubt that evidence of such a character tends to make it probable that the parties did commit the specific offense charged. Such evidence goes in proof of the main offense, because it is evidence of the probability of its perpetration. Where the acts precede the offense, they constitute the foundation of

an antecedent probability; but where they follow the main offense, their force and effect are materially different. It is one thing to affirm that evidence of prior incestuous intercourse is competent, and another thing to affirm that evidence of subsequent sexual intercourse is not competent; it is, therefore, not difficult to discriminate between the two cases."

In *State v. Guest*, 100 N. C. 410, 6 S. E. 253, defendant had been convicted upon an indictment for fornication and adultery. At the trial the husband of the woman with whom the crime was alleged to have been committed testified that defendant commenced coming to witness's house four or five years ago. Defendant objected, and the court instructed the jury that they could only consider testimony as to acts committed previous to two years before the bill was found for the purpose of enabling them to determine whether the defendant had committed the offense charged within two years. Another witness gave testimony as to acts of adultery in another county, which was also objected to, but was admitted for the purpose of enabling the jury to determine whether the defendant had been guilty of the offense charged against him in the county where he was being tried. After other testimony, the court instructed the jury that, as to acts testified to as having taken place outside of the county, or at a period of time more than two years prior to the finding of the bill, they could only consider such testimony for the purpose of enabling them to determine whether the defendant was in the habit of having sexual intercourse with the other defendant in the county within two years. In affirming a judgment of conviction, the supreme court said: "In our own reports, *State v. Kemp*, 87 N. C. 538, and *State v. Pippin*, 88 N. C. 646 [*infra*, IX.] are conclusive as to the admissibility of antecedent acts, as shedding light upon acts within the time limited; and acts committed without the limits of the county are admissible for the same purpose. As evidence, they can only be considered by the jury in determining the character of the acts committed within two years, and within the county of Transylvania, of which there must have been some evidence. They must convict or acquit, as the facts alleged are or are not proved beyond a reasonable doubt to have been committed within two years, and within the county; and the evidence was admissible in this point of view and no other, and, under the instructions of the court, it was properly submitted to the jury." The headnote to this case in the official report is as follows: "It is competent to offer testimony as to acts committed by a defendant in an indictment for fornication and adultery more than two years before the bill was found for the purpose of enabling the jury to determine whether he had committed the offense within two years; and, for the purpose of enabling them to find whether he had committed the offense in the county where the bill is found, they may hear evidence of his acts elsewhere." If that was what the supreme court meant to say, it would be deciding the opposite of what is conceded to be the general rule forbidding the admission of evidence of another crime to show that, because the defendant committed it, he probably committed the crime of which he was accused. But it is evident that that was not what the appellate court meant to decide. The decision should be read as though the latter had said that, as evidence, prior acts can only be

considered by the jury in determining the character of the acts committed within two years, and within the county, of the commission of which acts there must have been some other evidence. And yet the statement of what the trial court did, coupled with the affirmance of the judgment, gave the state reporter some warrant for his syllabus.

While evidence of an act of illegal intercourse, occurring more than two years before the indictment, is not competent as substantive testimony, it may be considered, if believed, as corroborative evidence of subsequent association. *State v. Dukes*, 119 N. C. 782, 25 S. E. 786.

And *State v. Guest*, 100 N. C. 410, 6 S. E. 253, *supra*, was cited as an authority for the foregoing proposition.

Upon the trial of an indictment charging the defendant with lascivious cohabitation with a married woman not his wife, evidence was admitted, although objected to by defendant, consisting of declarations made by the defendant touching his connection with the *particeps criminis*, made anterior to the time of the offense charged, and more than one year prior to the finding of the indictment. The defendant contended that, since the prosecution for offenses of this character is barred by limitation in one year, these declarations of the defendant, made more than one year prior to the finding of the indictment, were incompetent evidence to establish his guilt. It was held that, if the object of such evidence was to establish the defendant's guilt, the argument would be tenable, but that, as the evidence, while incompetent for that purpose, was clearly competent for the purpose of explaining subsequent acts of familiarity and intercourse falling within the period covered by the indictment, a general objection to it could not be entertained. That the only proper course for defendant in such cases is to ask the court to limit the effect of the evidence by instruction. *State v. Clawson*, 32 Mo. App. 93.

The crime of open and notorious adultery is not made out by a single act, or by the conduct of a single day, but by continuing acts and conduct over a period of time of more or less duration; and, where it is shown that at some prior period, not too remote, a man and a woman, not married to each other, abided and cohabited together, and it is shown at the trial that the abiding together continued and has been unbroken, the reasonable presumption or inference is that the cohabitation has also continued. Such evidence tends to prove the offense, and is, therefore, admissible. *State v. Coffee*, 75 Mo. App. 88.

On the trial of an information for incest evidence was offered of other previous acts of sexual intercourse between the defendant and the woman at various times, from the year 1853 down to about the time of the act of intercourse between them on the 17th of January, 1858, to which she had already testified, and upon which the prosecution relied for a conviction. The evidence of these previous acts was admitted by the recorder, not as evidence of substantive offenses, but in explanation and corroboration of the evidence of the act charged in the information. The court, after quoting the general rule, said: "But the courts in several of the states have shown a disposition to relax the rule in cases where the offense consists of illicit intercourse between the sexes; and it is principally to the American cases that we are to look for 92 L. R. A.

authorities upon this subject, as such intercourse is not generally rendered criminal in England, or prosecuted by indictment, being only of ecclesiastical cognizance." Continuing its reasoning on this subject, the court further said: "Previous familiarities, not amounting to actual intercourse, but tending in that direction, must have a strong bearing in all cases of this kind; and we can discover no just principle on which they could have been excluded without setting at defiance the common sense of mankind. Such evidence was given in this case by the father and mother of the girl, without objection from the defendant; and, if such familiarities may be shown because they tend to prove actual intercourse, or to corroborate other evidence of such intercourse, upon what principle can previous actual intercourse be rejected, when offered for the same purpose? It is the principal and most important act of familiarity, to which the others only tended. If offered as proof of substantive offenses on which a conviction might be had in the case, it should, of course, be excluded; but, as it was not offered for this purpose, and could not be allowed to have such effect, we can see no objection to its reception." *People v. Jenness*, 5 Mich. 305. This reasoning would seem to be in unison with that adopted by the supreme judicial court of Massachusetts in *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110, and *Com. v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346, *infra*, 1X. b.

In a prosecution for adultery acts of familiarity, committed two years before, are too remote to be put in evidence, but acts within a short time before, and very soon after the act complained of, if establishing a continuous intimacy, may be shown. *People v. Hendrickson*, 53 Mich. 525, 19 N. W. 169.

In *People v. Skutt*, 96 Mich. 449, 56 N. W. 11, *infra*, it is stated that this case appears to be in conflict with *People v. Jenness*, 5 Mich. 305, *supra*, though the facts in the two cases are different. The court adhered to the rule laid down in *People v. Jenness*. The attempt to distinguish upon the point involved does not appear to have been very successful, and it may be pretty safely said that, taken in connection with *People v. Jenness*, *People v. Skutt* practically overrules the case.

Upon the trial of an indictment for rape in the second degree, evidence of the commission of prior similar acts between the same parties is competent as tending to establish the commission of the particular act in question, or to corroborate witnesses testifying thereto. *People v. Grauer*, 12 App. Div. 464, 42 N. Y. Supp. 721.

By the Penal Code of New York rape in the second degree can be committed where the act is done with the consent of the female, the crime consisting of committing the act with a female under a certain age.

On a trial for rape, evidence as to a number of acts of carnal intercourse between the parties, before the age of consent was raised to fifteen years, two of such acts being outside the county of the prosecution, was held to be admissible to show the probability that defendant committed the offense, as charged, in corroboration of the testimony of the prosecutrix. And it was held that the court was not required, in the charge, to limit and restrict the purposes of such evidence; that the proper practice would have been for defendant to have asked that the prosecution be required to elect upon which particular act a conviction would be asked. *Ham-*

ilton v. State, 36 Tex. Crim. Rep. 372, 37 S. W. 431. To the same effect, Cooksey v. State (Tex. Crim. App.) 58 S. W. 103. See Barnett v. State (Tex. Crim. App.) 73 S. W. 399, *infra*, and Smith v. State (Tex. Crim. App.) 73 S. W. 401, *infra*, IX. b.

On a trial for rape committed upon a female under the age of consent, with her consent, testimony of former rapes committed by means of force by the defendant upon the prosecutrix is inadmissible. Barnett v. State (Tex. Crim. App.) 73 S. W. 399.

The court stated that Hamilton v. State, 36 Tex. Crim. Rep. 372, 37 S. W. 431, *supra*; Manning v. State (Tex. Crim. App.) 65 S. W. 920, *infra*, IX. b; and Cooksey v. State (Tex. Crim. App.) 58 S. W. 103, *supra*,—so far as they conflict with the foregoing, were overruled. *Ibid*.

The court said that in such a case such testimony is only admissible where it tends to solve some disputed fact or issue; that there was no difference, in the introduction of testimony as to other offenses, between a case of rape and any other criminal charge; and that, indeed, the reason of the rule excluding such testimony would appear to be stronger in a rape case than in any other character of offense, inasmuch as evidence of such extraneous crimes is more calculated to inflame the minds of the jury in a rape case than in any other. *Ibid*. See Smith v. State (Tex. Crim. App.) 73 S. W. 401, *infra*, IX. b.

To the same effect, and following and approving Barnett v. State (Tex. Crim. App.) 73 S. W. 399, *supra*, are the recent cases of Hackney v. State (Tex. Crim. App.) 74 S. W. 554, and Smith v. State (Tex. Crim. App.) 74 S. W. 556.

Upon the trial of an indictment for rape the prosecutrix, after testifying to the commission of the act charged in the indictment, was permitted, against the objection of the defendant, to testify that, four days before, the defendant had made an unsuccessful attempt to commit the offense. It was held that such evidence was competent. The reasoning of the court in coming to this result was that, if witnesses other than the complainant could have been called, who witnessed the unsuccessful attempt of the defendant to ravish the complainant four days before the crime was in fact accomplished, no one would have questioned the competency of their evidence; and that the evidence was not rendered incompetent because it came from the complainant herself. People v. O'Sullivan, 104 N. Y. 481, 58 Am. Rep. 530, 10 N. E. 880. In this case the general term of the supreme court had reversed the judgment of conviction, on the ground that such evidence was incompetent, and was likely to prejudice the jury seriously and strengthen the chances of a conviction. 25 N. Y. Week Dig. 196, 5 N. Y. S. R. 132. As has been seen, the court of appeals differed from the supreme court upon that proposition; but, inasmuch as it affirmed the judgment of the latter, reversing the conviction upon another ground, the suggestion is made, whether that fact detracts from the value or weight of the decision of the ultimate court on the subject.

In People v. Flaherty, 79 Hun, 48, 29 N. Y. Supp. 641, which was an appeal from a judgment rendered upon the trial of an indictment for rape committed upon a female under the age of legal consent, the people introduced evidence of eight different acts of intercourse previous to her becoming the age of legal consent. The judgment of conviction was, however, reversed. 62 L. R. A.

versed and a new trial ordered upon another ground. Upon the second trial the same evidence was admitted, and, upon appeal from the judgment of conviction, the appellate division affirmed the conviction, and, in an elaborate opinion, decided that evidence of the several acts was admissible. At the commencement of the second trial, counsel for the defendant moved that the people be compelled to elect which offense would be relied upon. The trial court refused to compel the people to elect at that time, and permitted the people to make the evidence of the eight different acts. At the close of the people's testimony the district attorney elected to proceed upon one act. The admission of the evidence was also objected to by the defendant. And this was affirmed by the appellate division. 27 App. Div. 535, 50 N. Y. Supp. 574.

The judgment of affirmance by the appellate division was, however, afterward reversed by the court of appeals, the latter court holding that the several acts testified to constituted, if they were committed, seven distinct crimes, for only one of which defendant was or could have been charged in the indictment; and that the defendant was entitled to know at the beginning of the trial whether he was to be tried for a crime committed on the day alleged in the indictment; and, if not, then that the people should state the date of the crime which it was purposed to prove as the one charged in the indictment. And that the refusal of the court to compel the people to so elect was prejudicial error; as was also the permitting of the people to show seven different acts, each of which, if committed, constituted a distinct crime; and to postpone such election until the close of their evidence; and that the evidence did not come within any of the exceptions to the general rule which forbids evidence of distinct independent crimes. 162 N. Y. 532, 57 N. E. 73. The opinion is of considerable length on this subject, and elaborates with great particularity the reasons why this evidence was inadmissible, and distinguishes People v. O'Sullivan, 104 N. Y. 481, 58 Am. Rep. 530, 10 N. E. 880, *supra*.

Upon the trial of an information for an assault with intent to rape a girl ten years of age, the trial court permitted the state to prove that, on one occasion, the defendant went to the room where the prosecutrix and another girl were sleeping, got into bed with them and had sexual intercourse with the other girl. In deciding that the evidence was properly admitted, the court said: "We do not suppose that evidence that the defendant had committed adultery, or been guilty of acts of improper familiarity, with the girl Emma at another time or place, would be competent evidence on the trial of the present issue, but rest our ruling on the ground, already stated, that the act of the defendant in going to the room where both Emma and the prosecutrix were sleeping, and getting in bed with them, was a grossly indecent assault on both." Proper v. State, 85 Wis. 615, 55 N. W. 1055.

In a prosecution for bastardy, evidence of acts of intercourse other than that charged in the complaint is admissible as bearing upon the probability of the particular act having occurred as charged. People v. Schilling, 110 Mich. 412, 68 N. W. 233.

A general conviction of a prisoner, charged both as principal in the first degree and as an aider and abettor of other men in rape, is valid

on the count charging him as principal. On such an indictment evidence may be given of several rapes on the same woman at the same time, by the prisoner and other men, each assisting the other in turn, without putting the prosecutor to elect on which count to proceed. *Rex v. Folkes*, 1 Moody C. C. 354.

In a prosecution for rape, alleged to have been committed on a female under the age of legal consent, testimony of the prosecuting witness of acts of intercourse between herself and the defendant prior to the act for which the defendant is being tried is admissible. *State v. Peres*, 27 Mont. 358, 71 Pac. 162.

Upon the trial of an indictment for incest, prior acts of incest between the same parties may be proved. *State v. De Hart*, 109 La. 570, 38 So. 605.

On the trial of an information for rape, proof of other acts of defendant is competent to show that he had made attempts to commit the same offense, recently before the commission of the act for which he was on trial. *State v. Scott*, 172 Mo. 538, 72 S. W. 897.

On the trial of an indictment for adultery other acts of adultery by the same parties are admissible in evidence, although committed four years previous to the finding of the indictment, as nearness of time is a circumstance affecting the effect of the evidence, and not its competency. *United States v. Griego* (N. M.) 72 Pac. 20.

Upon the trial of an indictment for adultery, evidence of acts of improper familiarity, which themselves amount to adultery between the same persons, before the time relied on as the time of the commission of the adultery charged, is inadmissible, either in corroboration of witnesses for the commonwealth, or to show the disposition of the parties to commit the crime. *Com. v. Thrasher*, 11 Gray. 450.

This case, as will be seen, is practically disapproved in *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110, *infra*, IX. 6.

On the trial of one charged with the crime of rape, by carnally knowing a female person under the age of eighteen years, several different acts of unlawful intercourse were testified to by the prosecutrix. The state elected to rely on a particular act, and, under this election, it was held to be the duty of the trial court to exclude from the consideration of the jury all testimony with reference to other acts that did not tend directly to prove the commission of the particular act relied upon by the state for conviction. *State v. Bonsor*, 49 Kan. 758, 31 Pac. 736.

On a charge of fornication with the prosecuting witness, it was held that the state, in its evidence, could go back and cover a period of two years anterior to the presentation of the indictment. The testimony of acts of fornication committed before that time, as a general rule, would be inadmissible; and such testimony could only be admitted under peculiar circumstances. The same observations were held to apply with reference to the proof that the witness had had six children by accused, because the proof in that regard would go more than two years behind the date when the indictment was presented; and that this character of testimony was calculated to injure the accused. *Duncan v. State* (Tex. Crim. App.) 45 S. W. 921.

Upon the trial of an indictment for an assault with intent to commit a rape, evidence that the prisoner on a prior occasion had taken liberties with the prosecutrix is not admissible 62 L. R. A.

to show the prisoner's intent. *Rex v. Lloyd*, 7 Car. & P. 318.

Under an information for adultery charging but one offense, and that in a single count, a public prosecutor, having given evidence of one act of adultery, will be confined to that act, and not permitted to introduce proof of other acts, committed with the same person at different times and places. In this case the court said: "The accused comes prepared to defend against a single charge: This he may do successfully, and, having done so, may find himself overwhelmed by a multitude of others of which the information gave him no notice, and against which he cannot be supposed to be prepared. And the prosecuting attorney, instead of shaping his case, at the outset, in the most favorable manner, may detain the court and jury by proving any number of offenses, and then elect upon which to claim a conviction. And why should this be done? He is supposed to be in the possession of the proofs, and should make his election from the first. In this there can be no hardship; and such is the well-settled rule in all analogous cases." *State v. Bates*, 10 Conn. 372. This case would seem to be opposed in theory and principle to like cases in other states, where it has been repeatedly held that, upon the trial of informations or indictments for this offense, other acts of a kindred nature between the same parties may be proved as tending to show the character of the act charged in the indictment or information. In this case the acts, evidence of which was held to be inadmissible, were committed previous to the act charged in the information.

On a trial for rape, where the prosecuting witness had given testimony of a rape perpetrated when she was alone with the defendant, and a ravishment upon another and different and later day, in the presence of another female, it was held that it is a familiar principle of our criminal law that it is not admissible to introduce evidence tending to prove a similar, but distinct, offense for the purpose of raising an inference or presumption that the prisoner committed the particular act with which he is charged and for which he is on trial; that there are exceptions to the rule above stated, but the case at bar did not come within any of these exceptions; and it was error to admit evidence of two separate, distinct, and substantive crimes over the objection of the defendant. *Parkinson v. People*, 135 Ill. 404, 10 L. R. A. 91, 25 N. E. 764.

Upon the trial of an indictment for fornication or adultery evidence of acts anterior to the time in which the fornication or adultery is alleged to have been committed is admissible. *Com. v. Lahey*, 14 Gray. 91; *State v. Jackson*, 65 N. J. L. 62, 46 Atl. 767; *State v. Kemp*, 87 N. C. 538; *State v. Pippin*, 88 N. C. 646; *Com. v. Bell*, 166 Pa. 405, 31 Atl. 123; *State v. Potter*, 52 Vt. 33.

In a prosecution for incest, it is competent for the state to prove acts of sexual intercourse prior to the specific act charged in the indictment. *Taylor v. State*, 110 Ga. 150, 35 S. E. 161; *Leforge v. State*, 129 Ind. 551, 29 N. E. 34; *People v. Cease*, 80 Mich. 576, 45 N. W. 585; *Com. v. Senak*, 9 Kulp. 558.

In a prosecution for assault with intent to commit rape, evidence is admissible of previous assaults of the same character upon the prosecutrix. *Williams v. State*, 8 Humph. 585; *Taylor v. State*, 22 Tex. App. 529, 58 Am. Rep. 656.

8 S. W. 753; Callison v. State, 37 Tex. Crim. Rep. 211, 39 S. W. 300; Hanks v. State (Tex. Crim. App.) 38 S. W. 173. And in a prosecution for rape. People v. Abbott, 97 Mich. 484, 56 N. W. 862.

As to evidence of previous, in connection with subsequent, acts being competent, see the following cases in *infra*, IX. b: Lawson v. State, 20 Ala. 65, 56 Am. Dec. 182; Alsabrooks v. State, 52 Ala. 24; Crane v. People, 65 Ill. App. 492, Affirmed in 168 Ill. 395, 48 N. E. 54; State v. Witham, 72 Me. 531; State v. Williams, 76 Me. 480; State v. Way, 5 Neb. 283; Burnett v. State, 32 Tex. Crim. Rep. 86, 22 S. W. 47; State v. Bridgman, 49 Vt. 202, 24 Am. Rep. 124.

And that previous acts may be shown, but that subsequent acts may not, these cases in the same subdivision: People v. Clark, 33 Mich. 112; People v. Fowler, 104 Mich. 449, 62 N. W. 572; People v. Payne (Mich.) 9 Det. L. N. 417, 91 N. W. 739.

b. Subsequent acts.

There are, however, as will be seen, decisions to the effect that evidence, not only of acts committed prior, but also of those committed subsequent, to the act charged, is admissible, although showing a distinct, independent crime. These are, however, believed to be in the minority, and, besides, are lacking the strong reason which is given for the admission of evidence of the prior act. They are here given, and are followed by those holding exactly the contrary doctrine.

Acts of indecent familiarity within the limited period cannot be explained by proof of the subsequent illicit intercourse of the parties; but when such acts of indecent familiarity have been explained by previous acts of illicit intercourse, then proof of the subsequent illicit intercourse becomes corroborative or cumulative evidence, and is admissible. Lawson v. State, 20 Ala. 65, 56 Am. Dec. 182.

On a charge involving illicit intercourse during a particular period, evidence of acts anterior or subsequent to that time, which tend to illustrate or explain similar acts within the particular period, although not evidence on which to base a conviction, are admissible, in connection with evidence of similar acts during the time laid, to prove illicit intercourse as charged. Alsabrooks v. State, 52 Ala. 24.

On an indictment for rape of a child under ten years of age, evidence was admitted of subsequent perpetrations of the same offense on different days previous to complaint to the mother, it appearing that the prisoner had threatened the child on the first occasion, and it being held that in such a case it was virtually all one continuous offense. Reg. v. Bearden, 4 Fost. & F. 76.

Under an indictment charging the defendants with living together in open adultery, prior and subsequent acts of improper familiarity, or of adultery, between the parties, whether occurring in the same or other jurisdictions, may be proved in explanation of, or to characterize, the acts of the parties complained of as constituting the offense charged. Crane v. People, 65 Ill. App. 492, Affirmed in 168 Ill. 395, 48 N. E. 54.

In a prosecution for adultery, acts prior, and also subsequent, to the act charged in the indictment, when indicating a continuance of illicit

intercourse, are admissible in evidence for the purpose of showing the relation and mutual disposition of the parties, the reception of such evidence to be largely controlled by the judge who tries the cause, explaining to the jury its purpose and effect. State v. Witham, 72 Me. 531. To the same effect, State v. Williams, 76 Me. 480.

Upon a charge of adultery in an indictment, evidence of improper familiarities between the parties, both anterior and subsequent to the time the offense is charged, may be received as corroborating proof, after evidence has been offered tending to prove the offense charged. State v. Way, 5 Neb. 283.

It is competent for the state, in the trial of an indictment for seduction, to show that there was sexual intercourse between the parties subsequent to the first alleged act. State v. Robertson, 121 N. C. 551, 28 S. E. 59.

Evidence of acts of adultery, subsequent to the date of the latest act charged in the petition, is admissible, for the purpose of showing the character and quality of previous acts of improper familiarity. Boddy v. Boddy, 30 L. J. M. C. N. 8. 23.

Where defendant was convicted of incest, the sole question raised in the case was, whether the state could prove the crime of incest by evidence of more than one act. It was held that this was not an open question; that it is well settled that, in prosecutions for adultery, or for illicit intercourse of any class, evidence is admissible of sexual acts between the same parties prior to, or, when indicating continuousness of illicit relations, even subsequent to, the act specifically under trial. Burnett v. State, 32 Tex. Crim. Rep. 86, 22 S. W. 47.

Upon an indictment for adultery evidence of other acts of improper familiarity and adultery between the parties to the alleged offense, continuing from before until after the offense charged, and after indictment found, is admissible, although it proves other and distinct offenses, to show the true relation of the parties to each other,—to show that the restraints and safeguards of common deportment and conventionality, and of the natural modesty that is presumed to exist, have been broken through and displaced by the adulterous disposition and the habits of adulterous intercourse. State v. Bridgman, 49 Vt. 202, 24 Am. Rep. 124.

See Thayer v. Thayer, 101 Mass. 111, 100 Am. Dec. 110, *infra*.

Upon the trial of an indictment for adultery in one county with a woman named, evidence is not admissible that the defendant, after the time alleged in the indictment, cohabited with the same woman in another county, and called her his wife, and said he had lived at the place named in the indictment. Com. v. Horton, 2 Gray, 354. The reason for holding that the evidence was inadmissible would seem to be that no act of the defendant after the time charged in the indictment for the commission of the offense with which he was charged could in any wise characterize that crime; and that a different rule applies where there is evidence of the same acts previous to the commission of the offense charged in the indictment, and such evidence is admissible.

In Thayer v. Thayer, 101 Mass. 111, 100 Am. Dec. 110, note, which was an action for a divorce, the court, disapproving of Com. v. Horton, 2 Gray, 354, *supra*, and particularly of Com. v. Thrasher, 21 Gray, 450, *supra*, IX. a, said:

"But by the application of the rule laid down in these cases, evidence tending to establish an independent crime is to be rejected, although all acts which are only acts of improper familiarity are to be admitted in proof. There is no sound distinction to be thus drawn. There is no difference between acts of familiarity and actual adultery committed, when offered for the purpose indicated, except in the additional weight and significance of the latter fact. The concurrent adulterous disposition of the defendant and the *particeps criminis* cannot be shown by stronger evidence than the criminal act itself. There is no one act by which the moral status of the parties is more clearly defined. And, for the purposes and with the limitations here stated, evidence of it is always admissible."

This was a civil action for a divorce, but, as the supreme judicial court of Massachusetts, by its judgment therein and in the opinion of the judge delivering such judgment, disapproves *Com. v. Horton*, 2 Gray, 354, *supra*, and *Com. v. Thrasher*, 11 Gray, 450, *supra*, IX. a; and inasmuch as the case has been followed and approved both in Massachusetts and other states where the question which is the subject under consideration herein has arisen,—it is deemed a proper case to be inserted here. The court took occasion to say further: "The fact that the conduct relied on has occurred since the filing of the libel does not exclude it; and proof of the continuance of the same questionable relations during the intervening time, as in the case at bar, will add to its weight." The evidence was brought out by the following question to the accused on his cross-examination: "Did you, within a few weeks either way, have criminal intercourse with Miss Morris anywhere?" and, being compelled by the court to answer, he answered: "I did." And that is all there is on the subject.

Upon the trial of an indictment for adultery, evidence of other acts of adultery committed by the same parties, near the time charged, though in another county, is admissible to support the indictment. *Com. v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346. This case cites, follows, and approves *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110, which, as has been seen, disapproved *Com. v. Thrasher*, 11 Gray, 450, *supra*, IX. a, and *Com. v. Horton*, 2 Gray, 354, *supra*, IX. b.

Upon the trial of an indictment for adultery, evidence of the criminal conduct of the defendant and his supposed paramour, as shown by disconnected acts occurring eighteen months after the time laid as for the commission of the crime in the indictment, is inadmissible. *State v. Crowley*, 13 Ala. 172.

As a general rule, evidence should not be given, either in criminal or civil cases, which does not directly tend to the proof or disproof of the matter in issue. Under this rule, the facts given to the jury in a criminal case should consist exclusively of the transaction which forms the subject of the indictment. Hence, the prosecution cannot prove another distinct offense for the purpose of raising an inference that the accused is guilty of the offense charged. Thus, where the indictment contained a single charge of incest, which was proved as laid, the state cannot prove that the defendant had sexual intercourse with the prosecuting witness at any subsequent time. *Lovell v. State*, 12 Ind. 18. See *State v. Markins*, 95 Ind. 464, 48 Am. Rep. 733, *supra*, IX. a. 62 L. R. A.

In a criminal prosecution for seduction the prosecution, after having introduced evidence tending to show an offense committed on a certain day, cannot show subsequent acts as corroborating testimony, as they would have no such tendency. Proof of previous acts of sexual intercourse would tend to show a much greater probability of the commission of a similar act charged to have occurred subsequent thereto; but the converse of this proposition would not be true, as the proof of a crime committed by parties on a certain day could have no tendency to prove that they had, previous thereto, committed a similar offense. *People v. Clark*, 33 Mich. 112.

An information for adultery charged the offense to have been committed on the 17th day of February, 1892. Testimony was admitted tending to show a similar offense some three months after the offense charged in the information. It was held that the court was in error in admitting this testimony; that acts of intimacy in this class of cases, prior to the offense charged, may be shown, but it is wholly incompetent to show subsequent acts for any purpose. *People v. Fowler*, 104 Mich. 449, 62 N. W. 572.

Upon a trial for seduction the information charged the offense to have been committed October 22d. The testimony showed it was committed September 22d. After this testimony was given, the people were allowed to show acts of intercourse in November and December, and that pregnancy resulted therefrom. This was held to be error. *People v. Payne* (Mich.) 9 Det. L. N. 417, 91 N. W. 739.

Where, contrary to the rule of law, in a prosecution for adultery, evidence was admitted of an adulterous act subsequent to the one charged in the indictment, the error was held to be cured by the district attorney's withdrawing from the jury the evidence of such subsequent act. The prosecuting witness testified to one act of intercourse between herself and the defendant in January, 1882. The court permitted her to testify to another act of intercourse occurring one week afterwards, and this action of the court was assigned as error. The court stated that the rule of law is that, where the charge is of one act of adultery only, in a single count, to which evidence has been given, the prosecution is not permitted afterwards to introduce evidence of other acts committed at different times and places; that the abstract showed, however, that, at the close of the argument, the district attorney said he elected to rely upon the transaction first testified to by the witness. The court held, further, that this, in effect, withdrew the evidence of the second transaction from the jury, and cured whatever error there may have been in its admission. *State v. Donovan*, 61 Iowa, 278, 16 N. W. 130.

Upon the trial of an indictment for the crime of adultery, the admission in evidence of acts of sexual intercourse, subsequent to the date on or about which the act of adultery declared upon in the indictment is charged to have been committed, is not reversible error, where, after the state had elected to stand upon the act testified to as being the first committed, and as occurring on or about the date alleged in the indictment, the evidence as to the other acts was stricken out, on defendant's motion. *State v. Oden*, 100 Iowa, 22, 69 N. W. 270.

The above case and *State v. Donovan*, 61 Iowa, 278, 16 N. W. 130, *supra*, are referred to

without approval in *State v. Smith*, 108 Iowa, 440, 79 N. W. 115, *infra*, where attention is called to the fact that in neither case was the statement of law in question necessary to the determination of the case, nor in fact applied.

In *State v. Smith*, 108 Iowa, 440, 79 N. W. 115, which was a prosecution for adultery, the court said that it did not find it necessary to decide whether the statement made in *State v. Donovan*, 61 Iowa, 278, 16 N. W. 130, *supra*, and approved in *State v. Oden*, 100 Iowa, 22, 69 N. W. 270, *supra*, correctly represents the law, and that in neither of those cases was the statement of law in question, *i. e.*, that where the charge is of one act of adultery only, in a single count, to which evidence has been given, the prosecution is not permitted to introduce other acts committed at different times and places,—necessary to a determination of the case; nor was it, in fact, applied. The court then decided that, if the defendant desired that an election be made of the different acts as to which evidence had been given, he should have asked it before the cause was submitted to the jury, and, having failed to do so, he was not entitled to relief on the ground that the election was not made.

Where an indictment charged a rape to have been committed upon a female under the age of consent, on the 25th day of May, and the evidence showed several rapes proved on the part of the state, and the state having elected to prosecute, under the insistence of accused, for a rape committed in February of the same year, it was proper for the court to limit the consideration of the jury to that offense. *Price v. State* (Tex. Crim. App.) 70 S. W. 966.

Upon the trial of an indictment for rape in the second degree, alleged to have been committed on the 13th day of January, 1894, upon a female under the age of sixteen, and not the wife of the defendant, evidence was admitted that, from the 9th of May to the 11th of June, the defendant and the female lived together in a flat in the city of New York. The court, in holding that the admission of such evidence was error, after citing cases in Maine, Massachusetts, and Vermont, and commenting upon them, said: "Applying the principle of these cases to the facts of the case at bar, we think it clear that the evidence tending to show cohabitation in the Thirty-sixth street flat was inadmissible. The cohabitation inferable from this evidence took place four months after the act for which it was sought to convict the defendant. There was no proof of intercourse, or even of familiarity, in the interim. Almost immediately after the alleged occurrence in January, the girl went to live with her mother at a flat in Twenty-eighth street, and she remained there until the following May. The defendant was in the city part of the time, and he was traveling in the west for a short period. There is not a suggestion of intercourse, proper or improper, during all this time. In fact, there is a complete gap in that direction, covering this whole period of four months. How, then, can evidence tending to show illicit relations in May and June be said to corroborate proof of the intercourse in January? If the defendant and the complainant had conceived an illicit passion for each other in January, is it probable that they would have postponed its gratification until May? Nothing, so far as it appears, put any restraint upon them save those dictates of decency which had already proved inadequate. 62 L. R. A.

The proof which was objected to quite fails, it seems to us, to show a mutually amorous disposition between the parties four months before. Still less does it tend to show continuance of illicit relations throughout those four months and down to and including the later periods." *People v. Freeman*, 25 App. Div. 583, 50 N. Y. Supp. 984.

After the state had introduced the prosecutrix as a witness, and she testified to an act of sexual intercourse between her and defendant at a certain time and place, that this was the first time he had had sexual intercourse with her, and that prior to this act he promised to marry her, evidence, against defendant's objection, to show by her that, a week after this first connection, defendant had sexual intercourse with her again, and that they continued to have sexual intercourse "regularly" for some months afterwards, is inadmissible. *Pope v. State* (Ala.) 34 So. 840.

The rule that in prosecutions for incest or adultery proof of subsequent acts of the same character between the parties are admissible has no application to a prosecution for rape which is a completed, and not a continuous, transaction. *Ball v. State* (Tex. Crim. App.) 72 S. W. 384.

The reason for the exception to the general rule forbidding the admission of evidence of a separate crime,—which, on a trial for a sexual offense, permits evidence of acts of prior intercourse between the parties,—is not applicable to an act of intercourse occurring after the time charged in the indictment, as it is manifest that the illicit relations may have commenced subsequent to the crime for which the accused is being prosecuted. And the admission of evidence of such subsequent act is error, for which a conviction will be reversed. *People v. Robertson*, 84 N. Y. Supp. 401.

On a trial for rape committed on a female under the age of consent, evidence of subsequent acts of intercourse between the parties is inadmissible, as such acts do not form part of a system, or part of the *res gestæ*, or serve to identify the accused. *Smith v. State* (Tex. Crim. App.) 73 S. W. 401. *Hamilton v. State*, 36 Tex. Crim. Rep. 372, 37 S. W. 431; *Callison v. State*, 37 Tex. Crim. Rep. 216, 39 S. W. 300; *Hanks v. State* (Tex. Crim. App.) 38 S. W. 173; *Cooksey v. State* (Tex. Crim. App.) 58 S. W. 103,—*supra*, IX. a, so far as they announce a doctrine contrary to the foregoing, overruled.

In the above case the court repudiated the doctrine stated to have been held in the *Hamilton* and *Cooksey* Cases,—that such evidence was admissible to show the probability that defendant committed the offense as charged in corroboration of the testimony of the prosecutrix; and very correctly scouted the idea that the complaining witness in a prosecution for rape can corroborate herself by swearing to one fact, and then swearing to another fact, and insisting that such other fact was corroborative of the previous statement. The case, in connection with *Barnett v. State* (Tex. Crim. App.) 73 S. W. 399, *supra*, IX. a, would seem to have almost completely changed the doctrine theretofore prevailing in Texas.

On a trial for rape evidence of other acts of intercourse between the defendant and prosecutrix is admissible for the purpose of showing the relation of the parties. *State v. Robinson*, 32 Or. 43, 48 Pac. 357; *Manning v. State* (Tex. 22

Crim. App.) 65 S. W. 920; *Lanphere v. State*, 114 Wis. 193, 89 N. W. 128.

In each of the foregoing cases the report fails to show whether the other acts were prior or subsequent to the act for which accused was on trial.

From the foregoing decisions it would appear that the weight of authority seems to be in favor of the doctrine that, in this class of cases, evidence of acts occurring prior to the act for which the accused is being tried may be given to characterize and explain the latter; but that evidence of subsequent acts may not. The minority in favor of the admission of subsequent acts is, however, a strong one; but it is thought that the reasoning in favor of their admission lacks a great deal of the force of that generally used in the arguments in favor of the admission of evidence of prior acts.

c. Acts with other persons.

On a trial for an assault with intent to commit a rape, the prosecution should not be permitted to introduce in evidence the declarations of the defendant concerning his misconduct with females, other than the one he is charged with having attempted to violate. *People v. Bowen*, 49 Cal. 654.

On a trial for detaining a woman with intent to carnally know her, she testified that the accused had often tempted her virtue. Asked by the defense why she had not made complaint, she said because his wife (her aunt) had had so much trouble about him. It was held that it was error to allow her to detail his sexual offenses with other women, in response to questions by the state. *Cargill v. Com.* 12 Ky. L. Rep. 149, 13 S. W. 916.

On a trial for assault with intent to rape, evidence of an attempt of the defendant to commit a similar crime on another person, an hour before the assault charged, is inadmissible. *McAllister v. State*, 112 Wis. 496, 88 N. W. 212.

The following are cases of sexual offenses which have been placed in other parts of the note because peculiarly applicable to the particular subject discussed in the several divisions of the note in which they will respectively be found, viz.: *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69; *Janzen v. People*, 159 Ill. 441, 42 N. E. 862, 1. *supra*; *State v. Desmond*, 109 Iowa, 72, 80 N. W. 214; *State v. Walters*, 45 Iowa, 380; *Palin v. State*, 38 Neb. 862, 57 N. W. 743,—*supra*, III. c. 3; *State v. Kavanaugh*, 133 Mo. 452, 33 S. W. 33, 34 S. W. 842, *supra*, V. a. 2; *Parkinson v. People* (Ill.) 24 N. E. 772; *State v. Taylor* (Mo.) 22 S. W. 806, 118 Mo. 153, 24 S. W. 449; *Thompson v. State*, 11 Tex. App. 51; *Davis v. State* (Tex. Crim. App.) 23 S. W. 685,—*supra*, VII. d; *Reg. v. Chambers*, 3 Cox C. C. 92; *Strang v. People*, 24 Mich. 1,—*supra*, VIII. b; *Mitchell v. People*, 24 Colo. 532, 52 Pac. 671; *State v. Higgins* (Iowa) 95 N. W. 244,—*infra*, XII.; *Bigcraft v. People* (Colo.) 70 Pac. 417; *Taylor v. State*, 22 Tex. App. 529, 58 Am. Rep. 656, 3 S. W. 753; *People v. Fultz*, 109 Cal. 258, 41 Pac. 1040,—*infra*, XVI. a. 1.

X. Committed in resisting arrest, or attempting to escape after commission of crime charged.

Evidence that defendant, charged with the theft of a saddle, while in possession of the 62 L. R. A.

saddle and a horse taken the same night, began firing before being spoken to, when approached by the sheriff and his posse, killing one of the posse, was held, in *Willingham v. State* (Tex. Crim. App.) 26 S. W. 834, to be admissible, the court saying that resistance to arrest is always admissible against the party making such resistance, and that the fact that a killing occurred did not render the evidence inadmissible; that the trial court instructed the jury to disregard the killing as evidence, which was favorable to the accused.

On a trial for murder evidence was admitted showing that, at the time of his arrest, or shortly thereafter, defendant shot two of the rangers who had him in charge, and made his escape. It was held that these acts of the defendant after his arrest, and while in custody, were properly admitted in evidence. *Cordova v. State*, 6 Tex. App. 207.

Evidence that a person charged with murder, upon being seized by a witness to the homicide and pulled away from his victim, requested to be turned loose, and, when this was refused, struck at the person holding him with a knife, is admissible on his trial for the murder, the act being contemporaneous with the killing, and evidently committed in an effort to get away or escape. *State v. Sanders*, 76 Mo. 35.

Evidence that a man accused of murder, knowing that he was suspected, went to the house of another the night after the homicide, and, while the owner was asleep, broke open his trunk and took therefrom some clothing, leaving his own soiled clothes in the house, was held to be admissible on his trial for the murder, notwithstanding the fact that it showed the commission of another crime than that charged. The court said that, while this evidence showed another offense, the facts evidently proved that defendant was endeavoring so to disguise himself as to be able to elude his pursuers and make good his escape; that this certainly was his purpose or he never would have left his clothing at the very spot of the theft, thus furnishing indisputable evidence of his guilt. *Williams v. State*, 15 Tex. App. 104.

Upon the trial of a woman for the murder of her stepdaughter evidence was admitted to show that defendant committed an assault upon her husband with an axe upon his return to his home the day of the homicide, and when the death of the daughter could no longer be concealed unless he was removed, or his life destroyed. This was objected to on the ground that it involved proof of one crime to establish defendant's guilt of another, but the court of appeals, in approving the admission of this evidence and affirming a conviction, stated that the demeanor, conduct, and acts of a person charged with crime, such as attempted flight, a desire to elude discovery, an anxiety to conceal the crime, or the evidence of it, are always proper subjects of consideration, as indicative of a guilty mind, and in determining the question of the guilt or innocence of the person charged. And, by way of illustration, the court added that, if the defendant, instead of assaulting her husband to prevent his discovery of the death of his daughter before she effected her contemplated escape, had set fire to the building to avoid detection, there would be no doubt that evidence of that fact would be admissible. And that, if she had stolen a horse and carriage

to aid her in her flight, there would be no doubt that evidence of it should be received. And thereupon the court reasoned that the jury might well have found that the purpose of her assault was to kill her husband and thereby prevent a discovery of her crime until she had an opportunity to escape, and that there was no error in the receipt of that evidence which would justify a reversal of the judgment. *People v. Place*, 157 N. Y. 584, 52 N. E. 576.

Upon the trial of an information charging the defendant with breaking and entering a dwelling house with intent to commit a felony, evidence that the defendant, subsequent to the alleged breaking, intentionally burned the building alleged to have been broken, in order to conceal the physical evidence of such breaking, is admissible. *Roberson v. State*, 40 Fla. 509, 24 So. 474. In this case the court said: "We think the evidence subsequently introduced by the state, tending to connect defendants with the alleged breaking, and the defendant Roberson with the burning, rendered the testimony objected to relevant and material. It is true that evidence of another and distinct crime committed by a defendant, in no way connected by circumstances with the one for which he is being tried, is inadmissible. It is equally true that proof of any fact with its circumstances, even though amounting to a separate crime, if it has some relevant bearing upon the issue being tried, is admissible in evidence."

Evidence showing that a person on trial for murder, six weeks after the homicide with which he was charged and twelve days before the term of the court at which he was tried began, attempted to break jail and escape, is admissible on such trial. *Anderson v. Com.* 100 Va. 860, 42 S. E. 865.

XI. Effect of indictment for, conviction or acquittal of, evidential crime.

a. Indictment.

The question has been raised in criminal trials whether a previous indictment for, or acquittal or conviction of, the other crime, has any effect upon the admissibility of the evidence of such other crime. It may be safely stated that the almost universal judgment is that neither of these circumstances will operate to the rejection of such evidence. And it is believed that most of the cases that have touched the subject have not only so held but, on requirement, have decided that in cases of indictment and conviction the record itself may be introduced.

It has been sometimes strenuously urged that, while an indictment (which is merely a public or official accusation), or a conviction, might be admissible, yet, where the fact is that the accused has been acquitted of the crime sought to be used as evidence, that fact should render it inadmissible; as to receive it would be to put the accused again in jeopardy, and would also contravene the record.

But the courts which have spoken upon the subject have all said, in substance, that he could not be put in jeopardy of a crime of which he had been acquitted, but that he was in jeopardy of the crime for which he was being tried; and that evidence of the transactions which had resulted in his acquittal was admissible if competent to show a fact material to the issue being tried; and that, as to the other objection, the particular ground of his acquittal was not 62 L. R. A.

matter of record, but matter of presumption only, which would be allowed only until the fact itself appeared. And so it could not be said that the record was contravened.

The prisoner was indicted for uttering a forged £1 Bank of England note, knowing the same to be forged. There was a second indictment against the prisoner for uttering another forged £1 note to another person. On the trial of the first indictment the prosecution, to show that the prisoner knew the note in that indictment to be forged, wished to give evidence of the other uttering to the person named in the second indictment, which was objected to as an endeavor to prove a man guilty of one offense by showing him guilty of another. *Vaughan, B.*, said: "I think, as the second uttering is made the subject of a distinct prosecution, we are not at liberty to go into evidence of it, even to show a guilty knowledge in a previous uttering. Other utterings, for which no prosecution had been commenced, have been held to be evidence to show a guilty knowledge. But even that was much questioned by many able lawyers; and I am of opinion that, if the prosecutors have made the second uttering the subject of a substantive charge, I cannot receive evidence of it in support of the present indictment." *Rex v. Smith*, 2 Car. & P. 633.

This case and the one immediately following it are the only English cases holding that evidence of another distinct crime cannot be admitted on a criminal trial if such other crime is the subject of another indictment. All the other English cases, and all the American cases, with the exception, possibly, of *Bell's Case*, 6 N. Y. City Hall Rec. 96, *infra*, are to the effect that the fact that the accused has been indicted, convicted, or even acquitted, of the distinct offense, cuts no figure whatever.

The case is sharply criticized in *State v. Robinson*, 16 N. J. L. 507, *infra*, XI. c, in which case the court said, among other things, that, as to the argument of *Vaughan, B.*, it seems to be confuted by his own admission that it may be done, if there is no indictment yet depending.

Upon the trial of an indictment for poaching in the night, with other persons armed, in order to prove the identity of the prisoner the prosecution proposed to show that one of the game keepers lost his coat during an affray which occurred on the occasion in question, and that this coat was found in the prisoner's house. This was objected to by counsel for the prisoner, as there was a separate indictment against him for the stealing of the coat. The court said that in the case of *Rex v. Ellis*, 9 Dowl. & R. 174, 6 Barn. & C. 145, 5 L. J. M. C. 1, it was held that, where several felonies formed part of one transaction, evidence may be given of them all, to which the counsel for the prisoner responded that in that case there was only one indictment; whereupon the court said: "That distinguishes the two cases; and I therefore shall not receive the evidence, unless the prosecutor consents to an acquittal on the indictment for larceny;" and the evidence was rejected. *Rex v. Westwood*, 4 Car. & P. 547.

In *Rex v. Sallsbury*, 5 Car. & P. 155, it was held that, on an indictment for felony, a matter which was the subject of another indictment for a felony was material to be given in evidence, where it formed a part of the facts of the case.

The prisoner was indicted for stabbing the

prosecutor, there being another indictment against him for stabbing another person on the same occasion. It was held that, on the trial of the indictment for stabbing the prosecutor, both the person for stabbing whom the second indictment was found, and the surgeon, might be asked as to what kind of a wound that person received, with a view of identifying the instrument used. *Rex v. Fursey*, 6 Car. & P. 81.

The prisoner was indicted for uttering a forged £5 note of the Bank of Ireland. To show guilty knowledge, it was proposed to give in evidence the uttering by him of two forged notes of bankers in Dublin, which was objected to, on the ground, first, that, these notes being the subject-matter of another indictment, they were inadmissible as evidence on this; second, that, being notes of a different description, they could not be given in evidence to show guilty knowledge of the forged character of the note set forth in the indictment. The objections were overruled, and the evidence admitted. *Kirkwood's Case*, 1 Lewin C. C. 103. To the same effect, *Martin's Case*, 1 Lewin C. C. 104.

The prisoners were indicted for robbing a person of bank notes, gold coin, and silver. The same prisoners were also indicted for robbing another of a silver watch and silver coin. On the trial of the first indictment it appeared that on a certain evening the prosecutors in both indictments were traveling in a gig, and were stopped by five persons, who beat and robbed them. Counsel for the prosecution proposed, on the trial of the first indictment, to ask the prosecutor in the second indictment what he had lost, which was objected to by the prisoner because it was the subject of the other indictment. The court held that it made no difference that the watch was the subject of another indictment, though he thought a part of the evidence was inadmissible. That evidence might be given of the loss of the watch at the same time and place, but that the prosecution must not go into evidence of the violence that was offered to its owner; and the prosecutor in the second indictment was allowed to state in evidence that he lost his watch and part of his fob, which were afterwards found on one of the prisoners. *Rex v. Rooney*, 7 Car. & P. 517.

The prisoner was indicted for arson by setting a rick of wheat on fire. There were two other indictments against him, for firing two other ricks on the same night, the respective properties of two other persons. There was evidence given on the trial that the prisoner had complained that the prosecutor had sent a lawyer's letter to his father for a debt which the prisoner owed him, and, after much violent language, the prisoner said he would be even with him, and would light the parish from end to end, and burn the whole lot. There was other evidence tending to show that the prisoner was in the vicinity of other ricks that were burned on the same night as that of the prosecutor's. It was held that evidence might be given, upon the trial, of the prisoner's presence and demeanor at the fires of other ricks on the same night, although those fires were the subject of other indictments against him, such evidence being important to explain his movements and general conduct before and after the firing of the rick set out in the indictment. *Reg. v. Taylor*, 5 Cox C. C. 138.

On an indictment for uttering a forged Bank

of England note, *Alderson, B.*, admitted another forged Bank of England note in evidence, although the subject of another indictment. *Rex v. Aston*, Cited in 2 Russell, Crimes, 6th ed. 678.

In *Reg. v. Lewis*, Cited in 2 Russell, Crimes, 6th ed. 678, Lord Denman, Ch. J., said that "he could not conceive how the relevancy of the fact to the charge could be affected by its being the subject of another charge;" and offered to admit the evidence.

On the trial of a prisoner indicted for feloniously and without lawful excuse having in his possession a stone upon which was engraved part of an undertaking for the payment of 2 guilders, of a body corporate in the Kingdom of the Netherlands, evidence of what was on a second lithographic stone found in the prisoner's lodging, in respect of which another indictment had been preferred against him, was held to be competent. *Reg. v. Zeigert*, 10 Cox C. C. 555.

Upon trial of an indictment for uttering forged notes of the Edinburgh Bank, the prosecution tendered in evidence the uttering by the prisoner of certain forged notes of the Paisley Bank, to show guilty knowledge. These notes formed the subject of another indictment. The trial judge had great doubts as to the admissibility of the Paisley notes under these circumstances, observing that, if the prisoner had been indicted for uttering the Edinburgh notes only, there would have been no question. He intimated that his own opinion was in favor of receiving the evidence; but added that many of the judges had great doubts about it. He finished by saying that he should reserve the point, but regretted being placed in the dilemma. *Hodgson's Case*, 1 Lewin C. C. 103.

Upon the trial of persons indicted for stealing and receiving, knowing to have been stolen, a quantity of brass, the prosecution proposed to give evidence of other property found in the possession of the prisoners, and alleged to have been stolen within the six months preceding the date of the commission of the offense charged. This other property was the subject of a second and similar indictment found against the prisoners and about to be tried in the same assizes. This was objected to by the counsel for the prisoners on the ground that the prosecution sought to prove the second indictment on the trial of the first, and the effect was to prejudice the prisoners in one or other of the trials. It was held that the evidence was admissible. *Reg. v. Jones*, 14 Cox C. C. 3. This evidence was offered under 34 & 35 Vict. chap. 112, § 19, which was the same statute as was considered in *Reg. v. Drage*, 14 Cox C. C. 85, *supra*, III. c. 16.

On the trial of an indictment for treason the prosecuting attorney offered testimony to prove that, in the course of the insurrection, the prisoner joined in robbing the public mail of the United States; and that several of the letters thus intercepted were read at an alleged treasonable meeting or assemblage. This was objected to on behalf of the prisoner, upon the ground that the robbery of the mail was a felony, for which, as a substantive and independent crime, he was actually charged by another indictment; and that, therefore, evidence relating to it should not be given on the present issue, as the prisoner was not prepared to answer, and a prejudice might be excited against him in the mind of the jury. The court said:

"An act committed with a felonious intention cannot be given in evidence upon the trial of an indictment for high treason. It does not yet appear that the mail was intercepted and rifled with a traitorous intention; and, as far as it respects the prisoner, there is another indictment against him, charging the offense merely as a felony. Under these circumstances the testimony cannot be admitted." *United States v. Mitchell*, 2 Dall. 357, 1 L. ed. 414, Fed. Cas. No. 15,789. Inasmuch as it did not appear that the mail was intercepted and rifled with a traitorous intention, did the fact that the defendant was under indictment for that felony change the situation?

In the trial of an indictment for uttering a counterfeit bank bill, it is competent to show the passing of other counterfeit bills about the same time, although other indictments are pending against the prisoner for those acts. *Com. v. Percival*, Thacher Crim. Cas. 293.

Upon the trial of an indictment for taking illegal fees, the state was permitted to introduce in evidence a prior indictment against the defendant for demanding, in the same official capacity, fees not allowed by law. It was held that the evidence was properly admitted as tending to show a knowledge on the part of the defendant that the fees mentioned in the indictment were not lawful,—the trial court having expressly limited said evidence to such purpose by its charge. *Brackenridge v. State*, 27 Tex. App. 513, 4 L. R. A. 360, 11 S. W. 630.

In *Dubose v. State*, 13 Tex. App. 418, the court said: "Defendant's bills of exception, so far as they relate to the admissibility of the indictments and records in other cases, wherein defendant was charged with assault with intent to murder and theft of the property of the deceased (J. T. Benton), are wholly untenable. Such evidence was admissible to show motive on the part of the defendant to murder Benton."

On the trial of a complaint for keeping a shop open on the Lord's Day, a portion of the evidence offered to show that the defendant kept his shop open as alleged was the same that had been offered and relied upon to sustain an indictment previously tried, in which the same defendant was charged with illegal sales of liquors under another statute; and it was objected that such evidence was incompetent. It was held that there was no reason for rejecting such evidence. That the offense charged in the other indictment was entirely a distinct offense, and the fact that the liquor was sold without license, on the Lord's Day, did not aggravate that offense or the punishment therefor. *Com. v. Harrison*, 11 Gray, 308.

In *People v. Wood*, 3 Park. Crim. Rep. 681, the court said that the acts, the declarations, and the conduct generally, of a party charged with the commission of an offense, both before and after its alleged commission, are competent to be proved upon the trial, to establish any fact essential to be proved, if they tend legitimately to establish such a fact, and they are as competent to establish the existence of motive as any other fact. That the atrocity of an act cannot be used as a shield under such circumstances, or a bar to its legitimate use by the prosecution. That the rule appears to be well settled, both by elementary writers and by adjudged cases, that separate and distinct felonies may be proved upon a trial for the purpose of establishing the existence of a motive to com-

mit the crime in question, even though an indictment is then pending against the prisoner for such other felonies.

For the purpose of proving the motive on the part of the defendant upon the trial of an indictment for murder, it is competent for the state, having made proof of the *corpus delicti*, to show that, previous to the murder, the defendant was under indictment for larceny, and that the deceased was mainly, if not entirely, relied upon for his conviction for that offense; and, to show that he was thus indicted, there could be no higher or better proof than the record of the indictment itself. *State v. Morris*, 84 N. C. 756.

Upon the trial of an indictment for receiving goods knowing them to be stolen, a witness was called to prove that other property than that mentioned in the indictment had been stolen from her and found in the house of the prisoner. This evidence was objected to by the counsel for the prisoner, because, as they alleged, a separate indictment was pending before the court against him, for receiving the goods stolen from this witness. The counsel for the prosecution admitted that there was such an indictment, but offered the testimony with the single view to show that, when the prisoner received the goods laid in the present indictment, he knew them to have been stolen. The recorder, in pronouncing the opinion of the court, said that the testimony was inadmissible. That this crime was different from that of passing counterfeit money; it was a specific offense, and must depend upon its own peculiar circumstances. *Bell's Case*, 6 N. Y. City Hall Rec. 97.

The following cases are also to the effect that evidence of the other crime is not rendered inadmissible by the fact that an indictment for it is pending against the accused: *Kitchen v. State*, 26 Tex. App. 165, 9 S. W. 461, *supra*, II. a, 2, (d); *Hudson v. State*, 28 Tex. App. 323, 13 S. W. 388; *Jacobs v. State*, 28 Tex. App. 79, 12 S. W. 408; *Martin v. Com.* 93 Ky. 189, 19 S. W. 580; *State v. Travis*, 39 La. Ann. 356, 1 So. 817,—II. b, *supra*.

b. Conviction.

Upon the trial of an indictment for a fraudulent use of the postoffice where the crime was charged to have been committed in August and September, it appeared from the evidence that the defendant had once before been before the court on a similar charge, alleged to have been committed in the March or April previous, and that he pleaded guilty to the information, and was thereupon convicted and punished. The court held that, while the defendant could not be again convicted of the offense charged in that case, yet it was entirely competent, in order to determine the true character of the defendant's business in August and September, that the history of the facts attending the establishment and conduct of the business previously, should go to the jury for what they were worth; that, so far as those facts threw any light upon the charge made in the information, it was entirely proper that they should be considered by the jury. *United States v. Stickle*, 15 Fed. 798.

On a trial for burglary, where it appeared that defendant had pleaded guilty in the county court on the prosecution for a theft committed at the time of the burglary, and which was part of the same transaction, the plea of

guilty in the theft case was admissible in evidence against the defendant in the burglary case. *Johnson v. State*, 39 Tex. Crim. Rep. 625, 48 S. W. 70.

In the trial of an indictment for keeping a drinking house and tipping shop, or for being a common seller of intoxicating liquors, the record of a former conviction for a single sale, or upon a search and seizure complaint covering the same time charged in the indictment, is competent evidence. *State v. Gorham*, 67 Me. 247.

Evidence of an indictment charging the defendant on trial for murder with the burglary of the storehouse of the deceased and another, and also the judgment of the court reciting the verdict of the jury finding the defendant guilty of the crime charged in such indictment, and the final judgment and sentence of the court upon such conviction, is competent evidence as tending to establish a motive for the shooting. *Powell v. State*, 13 Tex. App. 244.

Crass v. State, 31 Tex. Crim. Rep. 312, 20 S. W. 579, *supra*, II. b. and *World v. State*, 50 Md. 49, *supra*, VIII. k. are also cases where evidence of the conviction of the accused of a crime other than that for which he was on trial was properly admitted.

c. Acquittal.

On the trial of an indictment for uttering a forged note, it is competent evidence, in order to show a *scienter*, to prove that the prisoner uttered another forged note of the same bank on the same day, although he had been acquitted on a trial for that offense. *State v. Robinson*, 16 N. J. L. 507. In this case, in answer to the objection that, to permit the evidence in regard to passing a bill for uttering which the defendant had been tried and acquitted, would contravene the record of his acquittal, the court said that the record acquits him of the charge in that indictment, but does not aver the ground of that acquittal. The particular ground of his acquittal is not matter of record. It is a matter of presumption only, wholly collateral to the record; and mere presumption of a fact is allowed to stand only till the fact itself appears. That here the very fact is offered, and it neither puts him in jeopardy for it as a crime, nor is contrary to anything found by the record; that the evidence is clear of both the objections, and was legally admitted by the court. The court in this case also proceeded to discuss and criticize the decision of *Vaughan, B.*, in *Rex v. Smith*, 2 Car. & P. 633, XI. a, *supra*, showing that, if that decision were correct, it would be extremely difficult, if not impossible, to prove a *scienter* in a case of uttering forged paper.

The prisoner had been indicted for passing two counterfeit bills, and on his trial was acquitted. Thereafter, he and another were indicted for passing other counterfeit bills, and the prosecutor, for the purpose of establishing the *scienter*, offered evidence which had been introduced on the former trial, which was objected to on the ground that the prisoner had been acquitted, and also because the time at which the former offenses were committed, if at all, was too remote, and no connection existed between them and the one charged in the indictment. The court held that the evidence was admissible, and that it was immaterial whether the prisoner had been acquitted on the former trial or not, for the evidence now offered

was not for the purpose of convicting him for that offense, but to show that when he passed the bill laid in this indictment he knew it to be counterfeit. *Dougherty's Case*, 4 N. Y. City Hall. Rec. 166.

On the trial of an indictment for uttering and publishing a forged promissory note, knowing it to be forged, it is admissible, in proof of the defendant's knowledge, to show that another note passed by him was also forged. Nor does it render such evidence inadmissible, that the defendant had been formerly acquitted, upon an indictment for uttering the last-mentioned note knowing it to be forged; but the objection goes only to weaken its effect with the jury. *State v. Houston*, 1 Bail. L. 300.

On the trial of an indictment for forgery in passing a counterfeit bank bill, evidence was admitted that, the day following, the accused passed to other persons counterfeit bills on the same and other banks, for the passing of which other indictments had been found, some of which were pending, and on one of which he had been tried and acquitted. The court said that the law is well settled that the uttering of other counterfeit notes of the same kind with that charged in the indictment, and about the time that it was passed, may be given in evidence on the trial of the indictment, to prove guilty knowledge; and that the court could see no reason why the fact that indictments had been found, or that convictions or acquittals had been had upon them, should affect the admissibility of such utterings. That neither the indictments, nor the records of conviction or acquittal, need be, nor should be, given in evidence; but the facts and attendant circumstances alone of the utterings, as though no indictments had been found. *McCartney v. State*, 3 Ind. 333, 36 Am. Dec. 510.

Upon the trial of an indictment against a person for forging the indorsement of a firm to whose order a draft was made payable, the people called a witness, and showed him a draft other than the one described in the indictment, payable to the order of the same firm, and offered to prove by the witness that the signature of the firm was not the signature of any member of it, or of anyone authorized by them, and that the defendant passed that draft with the forged indorsement of the firm thereon. This was objected to by the defendant. Thereupon the district attorney admitted in open court, such admission being taken as proof of the fact, that defendant had been indicted in the same court for writing the alleged forged indorsement of the firm on the back of the draft in question, and for passing it with such alleged forged indorsement, knowing it to be forged; that he had been tried on such indictment and acquitted, and a judgment of acquittal duly entered thereon. Another draft payable to the order of the same firm, which was proved to have been found with the vouchers of the company by whose superintendent it was made, and payable to the order of the same firm, on the back of which was indorsed the name of the firm, was also admitted in evidence. In affirming a judgment of conviction, the court said: "The exception to the admission of certain other drafts claimed to have been forged and uttered by defendant about the same time, for the purpose of proving guilty knowledge, on the score that they had been the subject of other indictments upon which the defendant had been tried and acquitted, is not, in our judgment, well

taken. It is well settled that, in cases like the present, it may be shown that the defendant uttered, at or about the same time, other forged notes or bills, whether of the same kind or a different kind, or that he had in his possession other forged notes or bills, tending to prove that he knew the note or bill in question to be forged. . . . In order to render the verdict and judgment of not guilty upon the draft offered in evidence conclusive upon the facts which the prosecution sought to prove for the purpose of showing guilty knowledge, it must appear with certainty from the evidence offered in support of the alleged estoppel that those facts were directly and necessarily found by the verdict in that case in favor of the defendant; or in other words, that the jury could not have found the verdict which they did without having passed directly upon the facts offered to be proved, and found them against the prosecution: for, if it be doubtful upon which of several points the verdict was founded, it will not be an estoppel as to either." *People v. Frank*, 28 Cal. 507.

The defendant was charged on two indictments for passing counterfeit money, \$10 notes, on a bank. Upon his trial on one indictment the point was raised in his behalf that none of the notes had been read in evidence, or offered. They were proved, but it was insisted that this did not put them in evidence. The court was of the opinion that the notes were not in evidence, and the defendant was acquitted; but he was then tried on another indictment for passing another of these notes, and the same evidence was, by consent, admitted, except that the defendant objected to any evidence of passing the notes on which there had been a trial and acquittal, as proof of the guilty knowledge with which the note now on trial was passed. The court said it did not think the acquittal prevented proof of the fact of passing these notes; that, if it had been followed by an acquittal, that would be immediately offered, as fully rebutting any inference of guilty knowledge in this case arising from that; and it would tell the jury that, on proof of acquittal the weight of that evidence was entirely destroyed, and the fact could no longer be considered as evidence of guilty knowledge. *State v. Tindal*, 5 Harr. (Del.) 488.

Upon the trial of an indictment for forging an order for the payment of money usually denominated a bank check, a witness testified that the accused entered the bank and presented at the desk of the paying teller, where the witness was standing, the check described in the indictment, and received the money. The state then offered to prove, by the same witness, that on the following day the same party came to the bank in the morning and presented another check, similar, except in its amount, the amount of which the witness paid. The state then offered to prove that this second check, as also that which was presented and paid the day previous, was a forgery, and also offered in evidence the conversation that took place between the witness and the accused on each occasion. The accused objected to the admission of the conversation, and of everything connected with the presentation and payment of the second check and the proof that it was forged, because he had been indicted and tried before a jury and acquitted of forging and uttering that check. The objection was overruled, and this ruling was the ground for 62 L. R. A.

the first exception. It was held that the proof so offered by the state was clearly admissible. *Bell v. State*, 57 Md. 108.

The defendant was indicted for obtaining a check by falsely pretending that another check which he then gave to the prosecutor was a good and valid order for the payment of money. The prosecutor deposed that he gave his check on the faith of the defendant's statement that the check which he offered to the prosecutor was good. The check given by the defendant was dishonored. The defendant stated that, when he gave the check he expected a payment which would have enabled him to meet it. The defendant was acquitted. He was then tried on a second indictment, charging him with obtaining from other persons three sums of money on three checks, which were dishonored. To prove guilty knowledge, the prosecutor in the first case was called, and gave the same evidence as in the first case. The defendant was convicted, and the question as to the admissibility of the evidence was reserved. It was held (two judges dissenting) that the evidence which had been given on the first indictment, upon which the defendant had been tried and acquitted, was legally admissible upon the trial of the second indictment, for the purpose of proving guilty knowledge, and the conviction was right. *Queen v. Ollis* [1900] 2 Q. B. 758, 69 L. J. Q. B. N. S. 918, 83 L. T. N. S. 251, 49 Week. Rep. 76, 64 J. P. 518. As justifying the holding that such evidence was admissible, the Lord Chief Justice said, among other things, that, on the first indictment, the accused was acquitted upon that particular charge. That his acquittal might have proceeded upon the ground that the representation was not fraudulently made; or, if fraudulently made, that the prosecutor had not been induced by that fraud to part with his money. That it was clear that there was no estoppel; the negating by the jury of the charge of fraud on the first occasion did not create an estoppel. That the evidence was not less admissible because it tended to show that the accused was, in fact, guilty of the former charge. That the point was, Was it relevant in support of the three subsequent charges? and that in the opinion of the majority of the court, and in his own opinion, it was relevant as showing a course of conduct on the part of the accused, and a belief on his part that the checks would not be met.

Defendant and another were indicted for theft of a steer. There was a severance, and defendant alone was put upon trial. Both defendants had been indicted in four indictments for the theft of that number of cattle, and at subsequent terms they were tried and acquitted upon three. Upon this trial the defendant objected to the testimony as to the other steers stolen and found in a certain pasture, and, after it was admitted, defendant asked the witnesses who had testified that they had been called as witnesses on the trial of the defendants for the theft of the others, "What was the result of the trials?" The court, on objection of the district attorney, excluded the question and answer. The defendant offered the records of the court in the three other cases for theft, and the verdict and judgment in each case of acquittal. This evidence was also excluded. It was held that the court erred in permitting the state to prove that other stolen stock, taken from the same neighborhood, were found in the pasture under the control of this defendant's

codefendant. That, to make this evidence admissible as against this defendant, it must be shown that the stolen stock and the steer in question were taken at the same time, and formed but one transaction; and that this defendant's acts were such as to show a guilty connection with his codefendant when it was so taken or while it was under his control. That the rule is different where acts of theft are separate and unconnected. And that, the evidence having been admitted, the defendant should have been allowed to prove that he had been acquitted of the charge. *Ivey v. State*, 43 Tex. 425.

For other cases on this subject, see *Kitchen v. State*, 26 Tex. App. 165, 9 S. W. 461, *supra*, II. a, 2, (d); *State v. Travis*, 39 La. Ann. 356, 1 So. 817; *Dill v. State*, 1 Tex. App. 278; *Hudson v. State*, 28 Tex. App. 323, 13 S. W. 388; *Crass v. State*, 31 Tex. App. 312, 20 S. W. 579, —*supra*, II. b; *Trogdon v. Com.* 31 Gratt. 862, *supra*, III. c, 12, (c).

XII. Election of offense relied on.

In order that the accused in an indictment or information for crime, particularly when of the degree of felony, may not be called upon to defend against a charge of more than one offense when two or more distinct acts are alleged and sought to be proved, the court should, on proper application of the accused, require the prosecution to elect upon which accusation it will rely. And, where the prosecution fails to make a formal election, it will be deemed to have elected to rely upon the transaction first proved.

On the trial of a man and woman who were indicted, tried, and convicted of the crime of attempting to procure and produce the miscarriage of an unmarried woman, it affirmatively appeared at the close of the testimony that the male defendant had attempted the crime at the residence of the prosecutrix, but that the female defendant was in no manner connected with that transaction, and that thereafter the attempt to commit the crime was made by both defendants at the house of the female defendant. It was held that the people should have been put to their election whether they would proceed against the male defendant alone for what occurred at the house of the prosecutrix, or against them both for what occurred at the house of the female defendant. That, assuming the evidence of the prosecutrix to be true, it established two distinct offenses, one committed by the male defendant alone, and the other by him and the other defendant jointly; and, if the prosecution elected to proceed for the latter offense, all evidence of the former should have been excluded from the jury, as it is well settled that, upon the trial of a party for one offense growing out of a specific transaction, you cannot prove a similar substantive offense founded upon another and separate transaction, but in such case the prosecution will be put to its election. *Baker v. People*, 105 Ill. 452.

On the trial of a prosecution charging a defendant with having perpetrated an assault and battery upon a person named, the state gave evidence of an assault and battery committed by the defendant upon such person, and afterward offered evidence of a subsequent, but distinct and separate, assault and battery, perpetrated by the defendant upon the same person. It was held that the admission of evidence of the 62 L. R. A.

other distinct assault and battery having been given, the state could not select the second assault and battery as the one upon which it would rely; that when the state gave evidence of the first assault and battery, it elected to try him for that offense, and could not afterward abandon the election thus made, and put in evidence another offense. *Richardson v. State*, 63 Ind. 192.

In a prosecution for rape various acts of sexual intercourse were testified to. The evidence of different acts was not objected to, nor was any motion made requiring the prosecution to elect upon which of them it would rely for a conviction. It was held that the accused was not in a position to now complain that an actual election was not made, and that testimony as to more than one offense was permitted to go to the jury. That all the acts proved were within the period of the statute of limitations applicable to the offense charged; and the prosecution had the right to select from among them, upon which it would rely for a conviction; and that, in the absence of any express election from the record, it is to be presumed that the prosecution elected to stand by the offense it first introduced evidence to establish; and that evidence of other acts of sexual intercourse between plaintiff in error and the prosecuting witness was not introduced to prove substantive offenses, upon which a conviction might be had, but in corroboration and explanation of the evidence of the act charged. *Mitchell v. People*, 24 Colo. 532, 52 Pac. 671.

On a trial for gaming, where the state had introduced evidence to show that the defendant had bet at a game of cards at a particular house, at a specified time, it thereby elected to prosecute for that offense; and it was not competent thereafter to introduce evidence of other and distinct offenses, comprehended within the indictment, committed by the defendant at the same or other places. *Wickard v. State*, 109 Ala. 45, 19 So. 491. To the same effect, *Cochran v. State*, 30 Ala. 542; *Fields v. Territory*, 1 Wyo. 78.

A statute of Alabama (Code, § 3931) prohibits a purchase by a public officer of any claim payable out of the county treasury, or out of the fine and forfeiture fund of the county, and each separate purchase by a public officer of such a claim is a violation of this statute; and, where an indictment under said statute avers in a single count more purchases than one, the state should be required to elect on which offense it will proceed; and, if but a single offense is charged, it is error to admit evidence, against defendant's objection, of other purchases than the one averred. *Scruggs v. State*, 111 Ala. 60, 20 So. 642. In this case the court said that, while there are exceptions to the general rule, that evidence of other violations of law than the one for which the party is being tried is inadmissible, there was nothing in the present record to bring the case within the exception.

Upon the trial of an indictment for stealing a quantity of boots and shoes and a quantity of leather, it appeared that the prisoners were son and father in the employ of the prosecutors; that they lived together in the same village up to a certain date, when the elder prisoner removed into another county. It appeared that when he so removed he took with him a hamper, which passed and repassed afterwards repeatedly between the father and son, backwards

and forwards, down to a certain time, about a month after which the lodgings of the younger prisoner were searched, when a quantity of shoes and leather were found there, belonging to the prosecutors, and at the same time and place were also found letters from the father to the son, the contents of which induced the prosecutors to search the shop of the elder prisoner, who was then carrying on business as a shoemaker at the place to which he had removed, and in that shop there was also found property of the prosecutors, consisting of boots, shoes, and leather; and letters from the son to the father were also found there. Counsel for the prosecution proposed to put in the letters, both from the father to the son, and from the son to the father, and he stated that those letters were dated at various periods between May and the month of October following, and that they were all found to refer to the transmission from the son to the father of goods of the nature of those found at the father's house. The counsel for the elder prisoner objected to the reading of the letters upon the ground that if they did refer continually, as suggested on the part of the prosecution, to the transmission of the property, the effect of giving them in evidence would be to assist the proof of a single felony by proof of other felonies. That the prosecutors must elect on which offense they would proceed, and give in evidence such matter only as related to that felony. In deciding to admit the evidence Maule, J., said: "There is no rule of law that more than one felony may not be charged in a single indictment; if there were such a rule, the great majority of indictments would be bad on error. It is true that judges are in the habit of not allowing several felonious acts to be given in evidence under one indictment, where, as will often be the case, the effect of so doing will be to create confusion, or to surprise the prisoner, or otherwise embarrass the defense. But here embarrassment and injustice would be produced by putting the prosecutors to their election. They cannot possibly know at what time the several larcenies and receivings (if more than one) took place; the whole, according to the opening, seems to constitute a continuous transaction; therefore, I shall admit evidence relating to any takings and receivings under the circumstances suggested, provided the indictment contains corresponding charges." *Queen v. Henley*, 2 Moody & R. 524.

In *Rex v. Jones*, 2 Campb. 132, 11 Revised Reports, 680, Lord Ellenborough said: "In point of law, there is no objection to a man being tried on one indictment for several offenses of the same sort. It is usual in felonies for the judge, in his discretion, to call upon the counsel for the prosecution to select one felony, and to confine themselves to that; but this practice has never been extended to misdemeanors. It is the daily usage to receive evidence of several libels, and of several assaults upon the same indictment; and here I see not the slightest objection to evidence of various acts of fraud committed by the defendant in his office of commissary general, though ranged under different counts as distinct and substantive misdemeanors."

One of two of defendant's daughters engaged in an altercation with the prosecutrix, a school teacher, and had a personal encounter. Somewhere from ten to fifteen minutes after the cessation of this difficulty, and while the parties

were still engaged in more or less angry conversation, the defendant approached the scene, and thereupon another of his daughters engaged in another personal difficulty with the prosecutrix. During this altercation,—either immediately preceding or during the fight,—the defendant was heard to say, "Hit her;" or, "Double up your fist and hit." And this, it was claimed, was intended to encourage his daughter in the difficulty. It was held that it was error to refuse to require the state to elect as to the transaction on which a conviction would be sought, as the state had not shown any criminal connection of defendant with the first fight between the prosecutrix and the one daughter, and it was clear that there were two fights at an interval of fifteen or more minutes. *Williams v. State* (Tex. Crim. App.) 70 S. W. 957.

Where two murders were committed at the same place, on the same occasion, and under such circumstances that the proof in respect to one necessarily threw light upon the other, the rights of the accused were not prejudiced by the refusal of the court to compel a prosecutor to elect upon which of the two charges he would proceed; but the government may be required, at any time before the trial is concluded, to elect upon which charge it will ask a verdict. *Pointer v. United States*, 151 U. S. 396, 38 L. ed. 208, 14 Sup. Ct. Rep. 410.

The prisoner was indicted for setting fire to the house of a person, several persons named in the indictment being therein. There were five other charges of, in like manner, setting fire to the houses of four other persons. It was opened for the prosecution, that the five houses in question were a row of adjoining houses, and that the house of the prosecutor was first set on fire, and that the fire communicated to the others. Counsel for the prisoner asked that the prosecutor's counsel should be put to his election which count he would go upon, as the burning of each house was a distinct felony. The court said: "As it is all one transaction we must hear the evidence, and I do not see how, in the present stage of the proceedings, I can call upon the prosecutor to elect. I shall take care that, as the case proceeds, the prisoner is not tried for more than one felony. The application for a prosecutor to elect is an application to the discretion of the judge, founded upon the supposition that the case extends to more than one charge, and may, therefore, be likely to embarrass the prisoner in his defense." *Reg. v. Trueman*, 8 Car. & P. 727.

Upon a trial for adultery, distinct acts of the character charged may be proved in explanation of, or as characterizing, the acts and conduct of the parties complained of, as constituting the particular act of the offenses charged, particularly when the proof shows a continued adulterous relationship extending over a given period of time. And the prosecution will not be required to elect to rely upon any single act during that period. *State v. Higgins* (Iowa) 95 N. W. 244.

XIII. Right to question defendant concerning, on cross-examination.

As will be seen in the following cases, the question has at times arisen as to how far a cross-examination by the prosecution of a defendant in a criminal trial, who has offered himself as a witness in his own behalf, may be extended to questions in regard to the commission of distinct offenses. There would seem to

be some difference of opinion, which would indicate that it is one of those subjects upon which no iron-bound rule can be founded, but that each case must stand on its own circumstances.

On a trial for the murder of one party, it is not error for the court to compel a defendant, when testifying as a witness, to answer whether or not he had killed another party in the same difficulty, his objection being that he could not be made to subject himself to another prosecution for murder. It was held that the evidence was admissible, as the two killings were *res gestæ*. *Hargrove v. State*, 33 Tex. Crim. Rep. 431, 26 S. W. 993.

On a trial for murder evidence drawn from the accused, on his cross-examination by counsel for the state, as to having a dispute and drawing a razor on a third person, is incompetent; but if at all competent on cross-examination, being irrelevant and immaterial, the state is bound by the answer of the witness, and it lays no foundation for the right to contradict him in that respect by the testimony of the person mentioned. And where such person is called as a witness, and testifies, under objection, to an assault upon him by the accused, such testimony is clearly incompetent. *Bullock v. State*, 65 N. J. L. 537, 47 Atl. 62.

It is error to allow one accused of forgery, on trial therefor, to be interrogated as to other similar papers, unless it is first shown that such papers were forged, and the accused had culpable connection therewith. *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561.

Questions asked on cross-examination of a defendant charged with the crime of grand larceny by the district attorney, in good faith, for the purpose of laying a foundation for the impeachment of the defendant as a witness, by proof of inconsistent statements, and calling his attention to time, place, and parties present, specified with particularity, are not reprehensible, notwithstanding a claim of the defendant, urged upon appeal, that they tended to show that he was guilty of another offense, if it appears that the questions were not asked for that purpose; and the permission of them, and the proof of the inconsistent statements, is not ground for reversal. *People v. Pete*, 123 Cal. 373, 55 Pac. 993.

A defendant testifying in his own behalf on a trial for robbery may be contradicted, impeached, and sustained in the same manner, and occupies the same place, and is to be treated, as other witnesses; and, on cross-examination, his credibility may be attacked by questions, and he may be made to answer whether or not he has been previously arrested for other crimes. *Jackson v. State*, 33 Tex. Crim. Rep. 281, 26 S. W. 194, 622.

On a trial for assault with intent to rape, where defendant has testified as a witness in his own behalf, he may, on cross-examination, be asked if he has not been previously indicted for a similar offense. *Clark v. State*, 38 Tex. Crim. Rep. 30, 40 S. W. 992.

On a trial for larceny the defendant, as a witness in his own behalf, testified that, at the time of the alleged larceny, he was under the influence of liquor, and that, as he was walking along, he fell over something, and the first thing he knew somebody grabbed him. This was all he testified to on his examination in chief. On cross-examination, after being asked his true name, he was asked whether or not

he had gone by several other names, and whether he had ever been convicted of a felony. It was held that the cross-examination was proper. *People v. Meyer*, 75 Cal. 383, 17 Pac. 431.

Upon a prosecution for the wrongful removal of certain papers contrary to the provisions of a statute, consisting of an enrolled decree containing bill of complaint, pleadings, and other papers filed in and belonging to a certain cause in the circuit court, wherein the wife of accused was complainant and he and another were defendants, accused was cross-examined in regard to what were known as the green deed and mortgage contained in the papers supposed to have been stolen by him, and it was objected that such examination looked towards his having been, before that, charged with forgery, and this was alleged as error. The court held that here it was legitimate to show a motive for the commission of the offense charged. That it was the theory of the prosecution that the "green deed and mortgage" were forgeries, or, at least, that they were alleged by accused's wife to be forgeries; and that accused had been charged with such forgery in the very case in which they formed a part of the enrolled decree; and that the "practice paper," so called, was one upon which the accused had been experimenting in the direction of forgery. That, if this were true, it furnished an ample motive for the carrying away, or the destruction, of these papers; and testimony in support of this theory was, therefore, admissible; that accused, having furnished himself as a witness in his own behalf, was subject to any cross-examination which went directly to the merits of the case. *People v. Bussey*, 82 Mich. 49, 46 N. W. 97.

Upon the trial of an indictment for wife murder, the trial court permitted the state, over the objection of the defendant, to ask the defendant, upon cross-examination, the following question: "Were you indicted for aggravated assault upon your wife?" To which question defendant answered, "Yes, sir! I was indicted for aggravated assault upon my wife." It was held that it was proper, on cross-examination, to elicit any fact from the defendant that goes to show *animus* towards deceased, or motive for committing the crime. That certainly, if defendant admitted an assault upon his wife previous to her murder, this testimony would be legitimate, going to show the *animus* on the part of defendant towards deceased. That, where a person on trial for crime takes the stand in his own behalf, it is proper and legitimate to ask him, on cross-examination, if he has been indicted for a felony. *Powell v. State* (Tex. Crim. App.) 70 S. W. 218.

A defendant examined as a witness in his own behalf in a criminal action, in which he was charged with violation of the law against lotteries, may be asked if he had been engaged in the business of lottery tickets and lottery policies; and also whether he had been tried and convicted in the United States court, for violating the law prohibiting the sending of matters through the United States mail with reference to the drawing of any lottery, under N. Y. Penal Code, § 714, providing that a person convicted of any crime may, notwithstanding, be a competent witness in any cause of proceeding; but that the conviction may be proved, for the purpose of affecting the weight of the testimony, either by the record or his cross-examination, upon which he must answer any particu-

lar question relevant to that inquiry. *People v. Noelke*, 29 Hun. 461, Affirmed in 94 N. Y. 137, 46 Am. Rep. 128.

Defendant in a prosecution for carrying a pistol being on the stand as a witness on his own behalf, the state asked him if it was a fact that he had been theretofore charged, in a number of instances, in that county, with like offenses, to which he replied that he had been charged before with like offenses; he didn't know how many times. It was held that this evidence was clearly inadmissible; that the fact that a man unlawfully carries a pistol has no bearing upon his credibility as a witness, and the illegal testimony may have caused the jury to assess a larger fine than they would otherwise. *Bain v. State*, 38 Tex. Crim. 635, 44 S. W. 518.

On a trial for homicide the accused became a witness in his own behalf, and, after detailing what he claimed were the facts with reference to the killing of the person for whose murder he was being tried, the court compelled him to detail facts with reference to the killing of two other persons, thus forcing the accused to admit that he had killed one, and probably the other, of those persons. They were killed at the same place as the person for whose killing he was on trial, and immediately after. It was held that, to admit these facts certainly was calculated to influence the action of the jury in its consideration of the case on trial. It was held, further, that it is a rule that a witness is not bound to answer any question which tends to subject him to punishment, resentment, or infamy. That, under the Bill of Rights, he cannot be compelled to give evidence against himself, but, when he becomes a witness for himself in a criminal prosecution, he waives that right so far as the charge under investigation is concerned; but that the fact that he does so waive it does not give the commonwealth the right to compel him to admit the commission of other offenses which would subject him to punishment, resentment, or infamy. That, if this was done, it would be in utter disregard of the Bill of Rights and in many instances deter persons accused of offenses from going on the stand as witnesses for themselves; as a forced confession of another offense might subject them to punishment far greater than the charge under investigation. *Saylor v. Com.* 97 Ky. 184, 30 S. W. 390.

Upon the trial of an indictment for murder, it appeared that the crime was committed by someone who had burglariously entered the house of the deceased. The evidence was circumstantial, and the defendant, being sworn in his own behalf, on cross-examination was asked as to his connection with another burglary at the house of another person in the nighttime, which he denied. The owner of the latter house was subsequently called by the prosecution and permitted to testify, under objection, to facts showing that defendant did burglariously enter his house in the nighttime. It was held that the evidence was incompetent and damaging in its nature, and could not be said to have been harmless; and, on account of its reception, the judgment was reversed and a new trial granted. *People v. Greenwall*, 108 N. Y. 301, 15 N. E. 404.

In a prosecution for horse stealing it is error to compel defendant, who has offered himself as a witness, to testify that he had once before been convicted of horse stealing, since the tendency

of such testimony would be to prejudice the jury, and the demands of the statute permitting conviction of a crime to be shown to affect the credibility of a person offered as a witness are met by proof of the conviction, without unnecessarily parading before the jury that the defendant had at one time been guilty of the exact crime for which he is at the time on trial. *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523.

Upon the trial of an indictment for burglary, during the cross-examination of one of the defendants who testified in behalf of himself and his codefendant, he was asked, and required to answer over their objection, if he had not theretofore pleaded guilty to larceny for stealing a bee gum. It was held that, while the defendant answered in the affirmative, the offense had no connection whatever with the one for which he was on trial; that it is only where other specific crimes tend to throw light on the crime charged, and for which a defendant is upon trial, that he may be impeached by proof of them; and that the objection to the question should have been sustained. *State v. Hale*, 156 Mo. 102, 56 S. W. 881.

On the cross-examination of defendant indicted for manslaughter in producing an abortion upon a woman, he testified that he did not know a young woman in court then pointed out to him; that he had never seen her in his life; and that he had never procured an abortion upon her. The young woman was afterwards sworn, and testified, against objection and exception by the prisoner's counsel, that the prisoner had produced an abortion upon her person about two years before. It was held that the admission of this testimony was error upon well-established authority. That it was not competent to impeach the prisoner as a witness, nor any other witness, by contradicting him as to facts disconnected with, or collateral to, the subject-matter at issue and on trial, and that no person can be required to come into court, on a trial under an indictment for a specific offense, prepared to defend or explain other transactions, not connected with the one on trial. *Rosenwiel v. People*, 63 Barb. 634.

On a trial for homicide it is error to permit the prosecutor to ask the accused, on his cross-examination, if he had not been implicated in the theft of a horse which the proof showed to have been stolen by another person a short time before the homicide. *Nix v. State* (Tex. Crim. App.) 74 S. W. 761.

XIV. When not prejudicial.

Whenever a conviction has been reversed for the reason that evidence of another distinct crime was improperly admitted, it has been because such admission was prejudicial to the accused. In the following cases it was held that, while the evidence was within the inhibition of the rule, it did no injury, and was not to the prejudice of the accused, and the conviction would be allowed to stand:

The admission, on a prosecution for fornication, of evidence showing that one of the defendants was a prostitute, though it is irrelevant, is not reversible error, where it was inseparably connected with evidence relied upon to establish the offense charged, and no injury resulted to the defendants therefrom, the punishment assessed being the lowest permitted by law. *Perigo v. State*, 25 Tex. App. 533, 8 S. W. 660.

The admission, on a trial for murder committed in breaking and entering a dwelling house, of evidence that the owner of the house had lost some small things from a drawer on the occasion of a previous entering a few days before, even if erroneous, is harmless. *State v. Cannon*, 52 S. C. 452, 30 S. E. 589.

Error, if any, in the admission, on a trial for burglariously breaking and entering a hen house, of testimony of witnesses narrating a conversation with defendants, in which they admitted, not only the stealing of the chickens of the prosecutor, but also of chickens belonging to other persons, and a hatchet, at about the same time, is immaterial, where the defendants themselves testified on the trial to stealing other chickens and the hatchet. *State v. Cowen*, 56 Kan. 470, 43 Pac. 687. The court held, however, that the evidence was competent, and there was no error in admitting it, since the conversation was admissible as being the declaration of the defendants as to their doings on the night of the burglary, and their statements as to the larceny of the other chickens and the hatchet could not well be separated from those with reference to the taking of prosecutor's chickens.

Failure to instruct the jury, on a prosecution for horse stealing, as to the purpose of evidence introduced on the trial tending to show that at the same time and place that defendant took the horses mentioned in the indictment he took a horse not mentioned, the property of a person other than the prosecutor, and that they could not convict the defendant of the theft of any horse not mentioned in the indictment, though erroneous, will not require the reversal of a judgment of conviction, where the error is for the first time called to the attention of the trial court in a motion for new trial, unless it appears from the whole evidence adduced on the trial that the defendant's rights may have been injured in consequence of it. *Gentry v. State*, 25 Tex. App. 614, 8 S. W. 925. In this case the court stated that, after considering all the evidence, it did not seem probable that the defendant could have been injured by reason of the failure to give such instruction.

Error in the admission of evidence on trial of an indictment for obtaining money under false pretenses, which tends to show other distinct offenses, or that the defendant was in the habit of making false representations and resorting to fraudulent practices, will not authorize a reversal where the competent proof clearly justified the finding, and it must have been the same had the incompetent evidence not been admitted. *Jackson v. People*, 126 Ill. 139, 18 N. E. 286.

On a trial for homicide, where a witness had testified to the good character of the defendant, it is not proper to allow him to be asked, on cross-examination, if the defendant had been indicted for murder in another county, to which he answered that he "had heard of that." *Harris v. Com.* 25 Ky. L. Rep. 297, 74 S. W. 1044. The court, however, held that the appellant was not prejudiced thereby, as the witness was unwilling to say that his good character was injured by the charge; and further explained that it was not proved on him, but finally came out on others.

XV. Statement or insinuation by prosecution of other crime.

The following cases are instances of where 62 L. R. A.

judgments of conviction have been set aside because of the conduct of counsel for the prosecution in stating and insinuating other offenses than the one for which the accused was on trial, either in argument, or repeatedly asking rejected questions, and commenting on what the answers would have been if allowed:

Defendant had been convicted of maliciously cutting and wounding another with intent to kill. A witness for the commonwealth, called to rebut the defense of good character, was asked whether or not he and defendant had ever had a difficulty, which question the court permitted to be answered, notwithstanding the objection of the defendant. The witness was then asked what occurred at that difficulty, the objection to which was sustained. But the court permitted the commonwealth's attorney, although the defendant objected, to state, in the presence of the jury, that he expected the witness to state that, "on one occasion the defendant attacked witness on the street and knocked him off the sidewalk with a wagon spoke." It was held that in this case the court erred, in the first instance, in permitting the witness to state that he had ever had a difficulty with the defendant, for there was no connection whatever between that difficulty and the one in which the cutting and wounding were done, for which the defendant was then being tried; and evidence of what occurred at the time of the difficulty with the witness, and which the commonwealth's attorney, with the permission of the court, improperly and irregularly put before the jury, was obviously not competent for any purpose. *Flint v. Com. (Ky.)* 23 S. W. 346.

On a trial for wife murder, where the defendant had, on a former occasion, been charged with having murdered a person other than his wife, of which charge he was acquitted, and such former homicide was in no way connected with the one for which he was on trial, it was held improper for the attorney for the state, in cross-examining a witness, to propound questions or make remarks relating in any way to the prisoner's connections with such former homicide; he not having put his character in issue. *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676.

A conviction will be set aside where counsel for the state persisted in asking improper and prejudicial questions, and was allowed to cross-examine the accused as to other offenses, though he was told that he need not answer, and the closing speech to the jury was of an extraordinary and reprehensible character, and it was evident that there had not been a fair and impartial trial. *Cargill v. Com.* 12 Ky. L. Rep. 149, 13 S. W. 916. In this case it was further held that the fact that the court excluded the evidence did not do away with the prejudicial effect of the improper question.

On the trial of an indictment for murder, where the defendant claimed that the deceased had seduced his daughter, and that the information of the seduction excited him to uncontrollable passion and to an insane impulse to kill the seducer, "the defendant's wife was called as a witness in his behalf, and, on cross-examination, the court, over objection and protest, permitted the state to ask a number of questions as to other and distinct offenses committed by the defendant which would tend to blacken and degrade him in the eyes of the jury. She was interrogated as to whether he had not maintained

a 'joint' in the hotel, harbored lewd women there, and whether he had not used, and permitted the use of, rooms in his hotel for gambling purposes. To most of the inquiries she gave a negative answer, but the state was thereby allowed to insinuate charges and offenses other than the one alleged in the information, and the questions implied an assertion of belief on the part of the attorneys for the state that the defendant was guilty of the other offenses." The witness was compelled, on persistent questioning, to admit that she had seen men playing cards in the rooms of the hotel, but did not know that they were gambling. It was held that the charge of gambling, imputed by this question, was a felony, and had no connection whatever with the offense of murder, which was in issue; and that there was no justification or excuse for the allowance of these questions. The court said, further, that these offenses and misconduct, which were made the subject of inquiry, were not linked in any way with the offense charged in the information. That the general rule is that the charge upon which a person is being tried cannot be supported by proof that he committed other offenses, even of a similar nature. That, while evidence which legitimately tends to support the charge, or show the intent with which it is committed, is not to be excluded on the ground that it will prove other offenses, the other offenses inquired about in this case did not fall within any of the exceptions to the general rule. *State v. Kirby*, 62 Kan. 436, 63 Pac. 752.

For the purpose of rebutting a presumption created by evidence introduced by the government upon the trial of an indictment for murder in the Indian territory, that the defendant had fled from the Indian country, the defendant, as a witness in his own behalf, testified that he went back to Mississippi, the state of his former residence, to stand his trial there upon a charge of murdering a negro whom he had killed there previous to coming to the Indian territory, and that he was thereupon arrested, tried, and acquitted of that charge. In his closing argument to the jury the district attorney made use of the following language: "We know what kind of trials they have in the state of Mississippi of a white man for killing a negro. We know from reading the newspapers and magazines that such trials there are farces. We are not living in Egyptian darkness, but in the light of the nineteenth century. The defendant came from Mississippi with his hands stained with the blood of a negro, and went to the Indian country, and in less than four months had slain another man." And other like expressions and declarations that the killing of the negro in Mississippi, for which the defendant had been tried and acquitted there, was murder, were made use of, all of which were objected to, but the objections were overruled by the court, and the defendant excepted. He was convicted, and brought error to the United States Supreme Court. In reversing the judgment, the court said the attempt of the prosecuting officer of the United States to induce the jury to assume, without any evidence thereof, the defendant's guilt of the crime of which he had been acquitted, as a ground for convicting him of a distinct and independent crime for which he was being tried, was a breach of professional and official duty, which, upon the defendant's protest, should have been rebuked by the court, and the jury directed to allow it 62 L. R. A.

no weight; but that, if the defendant had murdered the negro in Mississippi, and had been there convicted therefor, evidence, either of the murder, or of the conviction, would have been incompetent to support the indictment against him for the murder for which he was being tried. *Hall v. United States*, 150 U. S. 76, 37 L. ed. 1003, 14 Sup. Ct. Rep. 22.

In a prosecution for theft, where defendant's counsel had stated privately to the court that defendant had been indicted for seduction in a part of the county where some of the jury were from, and had afterwards married, it was error not to sustain defendant's objection to questions asked his mother, as to whether she would know her daughter-in-law if she saw her, and as to whether she ever saw defendant with his wife, etc., as immaterial and calculated to prejudice the jury. *Mercer v. State* (Tex. Crim. Rep.) 66 S. W. 555.

The observations of the district attorney on a trial for burglary, to the effect that the defendant's purpose was not alone to commit the crime with which he was charged, but another, the vilest known, is highly improper, as the statement could have but one meaning, and that at once understood; and that, when understood, it would almost surely inflame a jury beyond control. *Long v. State*, 81 Miss. 448, 33 So. 224.

Repeated attempts on the part of the prosecuting officer, upon the trial of a prosecution for malicious mischief, to show that the defendant had been guilty of other crimes, is such prejudicial error as will reverse a judgment of conviction. *State v. Roscum* (Iowa) 93 N. W. 295.

On the trial of a person for rape in having sexual intercourse with a female under the age of sixteen years, it is reversible error for the district attorney repeatedly to ask questions the apparent object of which is to leave the impression on the mind of the jury that defendant had committed other crimes, and that he had changed his name; notwithstanding objections to such questions are sustained by the court. *People v. Derbert*, 138 Cal. 467, 71 Pac. 564.

Upon a trial for theft, the sheriff, while on the stand as a witness, was asked by the prosecuting attorney if he did not arrest the defendant several years ago for burglary. The defense objected, and the prosecuting attorney remarked, in the hearing of the jury, that he proposed to prove by the sheriff that defendant was arrested two or three years ago for a burglary committed at the same time and place as the theft with which he was now charged. It was held that such evidence was inadmissible, and afforded no reasonable presumption or inference pertinent to the issue for which the defendant was on trial, and the trial court should so have instructed the jury; and, for a failure to do so, the judgment was reversed. *Taylor v. State*, 27 Tex. App. 463, 11 S. W. 462.

On a trial for rape, where an assistant prosecutor asks the son of the accused, on cross-examination, if he had not stated to A that he suspected his father of having committed a similar offense with other girls, one a member of his family, and that such conduct on the part of the accused caused the death of witness's mother, and that, if at such conversation witness did not cry and say, "I can't go against my father, even if he is guilty," and repeatedly asks substantially the same questions, such con-

duct of the prosecutor is reversible error. *State v. Irwin* (Idaho) 71 Pac. 608.

Where counsel for the prosecution, on a trial for murder, in his concluding argument to the jury urges upon them the force of a claim made by him in his opening, of the commission by the defendant of another crime, but which the evidence fails to substantiate, he should be restrained by the court from so doing; and a refusal of the court to do so, followed by a charge in which the question mentioned was submitted for the consideration of the jury, the whole following a refusal by the court of a request to charge that there was no evidence to support the claim of the prosecuting counsel,—is error for which a conviction will be reversed. *People v. Montgomery*, 176 N. Y. 219, 68 N. E. 258. See S. C. *infra*, XVI. a, 1.

From the foregoing cases, it would seem that, where the prosecution is allowed to insinuate charges and offenses other than the one alleged in the information, by asking questions in regard to such pretended charges and offenses, even though those questions are answered in the negative, and no proof is made of such charges and offenses; and where such other charges and offenses are alleged and pretended by the counsel for the prosecution in his address to the jury,—the error is just as great, and a conviction will be reversed, the same as though the improper evidence of such other charges and offenses was actually given to the jury.

XVI. Necessity and correctness of instruction to jury.

a. General rule.

1. Necessity.

In many instances courts have properly admitted evidence of the other crime, it being competent for a certain purpose, and then neglected to instruct the jury that the evidence must be considered by them only for such purpose, and by reason thereof the conviction has been reversed. And in Texas it has been repeatedly held that a failure on the part of the court to so instruct the jury is reversible error, even when such instruction is not requested.

But, where the nature and circumstances of the case were such that the jury could not possibly have applied the evidence to any other purpose than that for which it was properly admitted, a failure to so instruct will not be considered prejudicial error.

Defendants were tried for and convicted of the theft of a cow, the property of a certain person. On the trial it was proved that eight other animals, belonging to other parties, were stolen in the same manner, if not at the same time. Defendants, by special instruction, asked the court to limit the purposes for which this evidence with regard to the theft of these other animals could and should only be considered by the jury, which instruction was refused, and the charge as given failed to apprise the jury of the only purposes of said proof. It was held that it was error to refuse the instruction. *Hanley v. State*, 28 Tex. App. 375, 13 S. W. 142.

On the trial of an information for unlawfully selling intoxicating liquors, the testimony of numerous witnesses was admitted, tending to show various unlawful sales of intoxicating liquors other than those upon which the state, by direction of the court, elected to rely for conviction. The defendant requested the court to in-

struct the jury not to take into consideration the evidence as to such other sales in determining the guilt or innocence of the defendant as to the particular sales upon which the state elected to rely. This the court refused, and nothing upon the subject was given in the general instructions. This was held error. That, while it is proper, in the first place, for the state to introduce evidence concerning any unlawful sales made by the defendant, yet, when an election has been made of a particular transaction upon which the state relies for conviction, the evidence as to other illegal sales is practically eliminated from the case. It cannot be used or referred to merely for the purpose of bolstering up and strengthening the case made by the state upon the elected transaction; and the defendant is entitled to have the jury so instructed. *State v. Nield*, 4 Kan. App. 626, 45 Pac. 623; *State v. Reynolds*, 5 Kan. App. 515, 47 Pac. 573.

On the trial of an indictment for rape the state was permitted, over objection, to prove other acts of sexual intercourse between the prosecuting witness and the defendant, some of which were not within the period of limitations. It did not appear whether such acts were introduced to prove substantive offenses or in corroboration and explanation of the evidence of the act upon which the prosecution relied; and it did not appear that in the charge to the jury the purpose of such testimony was explained. It was held that it was error to permit evidence to be introduced of any offenses which were barred by the statute of limitations, and of acts other than the one relied on, for any other purpose than such corroboration and explanation; and that the court, on request, should, in the charge to the jury, have explained the purpose of such testimony. *Bigcraft v. People* (Colo.) 70 Pac. 417.

On a trial for passing a forged instrument, where testimony has been introduced showing that defendant had other alleged forged instruments in his possession, the failure of the court to limit and restrict the purposes for which such testimony could alone be considered by the jury is fundamental error, although the charge was not excepted to for such omission. *Thornley v. State*, 36 Tex. Crim. Rep. 119, 34 S. W. 264, 35 S. W. 981.

On the first hearing of this case the judgment was affirmed, one of the reasons being that the omission in the charge was not excepted to at the time, nor mentioned in the motion for a new trial; but the court held, further, that the omission, under the circumstances of the case, was not at all calculated to injure the accused. Upon rehearing the court, in reversing the judgment and remanding the case, said: "We have examined the authorities referred to, and they indicate, with but few exceptions, an unbroken line of decisions to the effect that when evidence is adduced; on the trial of a case against a defendant, tending to show the commission of another crime by him, it is the duty of the court, whether asked or not, to properly instruct the jury with reference to the purposes and object of such testimony. The exceptions to this rule, when examined, will be found to recognize the general rule, and to be predicated upon some peculiarity in the particular case." After citing with approval *Burke v. State*, 24 Tex. App. 326, 6 S. W. 300, *infra*, and *supra*, III. c. 13, (c), and *Hennessy v. State*, 23 Tex. App. 340, 5 S. W. 215, *supra*, V. b, the court said further: "Upon the former hearing of

this case we were of the opinion that it came within the line of decisions which hold it unnecessary to charge upon and limit the effect of extraneous crimes when admitted as testimony; and, not coming within that category, and being of a criminative nature, the court should not have charged with reference to the matter, as it would have had a tendency to call the attention of the jury to this circumstance, so as to affect the appellant adversely. Upon a closer examination of the record and the authorities, we believe that we were wrong, and that the case comes strictly under the authority of *Hennessy v. State*, 23 Tex. App. 340, 5 S. W. 215, and *Burks v. State*, 24 Tex. App. 326, 6 S. W. 300 [*supra*] and that line of authorities."

On a trial for theft, where the court has properly admitted evidence of other and different offenses charged against the defendant, it is error not to limit and restrict the effect and consideration of such evidence to its legitimate purposes by proper instructions in the charge to the jury, and this whether requested by the defendant to do so or not. *Warren v. State*, 33 Tex. Crim. Rep. 502, 26 S. W. 1082.

On the trial of an indictment for swindling, the court admitted in evidence before the jury another alleged fraudulent transaction between the defendant and another party, of the same character as that charged in the indictment, and still another of the same character with another person, but failed to limit the purpose and object of the testimony. It was held that it was the duty of the court to have so limited it, without any request or exception; and, in order to revise the action of the court in this regard, an exception was not necessary. *Martin v. State*, 36 Tex. Crim. Rep. 125, 35 S. W. 976.

Upon the trial of an indictment for placing an obstruction upon a railroad track, evidence that the defendant placed another obstruction upon the track, was admitted by the trial court. It was held that such evidence was competent for the purpose of showing the motive or intent with which the first obstruction was placed upon the track, and also for the purpose of developing the *res gesta* of the first offense. But that, whilst said testimony is admissible, it devolves upon the court to instruct the jury as to the purpose for which it was admitted, and to restrict, their consideration of it to that purpose only; and a failure to do so is fundamental error, even if an exception has not been reserved to the charge, and for the error of such omission a judgment of conviction will be reversed. *Barton v. State*, 28 Tex. App. 483, 13 S. W. 783.

While it is proper, upon the trial of an indictment for passing a forged instrument, to permit the state to prove that the defendant attempted to pass said instrument, on the same day, at a different time and place, to another person, for the purpose of proving the defendant's fraudulent intent with respect to the attempt for which he is on trial, the court, in its charge to the jury, should restrict such evidence to the purpose for which it is admitted by proper instructions, and an omission to do so is reversible error, although not excepted to. *Burks v. State*, 24 Tex. App. 326, 6 S. W. 300.

Where testimony as to the commission of other independent crimes has been permitted to be shown on cross-examination of the defendant when a witness, it is the duty of the court to charge the jury in writing that such testimony

was admitted, not as proof of defendant's guilt of the crime charged, but only as affecting his credibility as a witness, and a failure to so instruct is fatal and reversible error. *Oliver v. State*, 33 Tex. Crim. Rep. 541, 28 S. W. 202.

While it is admissible, on a trial for theft, to prove contemporaneous theft, yet, when this has been done, it is error for the court, in its charge to the jury, to fail to limit the effect of such testimony to the only purposes for which it could be considered by the jury. *Mask v. State*, 34 Tex. Crim. Rep. 136, 31 S. W. 408.

Upon a trial for larceny it was proved by the state that, about the same time that the animal named in the indictment was stolen, other horses were stolen from the same neighborhood, and that these horses were recovered by the owners, at the same time and place that the owner of the animal mentioned in the indictment recovered hers. It was held that this evidence required from the court a charge to the jury explaining and limiting the purpose for which it was admitted; and the court, having omitted to give such charge, committed error for which the judgment was reversed. *Mayfield v. State*, 23 Tex. App. 645, 5 S. W. 161.

Where a trial court, upon the trial of an indictment for the theft of a horse, has permitted the state to prove the contemporaneous theft of other property at the time and place of the theft charged in the indictment, it is incumbent upon the court, in its charge to the jury, to explain the purposes for which such testimony was admitted, and to instruct and direct the jury that it could only be considered for those purposes, and that the defendant could not be convicted for any other theft than that of the horse named in the indictment. *Reno v. State*, 25 Tex. App. 102, 7 S. W. 532.

But on a trial for stealing a horse the failure of the court to instruct the jury that evidence that the defendant had been confined in the penitentiary for house breaking merely affected his credibility is not error, if such evidence was voluntarily introduced by the defendant himself. *Turpin v. Com.* 25 Ky. L. Rep. 90, 74 S. W. 734.

On a trial for theft an instruction in the following words: "In this case the state has introduced evidence tending to prove the theft of other property than that alleged in the indictment to have been stolen at the same time and place," where the court then proceeded to instruct the jury for what purpose the testimony could be used,—is incorrect and improper, as the excerpt of the charge is on the weight of the testimony. *Cortez v. State* (Tex. Crim. App.) 74 S. W. 907.

Defendant was convicted for horse theft, and on his trial evidence was adduced of the theft of several other animals at the same time and place as the one for which defendant was being prosecuted. It was held that, though this evidence was admissible and legitimate, it was, nevertheless, the imperative duty of the court, in its charge, to so limit and restrict such evidence to the purposes for which, alone, it was admissible, as that the jury might not use it improperly in considering it in connection with the defendant's guilt of theft of the animal for which he was upon trial; and that the omission of the court to so limit and restrict the evidence was error. (In this case the error was admitted by counsel for the state.) *Barnes v. State*, 28 Tex. App. 29, 11 S. W. 679. To the same effect, *Williamson v. State*, 30 Tex. App. 330, 17 S. W. 722.

On the trial of a person indicted for fraudulently converting to his own use, and fraudulently taking and secreting, certain moneys belonging to a savings bank of which he was treasurer, where the indictment alleged the wrongful taking and secreting of a certain sum deposited by one person, evidence was admitted tending to show another embezzlement by the defendant committed near the time of the act charged in the indictment. On setting aside the verdict the supreme judicial court said: "Evidence of another act of embezzlement by the defendant during the same week in which that charged in the second count of the indictment was alleged to have been committed was competent only for the single purpose of proving a guilty intent in the mind of the defendant in the commission of the principal act. It is a dangerous species of evidence, not only because it requires a defendant to meet and explain other acts than those charged against him, and for which he is on trial, but also because it may lead the jury to violate the great principle, that a party is not to be convicted of one crime by proof that he is guilty of another. For this reason, it is essential to the rights of the accused that, when such evidence is admitted, it should be carefully limited and guarded by instructions to the jury, so that its operation and effect may be confined to the single legitimate purpose for which it is competent. . . . In the present case there is nothing in the report which shows that any specific instructions were given on this point. For aught that appears, this evidence was admitted as general proof of the guilt of the defendant, and the jury were left to draw such inferences from it as they might think proper." *Com. v. Shepard*, 1 Allen, 575.

While evidence tending to show that at the same time and place that the defendant took the horses mentioned in the indictment he took another horse not mentioned therein, belonging to another person, is admissible on the trial of such indictment; it is error to omit instructing the jury as to the purpose of such testimony, and that they could not convict the defendant of the theft of any other horse than those named in the indictment. *Gentry v. State*, 25 Tex. App. 614, 8 S. W. 925.

On the trial of an indictment for rape, while it is proper to admit evidence of other criminal acts of the defendant perpetrated upon the prosecutrix, of a like nature as that for which he was on trial, the charge of the court should explicitly explain to the jury the purpose for which, alone, the testimony was admitted; and in such case such a charge is indispensable, as, without it, the jury might give the testimony unwarranted weight as evidence proving the main fact. *Taylor v. State*, 22 Tex. App. 529, 58 Am. Rep. 656, 3 S. W. 753.

Upon the trial of an indictment for forgery other forgeries may be shown, and are admissible in evidence when there is evidence from which the jury may find that they are forgeries, and that the defendant had culpable connection therewith. But, if admitted, the jury should be instructed not to consider them unless they find them to be forgeries. Similar documents to the one charged in the indictment, claimed to be forged, are not admissible to prove intent when it is not shown that the persons whose signatures were claimed to be forged thereto did not authorize such signing. *State v. Prins*, 113 Iowa, 72, 84 N. W. 980.
62 L. R. A.

Upon the trial of an indictment for perjury, the record and judgment in the action in which the perjury is claimed to have been committed are admissible in evidence as matter of inducement, but not to prove the main offense. And in such case it is the duty of the trial court to instruct the jury as to the purpose for which the evidence is admitted, and to restrict them, in considering it, to such purpose. *Davidson v. State*, 22 Tex. App. 372, 3 S. W. 662.

But while a court, after properly admitting evidence of another crime, should limit the effect of such proof by a proper instruction, if it fails to do so, and the defendant does not ask for such an instruction, no error can be assigned, and the judgment will not be reversed for that reason. *Glover v. People* (Ill.) 68 N. E. 464.

The defendant was indicted for burning a dwelling house. The report states that the case is silent as to any direct evidence of the prisoner's guilt. To show that she was guilty, the prosecuting officer offered to prove that two previous attempts had been made to burn the same house,—one about the middle of January preceding the actual burning, and the other, on the night of the 24th of February, the day previous thereto. The introduction of this evidence was objected to by the counsel of the prisoner. The prosecuting officer then stated that he expected to prove facts and circumstances tending to show that the prisoner was the person who made the attempt each time. Upon this statement the evidence was admitted. Upon review, the court held that the connecting facts were the sole ground upon which the proof of the attempts was admitted. That they were in the nature of a condition precedent. But that the state did not redeem its pledge, and the evidence ought to have been withdrawn by the court from the attention of the jury,—certainly as to one of the attempts, if not as to both. That, on the contrary, by suffering the jury to consider it, the trial court added to it the weight of its authority, and thereby suffered the jury to be misled by such irrelevant testimony. And the judgment was reversed *State v. Freeman*, 49 N. C. (4 Jones L.) 5.

Where defendant had been convicted for receiving a stolen horse, knowing it to have been stolen, it was urged, upon appeal from a conviction therefor, that the trial court erred in failing to instruct the jury that testimony introduced on the trial as to the theft of a saddle and bridle taken with the stolen horse, and which were on the horse at the time he was taken, could only be used for the purpose of establishing the identity, in developing the *res gestæ* of the offense, to show the connection of defendant therewith, or the intent with which he acted in regard to the horse. It was held that, while it has been held that with reference to this character of cases the charge should usually be given, it was not absolutely necessary to be given, unless the character of the property stolen contemporaneous with the theft charged was such that the jury might convict for that offense. But that there was no danger of a conviction for stealing a saddle and bridle under a charge of theft of a horse, or receiving said horse after it was stolen. *Moseley v. State*, 36 Tex. Crim. Rep. 578, 37 S. W. 736, 38 S. W. 197.

Defendant, while confined in jail, set fire to, and sought to burn, the jail. During his trial for the arson, it was proved that defendant was incarcerated under a charge for burglary. *Mo-*

tion for a new trial was made by the defendant on the ground that the charge of the court failed to limit the effect of this evidence to the impeachment of defendant's credibility as a witness. It was held that it was only necessary to limit this character of evidence when there might be danger of its being used injuriously to defendant, or for the purpose of convicting him of an offense for which he was not on trial. *Carroll v. State* (Tex. Crim. App.) 58 S. W. 340.

The rule which requires that the jury should be instructed to restrict their consideration of extraneous matter adduced in evidence to the specific purpose for which it was admitted was held, in *Leeper v. State*, 29 Tex. App. 63, 14 S. W. 398, on a prosecution for murder committed in attempting to rob, not to apply to evidence of other assaults committed at the same time and place, all forming part of the general scheme of robbery, and being essential to identify the defendants as the persons who committed the murder charged, and thus bearing directly on the main issue in the case. The court, furthermore, said that the main, if not the sole, reason of the rule which requires the court to restrict the jury in the consideration of extraneous matter admitted in evidence did not obtain in this case; that defendants were being prosecuted for the murder of the party named in the indictment by shooting him, and, it being conclusively proved that he died within a few hours from the effects of the shooting, and none of the other parties assaulted being killed, the jury could not have been influenced or misled by the testimony of the other assaults to convict the defendants of those assaults.

On the trial of an indictment for burglary, the state offered evidence of theft committed at the same time, and also that the building was set fire to. It was held that it was not necessary in this case for the court, in its charge, to eliminate, and properly direct the jury as to the effect of, the evidence with reference to the theft and arson in connection with the alleged burglary; that this testimony was properly admitted as a part of the *res gestæ*, and there was no danger of a conviction for either of said last-mentioned offenses, and it was not necessary for the court to warn the jury against a conviction of said offenses. *Mixon v. State* (Tex. Crim. App.) 31 S. W. 408.

In a prosecution for a rape, committed by the defendant upon his daughter, a child under twelve years of age, evidence of other rapes and acts of lewdness committed by him upon her is admissible, in explanation of the fact that there was no outcry and no pain suffered by the child, and also to account for the absence of laceration; and the defendant, if he wished the court to instruct the jury to limit the consideration of the evidence to such purposes, should have so requested. *People v. Fultz*, 109 Cal. 258, 41 Pac. 1040. See *Reg. v. Chambers*, 3 Cox C. C. 92, VIII. b, *supra*.

On the trial of a man for killing his wife by shooting her, where the prosecution had claimed that the defendant, previous to the shooting, assaulted his wife with a stick or billet of wood, and had introduced the stick in evidence, but had not made sufficient proof of the assault; and the whole evidence in the case failed to show such assault,—it is error to refuse to charge the jury, upon request, that there was no evidence that the stick had been used by the defendant in the commission of an assault upon

the wife prior to the shooting. *People v. Montgomery*, 178 N. Y. 219, 68 N. E. 258.

2. Correctness.

On the trial for the theft of a horse the trial court admitted evidence of the contemporaneous theft of other property than that involved in the trial, and instructed the jury that the defendant was on trial for the theft of the horse, and that they should give no attention to the testimony about the other property as evidence to show the theft of the horse; that this testimony could only be considered by the jury, if at all, for what they might deem it worth as tending to show the intent of the defendant, in whatever action, if any, they might find from the evidence was taken by him. It was held that there was no error, either in the admission of the evidence, or in the instruction. *Moore v. State*, 28 Tex. App. 377, 13 S. W. 152.

In *Holt v. State*, 39 Tex. Crim. Rep. 282, 45 S. W. 1018, on Rehearing, 46 S. W. 829, it is said that, whenever extraneous crimes are introduced in evidence before the jury, and there might be danger of a conviction of these extraneous crimes, the court should limit the effect of such testimony to the purpose for which it is introduced. In this case, which was a prosecution for theft, an exception was taken to the action of the court limiting the effect of testimony of other thefts, on the ground that it was a charge upon the weight of the evidence; but, on appeal, it was held that the charge, under an unbroken line of state decisions, was a correct enunciation of the law, and that the trial court did not err in giving the same.

On a trial for theft of a mule, where defendant's confession, introduced in evidence, admitted the fraudulent taking of other animals, a charge to the jury that they might consider the evidence of other offenses for the purpose of tending to connect defendant with the theft alleged in the indictment was held proper, in *Tidwell v. State*, 40 Tex. Crim. Rep. 38, 47 S. W. 466, 48 S. W. 184. Defendant contended, in his motion for a new trial, that there was no evidence of contemporaneous thefts, and that the court erred in thus charging; but it was held that, in view of defendant's confession, the court certainly could not be said to have given a charge to his injury, since the instruction complained of limited the evidence to its proper purpose; but that, if the court had failed to do this, there might have been some ground for complaint on the part of defendant.

In *Camarillo v. State* (Tex. Crim. App.) 68 S. W. 795, the accused was convicted of burglary, and appealed. In affirming the conviction, the court said: "There is no bill of exceptions in the record. In the motion for new trial, appellant criticises the charge of the court. Among other things, he objects to the charge in regard to other houses shown to have been entered by appellant on the same night. There is no objection to the evidence in this respect. However, we think the testimony was properly admitted. 1 Bishop, Crim. Proc. 2d ed. § 1066. We also think the charge properly limited the testimony in regard to the entry of the other house to the intent with which appellant may have entered the house he is charged to have burglarized in this case."

By a statute of Alabama prohibiting the distillation of spirituous or intoxicating liquors from grain, each act of distillation was made a

distinct offense, and the subject of a separate indictment.

Upon the trial of an indictment for a violation of the statute, the court permitted the state to prove acts of distillation not charged in the indictment, and instructed the jury that they might look to the evidence of such acts "in aggravation of the fine, but for no other purpose." It was held that, in giving this charge, the court clearly erred, the rule being that, in giving evidence of matter in aggravation, the distinction is, that where the aggravating matter is the immediate consequence of the offense for which the defendant is on trial, it may be shown; but, if it is a distinct crime, not necessarily connected with the offense charged in the indictment, it cannot be received. *Ingram v. State*, 39 Ala. 247, 84 Am. Dec. 782. To the same effect, *Skains v. State*, 21 Ala. 218; *Baker v. State*, 4 Ark. 56.

On an indictment for a conspiracy to obtain money from a county by false pretenses by means of fraudulent bills for work, labor, and materials, the prosecution having, in obedience to a rule of court, furnished the defendants a bill of particulars relating to bills for work done on a particular building, evidence of other fraudulent bills for labor and materials for other buildings is inadmissible; and, where such evidence is introduced, a refusal to instruct the jury that defendants are not upon trial for conspiracy to defraud the county by any transactions other than those set out in the bill of particulars is erroneous. *McDonald v. People*, 126 Ill. 150, 18 N. E. 817. The court said that, this evidence of other fraudulent bills for work on other buildings being before the jury, they were as likely to convict the defendants of a conspiracy in regard to the work performed on such other buildings as in regard to the work done on the building specified in the bill of particulars, unless they were properly instructed; that the jury were left entirely in the dark as to which transactions they were entitled to consider in returning a verdict; and that the manner in which the case was submitted to them left it impossible to determine whether defendants were convicted of the offense for which they were put upon trial, or for some other and different offense.

Testimony in regard to the contemporaneous theft of other property than that stated in an indictment for burglary having been properly admitted in evidence on the trial to establish the intent of the accused in committing the offense charged, it is error for the court to tell the jury that, in considering the case, they should not look to any evidence of theft of any other property than that charged in the indictment to have been stolen; but that, in passing on the credibility of the defendant as a witness, they might consider such evidence of other thefts. *Hayes v. State*, 36 Tex. Crim. Rep. 146, 35 S. W. 983. By this instruction, the court said, the jury were told that they could not regard such testimony for the only purpose for which it could properly be considered by them, but that they might use it for a purpose for which it was not legitimate evidence, viz., in passing upon the credibility of the defendant as a witness, adding: "The defendant was a witness in the case, and testified to material facts on his behalf; and for the jury to be told by the court that they could consider certain testimony to discredit him, not authorized by law to be considered, was to impair his cred-

ibility before the jury. We are unable to tell what effect it may have had upon the jury, but the fact that they may have considered this testimony, improperly applied under the charge of the court, is enough to reverse this case."

In a prosecution for an illegal sale of intoxicating liquor, it is error for the court to instruct the jury that evidence of other unlawful sales may be considered, without any restriction, to determine whether the defendant is guilty of making the sale on which the state elects to rely for a conviction. *State v. Marshall*, 2 Kan. App. 792, 44 Pac. 49; *State v. Hughes*, 3 Kan. App. 95, 45 Pac. 94.

In *Fletcher v. State*, 49 Ind. 124, 19 Am. Rep. 673, it appeared that the trial court, in an instruction to the jury, said that a witness when upon the stand was permitted to give in evidence any statements made by defendant in conversation with him, in relation to the forgery charged in the indictment. That, if there was anything in such evidence tending to show that defendant was charged with, or was guilty of, forgery before that time, it would be legitimately before the jury, simply as being a part of that or those conversations, and could not be withdrawn from the consideration of the jury. That it was not competent, however, to prove, as an isolated fact, that defendant had at any time before been guilty of, or charged with the commission of, any crime, as a circumstance to prove that defendant was guilty of the crime charged. Upon appeal from a judgment of conviction and the action of the court in overruling a motion for a new trial, the court held that the trial court should have expressly withdrawn such admissions from the consideration of the jury, and charged them that they were not to be considered for any purpose of the trial. That the charge was erroneous. That inasmuch as the declarations constituted part of conversations which were relevant, they were properly admitted in evidence; but the court should have charged the jury that they were admitted solely because they were so connected with conversations that they could not be separated, and that they were not to be considered for any purpose connected with the question of the guilt or innocence of the appellant, or of the extent of punishment, if found guilty. That, the court having charged the jury that such admissions were "legitimately in evidence," and "could not be withdrawn," the jury must have understood that they were to be considered for some purpose, though they were told that they were not to be considered in determining whether the appellant had committed the crime charged in the indictment. That, if they were not competent for such purpose, they were not competent for any, for that was the sole subject of inquiry. That the error in the instruction consisted in telling the jury that such admissions were "legitimately in evidence," and "could not be withdrawn," as the jury might have understood that they were to be considered in fixing the punishment, and may have so considered them.

Upon the trial of a person charged with the murder of his wife by poison, testimony was introduced which it was claimed tended to show that the respondent, at the same time he was poisoning his wife, was also poisoning her sister, who was an inmate of his household during the last illness of his wife. The court charged the jury that they might consider this evidence in determining the facts as to the death of the wife, and as to whether she came to her death

by poison, and, if so, by whom the same was prepared or administered. He further charged them that they might consider the testimony in relation to the powder found in the food and water prepared for the wife's sister, and whether the same was poisonous, if they found such powder was found in her food and drink; and that if, after a full and careful consideration of the evidence in the case, and all of it, they should find, beyond a reasonable doubt, that the wife came to her death, or that her death was hastened, by poison, they could then proceed to consider the further question as to the respondent's responsibility in relation thereto. It was held that this was only another way of saying to the jury that, if they found the respondent poisoned the wife's sister, it was probable he poisoned his wife; or, in other words, that the evidence of an offense committed by the respondent of which he was not charged in the information might be considered to establish his guilt of the offense which was charged against him in the information. It was held, distinguishing *People v. Seaman*, 107 Mich. 348, 65 N. W. 203, *supra*, VI. d, that the charge was an erroneous one. The court, however, stated that, if there was evidence in the case at bar that the respondent had administered poison to his wife, it would have been competent, as bearing upon his motive or intent in administering the poison, to show that, at about the same time, he was giving poison to the sister of his wife, who was also an inmate of his household. The court proceeded to say further: "Had the trial judge limited the use of this testimony to that purpose, there would have been no error; but, when he went further, and informed the jury that they might consider this testimony for the purpose of establishing whether the respondent in fact administered poison to his wife, he went further than any of the cases go, and announced a doctrine that it would be exceedingly dangerous to follow." *People v. Thacker*, 108 Mich. 652, 66 N. W. 562.

Upon the trial of an indictment for setting fire to a dwelling house on December, 1888, the prisoner, on his cross-examination, had testified to six other fires occurring between 1877 and 1883, but his explanation of the causes of the fires, if true, showed him to be blameless in regard to them. In charging the jury, the court said that the testimony as to those fires was relevant on the questions, whether the fire then being investigated was accidental, and whether the prisoner had a motive or intent to defraud anybody at the time that fire occurred. Upon appeal, the court, after stating the general rule that, upon the trial of a person for one crime, evidence that he has been guilty of other crimes is irrelevant, and after stating various exceptions thereto and citing and quoting largely from authorities, both American and English, said that, in general, it may be said that, whenever the defendant's guilt of an extraneous crime tends logically to prove against him some particular element of the crime for which he is being tried, such guilt may be shown. That in the present case, the fires which the jury were instructed to regard as relevant testimony on the inquiry whether the fire in issue was accidental, and whether the prisoner had a motive to defraud anybody by it, occurred between five and eleven years previously, and no ground existed for a suspicion that there was the slightest connection between it and them, except such as would bind together the different crimes of 62 L. R. A.

any habitual offender. That it was impossible to reason from those fires to this, save by the inference that, if the prisoner was to be benefited by the destruction of those buildings, and on that account set them afire, then, if he was to be benefited by the destruction of this building, he probably set it afire also. That such reason derives its whole force from the character of the prisoner, which can never be thrown into the scales on a criminal charge, except at the instance of the accused; that, had the state offered to prove the prisoner's connection with those fires as a substantive part of its affirmative case, the offer would have been unhesitatingly overruled; its being brought out on cross-examination of the prisoner, while it might legalize the evidence as possibly bearing upon his credit as a witness, did not render the testimony any more relevant to the main issue of his guilt. And that there was error in the charge on this point. *State v. Raymond*, 53 N. J. L. 260, 21 Atl. 328.

Upon the trial of an indictment for libel, where the state, for the purpose of proving malice, introduced in evidence other libelous publications by the defendant in regard to the same person, a charge to the jury that such other articles might be considered by them as showing that defendant was in a state of mind unfriendly to the person libeled, and, therefore, more likely to be the author of the libel charged in the indictment, was held to be erroneous. *State v. Riggs*, 39 Conn. 498. The court stated that this was, in a word, telling the jury that proof that defendant had published a libel on the person named in the indictment before or after that prosecuted on was competent evidence that he published the latter; but that, even if the charge was justifiable as matter of law, it was not justifiable under the circumstances of the case; that, the evidence of the other publications having been offered and admitted solely for the purpose of proving malice, it was a surprise to the defendant for the court to give it to the jury at the last moment for a new purpose, to prove, not the intent, but the fact of publication.

Upon a trial for robbery, where the defendant was a witness in his own behalf, an instruction that the jury might take into consideration the fact, if the same was proved (which was admitted by the defendant), that he had been convicted of a felony, and confined in the penitentiary of another state, as affecting his credibility as a witness, is not erroneous. *Keating v. State* (Neb.) 93 N. W. 980.

b. Effect of instruction to disregard.

When evidence of a separate, independent crime has been improperly introduced, and it is apparent that its reception must have been to prejudice the rights of the accused, a charge to the jury to disregard the evidence will not cure the error in admitting it.

On a trial for murder, evidence of other crimes, such as robberies, committed by the defendants, is inadmissible; and the error of admitting such evidence is not cured by the judge's charge that defendants were not to be convicted because of the commission of such other crimes. *Boyd v. United States*, 142 U. S. 450, 35 L. ed. 1077, 12 Sup. Ct. Rep. 292, Reversing 45 Fed. 851.

A conviction under the first count of an information charging defendant, in the first count, with stealing certain goods, and in the

second count with receiving such goods knowing them to be stolen, must be reversed where the prosecution was permitted to introduce, under the second count, testimony of other alleged larcenies committed at the same time, and for which other suits were pending against accused, although defendant was not found guilty under that count, and the court charged that the objectionable testimony could only be taken into account in considering the second charge; since such evidence tended to make defendant a common thief, and required him to defend against all the other prosecutions, in order to show his innocence of the crime with which he was charged. *People v. Jacks*, 76 Mich. 218, 42 N. W. 1134. The court stated that this testimony could hardly have failed to impress the jury strongly against accused upon the charge in the first count, and that it would be impossible to say that the subsequent charge of the court entirely removed such impression, or to what extent the rights of the defendant were prejudiced thereby; and that, therefore, the rule of safety required that a verdict obtained under such circumstances should not be allowed to stand.

Where, upon a trial for illegal branding and marking of property which had been stolen, evidence of the stealing and branding and marking of other stolen property is improperly admitted, the error in so admitting the incompetent testimony is not cured and rendered harmless by the court afterward instructing the jury to disregard it. *Welhausen v. State*, 30 Tex. App. 623, 18 S. W. 300.

See also *State v. Ditton*, 48 Iowa, 677; *House v. State*, 16 Tex. App. 25,—*supra*, V. a. 3; *Hamilton v. State*, 36 Tex. Crim. Rep. 372, 37 S. W. 431; *State v. Clawson*, 32 Mo. App. 93,—*supra*, IX. a.; *Gentry v. State*, 25 Tex. App. 614, 8 S. W. 925, *supra*, V. a. 3; XIV.

XVII. Miscellaneous.

In an indictment for murder, committed during a riot in which the prisoner was engaged, evidence to prove other riotous acts by him at a different place and several hours earlier is incompetent, unless it is first shown that the various acts were all parts of one continuous transaction. *Com. v. Campbell*, 7 Allen, 541, 83 Am. Dec. 705.

Where a pickpocket is discovered plying his vocation in a crowd, a citizen has the right to arrest him upon fresh pursuit without a warrant, and, if the wrongdoer kills him while he is attempting to make the arrest, it is murder. In such case, on the trial of the thief for murder, it is competent to prove, by either direct or circumstantial evidence, the recent commission of the robberies and connection of the accused therewith, for the purpose of showing that the citizen was engaged in the performance of his duty when slain. *Kennedy v. State*, 107 Ind. 144, 57 Am. Rep. 99, 6 N. E. 305.

Upon the trial of an indictment for murder perpetrated by the killing of an officer who had defendant under arrest for the crime of burglary, evidence that, previous to the homicide, a store was burglarized; that defendant and two others, all strangers in the city, had for two or three days prior to the burglary, and on the day succeeding it, taken meals at a restaurant in the city; and that the proprietor, being led to suspect that they were connected with the burglary, communicated his suspicions to the officers at police headquarters; that the chief instructed him that, if the strangers again ap-

peared in his restaurant, he should telephone to police headquarters; and also informed the officer, afterwards killed, as to the arrangements made with the restaurant proprietor, and instructed him that, if he received a telephone message, he should go to the restaurant and arrest the persons pointed out to him,—was held to be admissible for the purpose of showing that the arrest, which was made without a warrant, was justified.

The court, of its own motion, struck out a portion of the evidence, making the statement that all that was allowed to stand was such as tended to establish the fact of the burglary, and the statements and circumstances communicated to the murdered officer which showed that he had probable cause for making the arrest, but that any evidence tending to show that defendant was guilty of the burglary was stricken from the case, and should be given no consideration. The court of appeals, in affirming a conviction, said: "We think sufficient evidence was left in the record, after this action of the trial judge, to justify submitting to the jury the question whether detective Harvey, a felony having been committed, had reasonable cause for believing the persons to be arrested had committed it, and was justified, as a peace officer, in making the arrest without a warrant. We, also, are of opinion that the trial judge was not called upon to strike any of this evidence from the record, as it was all competent to be submitted to the jury on the question whether detective Harvey was justified in arresting the defendants in this indictment without a warrant. We, however, go still further, and hold that, if this evidence had been offered generally in the cause, and without limitation, it would have been perfectly competent as bearing, both upon the action of Harvey in making the arrest, and upon the understanding of defendant that he was taken into custody upon a charge of felony." *People v. Wilson*, 141 N. Y. 185, 36 N. E. 230.

On an indictment which, in addition to a charge of grand larceny, alleges that accused has, twice before, been convicted of felonies, proof of former convictions of grand larceny is admissible, under Ky. Stat. § 1130, creating a higher degree of felony in the case of persons who have been twice before convicted of felony, and assessing a higher penalty. *Hall v. Com.* 106 Ky. 894, 51 S. W. 814. Defendant contended that proof of the former convictions should not have been admitted until after the jury should have first found her guilty under the charge for which she was then being tried, but the court held that, while such evidence was bound to prejudice accused, it nevertheless was necessary in order to prove her guilty of the degree of the offense charged, adding that the statute made no provision for a separate trial of the fact of former conviction, and that, while the law seemed to work a hardship, it was one which the legislature alone could remedy.

It is no objection to evidence of an indictment for felony that it also goes to show the prisoner guilty of another felony. *Rex v. Moore*, 2 Car. & P. 235. The case consists of nothing but a syllabus in which the above is all that is said upon the subject.

On the trial of an indictment for stealing slaves, the court said, in regard to the admissibility of certain statements and propositions of the prisoner, to the witness by which they were proved: "It was not undertaking to prove the

guilt of the prisoner, by showing that he had previously committed another felony of the same kind; nor is it proof that the prisoner has a general disposition to commit the same kind of offense. Both these kinds of proof would be inadmissible." *State v. Ford*, 3 Strobb. L. 517, note.

XVIII. Recapitulation.

Summing up the foregoing decisions, the result would seem to be: That, as a general thing, evidence of a separate, independent, and distinct crime from that which is the subject of judicial inquiry in a criminal trial is inadmissible. And the rule is that the prosecution is not permitted to introduce evidence of the commission by the accused of a crime entirely distinct from that for which he is being tried, for the purpose of proving him guilty of that crime; and that the prosecution cannot show the bad character of the accused until he has placed his character in issue. But that facts and circumstances which tend to prove any of the essential elements or ingredients of the crime for which the person accused is on trial, and competent and material for that purpose, are not to be rejected as evidence, simply because they may prove, or tend to prove, the accused person to have committed another and distinct crime.

And so, the rule which excludes evidence of other criminal acts on the trial of a particular criminal issue is not without limitations or exceptions.

Evidence of another offense than that for which the accused is being tried, if it tends to establish the existence of a motive to commit the crime charged, is competent where there is an apparent connection or relation between the imputed motive and such crime.

In order to convict of certain crimes it is necessary and material to introduce proof of the wicked intent, or guilty knowledge, of the accused; and in such cases, and for the purpose of showing such intent, evidence may be given of a distinct offense not laid in the indictment or information. And such evidence of intent is also competent and admissible in cases where it is not essential.

And where the crime charged is so connected with the other offense sought to be proved as to form part of an entire transaction, evidence of the latter may be given to show the character of the former.

Sometimes, in the trial of a criminal action, it becomes necessary to establish the identity of the person committing the offense; and in such cases evidence of other crimes is admissible for that purpose.

And in cases where the accused has inserted the plea, and attempted to establish that the act charged as a crime was the result of a mistake or accident, facts tending to rebut the same may be given in evidence, although they develop another distinct crime.

There are instances where the person who committed the crime for which the accused is on trial committed another at the same time, and the facts and circumstances are so interwoven that evidence of the commission of one of necessity proves the other; and such evidence is always competent.

As has been said before, the exception to the general rule has been liberally extended by the courts to those crimes where evidence is competent and necessary to prove the intent or guilty knowledge with which the act constitut-

ing the offense in question was committed; or to explain or characterize such act.

The evidence of the other crime being otherwise admissible, it is no objection that the accused has been indicted for, or convicted, or even acquitted, of it.

As a general rule, the evidence of other crimes in criminal cases is admitted to establish or strengthen some particular element or ingredient of the crime for which the accused is being tried, and in such case it is the duty of the trial court to instruct the jury to consider the evidence as to the extraneous crime, only for the particular purpose for which it was received; and in some cases it is decided that this is so, even though there be no request on the part of the accused for such instruction, and no exception is taken at the trial to the omission or refusal to give it.

But even in such cases, if it appears that, without such instruction, it was impossible for the jury to have applied such evidence in any other way or to any other purpose than that for which it was admitted, the judgment of conviction will not be interfered with. P. H. V.

Charles H. MONNIER, *Respt.*,

v.

NEW YORK CENTRAL & HUDSON
RIVER RAILROAD COMPANY, *Appt.*

(175 N. Y. 281.)

One who boards a train without a ticket because the ticket office is not open for the sale of tickets as required by statute cannot refuse to pay the extra train fare required of passengers without tickets, and resist ejection on tender of the price of the ticket, but must pay the additional fare and resort to his legal remedy to recover it and the statutory penalty for failure to have the office open.

(*Bartlett, Martin, and Vann, JJ., dissent.*)

(June 9, 1903.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Oneida County in plaintiff's favor in an action brought to recover damages for alleged assault and illegal ejection of plaintiff from defendant's car. *Reversed.*

The facts are stated in the opinion.

Messrs. Lewis, Watkins, & Titus, for appellant:

It was error for the court to deny the de-

NOTE.—For a case very similar to this, holding that the ejection of a passenger without a ticket because of his refusal to pay more than the regular fare is wrongful where the failure to procure a ticket was due to delay, without his fault, in finding his satchel in the baggage room, see *Coffey v. Louisville & N. R. Co.* (Miss.) 45 L. R. A. 112.

As to validity of extra charge for passenger fare when paid on train, see *Phetiplice v. Northern P. R. Co.* (Wis.) 20 L. R. A. 483, and note.

defendant's motion for nonsuit at the close of all the evidence in the case.

Magee v. Oregon R. & Nav. Co. 46 Fed. 734; *Poulin v. Canadian P. R. Co.* 17 L. R. A. 800, 3 C. C. A. 23, 6 U. S. App. 298, 52 Fed. 197; *Harrison v. Fink*, 42 Fed. 787; *Townsend v. New York C. & H. R. R. Co.* 56 N. Y. 295, 15 Am. Rep. 419; *Wiggins v. King*, 91 Hun, 343, 36 N. Y. Supp. 768; *Atchison, T. & S. F. R. Co. v. Hogue*, 50 Kan. 40, 31 Pac. 698; *Belknap v. Boston & M. R. Co.* 49 N. H. 358; *Cincinnati, H. & D. R. Co. v. Cole*, 29 Ohio St. 126, 23 Am. Rep. 729; *Mosher v. St. Louis, I. M. & S. R. Co.* 127 U. S. 390, 32 L. ed. 249, 8 Sup. Ct. Rep. 1324; *Frederick v. Marquette, H. & O. R. Co.* 37 Mich. 342, 26 Am. Rep. 531; *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499; *Lake Shore & M. S. R. Co. v. Pierce*, 47 Mich. 277, 11 N. W. 157; *Bradshaw v. South Boston R. Co.* 135 Mass. 407, 46 Am. Rep. 481.

Mr. D. F. Searle, for respondent:

A passenger's right to ride does not depend upon the capricious will of the conductor, nor his interpretation of rules. The right of personal liberty and of self-defense are more sacred and more important than the convenience of railroad companies.

The public interests require that passengers shall not be assaulted and wrongfully ejected.

The plaintiff being rightfully on the train, and tendering the full amount of fare fixed by the legislature as a condition of defendant's existence, he had a right to resist any attempt wrongfully to eject him, and to defend himself against assault.

English v. Delaware & H. Canal Co. 66 N. Y. 454, 23 Am. Rep. 69; *New York, L. E. & W. R. Co. v. Winter*, 143 U. S. 60, 36 L. ed. 71, 12 Sup. Ct. Rep. 356; *Hamilton v. Third Ave. R. Co.* 53 N. Y. 25; *Cox v. New York C. & H. R. R. Co.* 63 N. Y. 414; *Stewart v. Brooklyn & C. T. R. Co.* 90 N. Y. 588, 43 Am. Rep. 185; *O'Brien v. New York C. & H. R. R. Co.* 80 N. Y. 236; *Rown v. Christopher & T. Street R. Co.* 34 Hun, 471; *Muckle v. Rochester R. Co.* 79 Hun, 32, 29 N. Y. Supp. 732; *Franklin v. Third Ave. R. Co.* 52 App. Div. 512, 65 N. Y. Supp. 434; *Hanna v. Nassau Electric R. Co.* 18 App. Div. 137, 45 N. Y. Supp. 437; *Jenkins v. Brooklyn Heights R. Co.* 29 App. Div. 8, 51 N. Y. Supp. 216; *Weber v. Brooklyn, Q. C. & Suburban R. Co.* 47 App. Div. 306, 62 N. Y. Supp. 1; *Horton v. Erie R. Co.* 65 App. Div. 587, 72 N. Y. Supp. 1018; *Jacobs v. Third Ave. R. Co.* 71 App. Div. 199, 75 N. Y. Supp. 679; *Ray v. Cortland & H. Traction Co.* 19 App. Div. 530, 46 N. Y. Supp. 521; *Reiffeld v. Delaware & H. Canal Co.* 20 App. Div. 635, 47 N. Y. Supp. 635; *Eddy v. Syracuse Rapid Transit R. Co.* 50 App. Div. 109, 63 N. Y. Supp. 645.
62 L. R. A.

A common carrier is an insurer against all wrongful acts and injuries by its agents to passengers.

Duinelle v. New York C. & H. R. R. Co. 120 N. Y. 125, 8 L. R. A. 224, 24 N. E. 319; *Stewart v. Brooklyn & C. T. R. Co.* 90 N. Y. 588, 43 Am. Rep. 185; *Palmeri v. Manhattan R. Co.* 133 N. Y. 261, 16 L. R. A. 136, 30 N. E. 1001; *New Jersey S. B. Co. v. Brockett*, 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1030.

The defendant is liable for the wrongful acts of the conductor, irrespective of his belief.

Clark v. New York, L. E. & W. R. Co. 40 Hun, 610; *Palmeri v. Manhattan R. Co.* 133 N. Y. 265, 16 L. R. A. 136, 30 N. E. 1001; *Hamilton v. Third Ave. R. Co.* 53 N. Y. 25; *Jenkins v. Brooklyn Heights R. Co.* 29 App. Div. 8, 51 N. Y. Supp. 216; *Jacobs v. Third Ave. R. Co.* 71 App. Div. 199, 75 N. Y. Supp. 679.

Damages have been sustained for wrongful ejection of passengers.

Craker v. Chicago & N. W. R. Co. 36 Wis. 657, 17 Am. Rep. 504; *Bass v. Chicago & N. W. R. Co.* 42 Wis. 654, 24 Am. Rep. 437; *Indianapolis, B. & W. R. Co. v. Milligan*, 50 Ind. 392; *St. Louis & S. E. R. Co. v. Myrtle*, 51 Ind. 566; *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Du Laurans v. First Div. St. Paul & P. R. Co.* 15 Minn. 49, Gil. 29, 2 Am. Rep. 102; *McGinnis v. Missouri P. R. Co.* 21 Mo. App. 399; *International & G. N. R. Co. v. Gilbert*, 64 Tex. 536; *Brown v. Memphis & O. R. Co.* 5 Fed. 500; *Atchison, T. & S. F. R. Co. v. Cuniffe* (Tex. Civ. App.) 57 S. W. 692; *Missouri P. R. Co. v. Martino*, 2 Tex. Civ. App. 634, 18 S. W. 1066, 21 S. W. 781; *Cunningham v. Seattle Electric R. & Power Co.* 3 Wash. 471, 28 Pac. 745.

O'Brien, J., delivered the opinion of the court:

The plaintiff has recovered damages for an assault and battery committed upon his person by one of the defendant's conductors on the 16th day of November, 1900, when the plaintiff was in one of the defendant's cars as a passenger from Oriskany to Utica. There is little, if any, dispute about the facts. It appears that on the day mentioned the plaintiff went to the defendant's station at Oriskany to take passage upon the local train to Utica. The office for the sale of tickets located at the station was open for an hour before the departure of the train, but from five to ten minutes before the train pulled out the ticket agent was absent from the office, as he was obliged to pass over on the opposite side of the track, a short distance, to look after an express package, and before he returned the train

pulled out and the plaintiff entered one of the cars without any ticket. We must assume from the verdict of the jury that the plaintiff boarded the car without a ticket for the reason that the ticket agent was absent from the office from five to ten minutes before the train started, and therefore the plaintiff was unable to procure a ticket. Two other passengers entered the train at the same station, but both of them had procured tickets. Soon after leaving the station the conductor passed through for the purpose of taking up the tickets. The two other passengers who entered the train at the same station handed him their tickets, but when he came to the plaintiff he was told that as the office was closed he had no ticket. The plaintiff then tendered 15 cents to the conductor as the fare to Utica, but the conductor told him that the fare was 19 cents when the person had no ticket. The plaintiff replied that the ticket office was not open and he could not get a ticket, and that he would pay the price of a ticket, but no more. The conductor again told him that the fare was 19 cents, and demanded that amount, telling him at the same time that if he did not pay it he must get off at the next station, and the plaintiff's answer was, "I will pay the New York Central Company all the law allows them." On arriving at the next station the plaintiff, in response to a similar request, refused to pay the 19 cents, but offered to pay 15 cents. When the plaintiff refused to pay the sum demanded, the conductor stopped the train at the station and put him off. The plaintiff resisted the conductor, but he was overpowered and finally removed from the car; the conductor using no more force than was necessary. The plaintiff then took a street car to Utica, the fare being 10 cents. The conductor inquired of the other passengers who entered the car at Oriskany if they had purchased their tickets at the station that morning, and they told him that they had; but at the same time they corroborated the plaintiff's statement that the ticket agent had stepped out of the office and across the track a short time before the train started. The removal of the plaintiff from the car in the manner and under the circumstances stated is the assault and battery of which he complains and for which he recovered the damages. The right of the plaintiff to recover was challenged by defendant's counsel, by a motion at the close of the case and by requests to charge, all of which were denied or refused by the learned trial judge, and exceptions taken.

This case presents the question whether the plaintiff had any right to resist the conductor when he was ordered to leave the train. The right of the conductor to remove

a passenger from the car when the latter refuses to obey the reasonable rules and regulations of the company, and the right of the passenger to resist the enforcement of such rules by force, cannot exist at the same time. When such claims come in conflict with each other, every reasonable man will agree that there are certain principles so obviously just that, when applied to the facts of the particular case, they will work a fair solution of the question in controversy. The rule of the company that required the conductor to collect 19 cents from the passenger who did not purchase a ticket is concededly a valid and reasonable regulation. It is sanctioned by the terms of an express statute, and the duty of the conductor was to enforce it, and therefore it was the duty of the passenger to submit to it. A person who becomes a passenger in a public conveyance must subordinate his conduct to all rules that are reasonable and valid. Without such rules the corporation will not be able to perform the functions for which it was created. In the present case no one questions these propositions, but what is asserted in behalf of the plaintiff is that, behind these reasonable regulations there was a fact which rendered them inoperative or inapplicable to him, and that was the fact that the ticket agent was not in his office when the train started, and in consequence of his absence the plaintiff was unable to procure a ticket. But the conductor could not know what the fact was in that respect, and was not bound to take the passenger's word for it; nor could he try and decide the question upon the word of the other passengers who procured tickets at the same station. The simple duty of the conductor is to execute and enforce all reasonable rules and that of the passenger is to obey them. If there is some fact or omission behind the rules, not apparent upon the face of the transaction, the passenger must resort to some other remedy for his grievance besides the use of force against the conductor; and if, under such circumstances he invites a personal collision with the officer in charge of the train, resulting in his forcible expulsion, he puts himself in the wrong, and cannot sue the company or the officer for assault and battery. In this case the plaintiff acted upon the principle that if he could ultimately prove that the ticket office was not open when the train started, and that he could not procure a ticket, he had the right to refuse to pay the 19 cents, and to resist the conductor by force when he attempted to put him off. It would be difficult to show that such a principle has any support in reason, justice, or authority. It is based upon the notion that the plaintiff had the right to be the judge in the controversy, and to en-

force what he deemed to be his rights with the strong arm, and, if worsted in the struggle, to sue the railroad for assault and battery. That, I think, is not the law. When a railroad company wilfully exacts from a passenger more than the legal rate of fare, the latter may sue the company under the statute for the penalty of \$50 and the excess of fare, besides the damages that he may sustain in consequence of the wrongful act. But, as in this case, when the conductor demands only what he has the right to demand by the statute and rules of the company, the passenger is not at liberty to assert and maintain by force some right that he may claim which grows out of facts not within the knowledge of the conductor, and which may render the rules inoperative or inapplicable. He is bound for the time being to yield to the reasonable practice and requirements of the officer in charge of the train, and enforce any right that he may have against the company in some other and more proper way. By paying such a demand his cause of action is just as complete as if he forcibly resisted the demand and suffered himself to be ejected. His ejection in such case will add nothing to his cause of action.

It would be an absurd and intolerable rule of law that would permit passengers upon a railroad to resist the officer in charge whenever a dispute arose in regard to some trivial matter wherein the passenger had a real or fancied grievance. When the plaintiff was told that he must, under the rules, pay the 19 cents or leave the car, it was his duty, either to pay the extra 4 cents, or leave, and resort to the remedy which the law gave for the redress of his grievance. The conductor could not suspend the rule merely because he was told that the passenger could not procure a ticket before the train started, and, when notified by the conductor that removal from the train must follow his refusal to pay, he had notice of the rule and the consequence of his disobedience to it. When he waited for the application of force to remove him, he did so in his own wrong. He virtually invited all the force necessary to remove him, and, since no more was applied than was necessary to effect the object, he cannot recover, either against the conductor or the defendant in an action for assault and battery. *Townsend v. New York C. & H. R. R. Co.* 56 N. Y. 295, 15 Am. Rep. 419.

No case has been cited that sustains the proposition contended for by the learned counsel for the plaintiff, and that is that the plaintiff had the right to resist the conductor by force, on the ground that he was unable to procure a ticket. There are cases where damages were recovered for ejecting

a passenger from the train. Such was the case of *English v. Delaware & H. Canal Co.* 66 N. Y. 456, 23 Am. Rep. 60, where it was found that the conductor used more force than was necessary, and the proof tended to show that the train was in motion at the time, and therefore the law of self-preservation justified the passenger in repelling any attempt to eject him which would endanger his life. The case of *New York, L. E. & W. R. Co. v. Winter*, 143 U. S. 60, 36 L. ed. 71, 12 Sup. Ct. Rep. 356, justifies resistance in a case like this only so far as may be sufficient to denote that the passenger gets off by compulsion, and not voluntarily. The cases in other jurisdictions are to the effect that in a case like this the passenger must submit to the inconvenience of either paying the fare demanded or ejection, and rely upon his remedy against the company for the negligence or mistake of the ticket agent. The conductor cannot decide, from the statement of the passenger or his neighbors, what the facts are which may affect the operation of the rules. This would require more time than the conductor can find in the proper discharge of his duties, and would expose the company to numerous and constant frauds. *Bradshaw v. South Boston R. Co.* 135 Mass. 407, 46 Am. Rep. 481; *Frederick v. Marquette, H. & O. R. Co.* 37 Mich. 342, 26 Am. Rep. 531; *Shelton v. Lake Shore & M. S. R. Co.* 29 Ohio St. 214; *Dietrich v. Pennsylvania R. Co.* 71 Pa. 432, 10 Am. Rep. 711; *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499; *Poulin v. Canadian P. R. Co.* 17 L. R. A. 800, 3 C. C. A. 23, 6 U. S. App. 298, 52 Fed. 197; *Hall v. Memphis & C. R. Co.* 15 Fed. 57; *Wiggins v. King*, 91 Hun. 343, 36 N. Y. Supp. 768.

The question always is, in controversies of this character, whether it is the conductor or the passenger that is in the wrong. If in this case it be the conductor, it must be because he should have disregarded the rules of the company upon the faith of the statement of the passenger and his neighbors that the ticket agent was absent from the office. On the other hand, it must be that the passenger, finding that the ticket agent, at a rural station where few tickets are sold, stood at the window ready to hand out tickets for only fifty instead of sixty minutes, was justified in starting a dispute with the conductor which involved only 4 cents more than he offered to pay, resulting in a personal collision or trial of strength and force, and ending in his expulsion from the train. It seems to me that, when a passenger defies the authority of the officer in charge upon such grounds and under such circumstances, he must be held to have deliberately invited and procured the assault of which he complains. In the interests of

peace and good order the law imposed upon the passenger the duty of obedience, and hence he should have either paid the 4 cents or left the car under protest, and then resorted to those peaceful remedies which the law provides in cases of wrongful or oppressive acts on the part of the railroad. The law imposes upon the individual the duty of obedience, under all circumstances, to lawful authority, and if, underlying the authority, there may be a question of fact which renders the exercise of it unlawful, it is not for the party himself to decide that question, and resort to violence or forcible resistance. The remedy is to appeal to the regular tribunals for the redress of any wrong or injury that he may have sustained in consequence of his enforced obedience to the regulation which he claims was not, for some reason, applicable to him under the circumstances.

We have, of course, no reference here to cases where personal rights or privileges may be invaded without jurisdiction or warrant of law, but to cases that in some sense are analogous to that of an officer who is called upon to execute process regular upon its face, though behind the process there may be some fact which would justify the decision that it was absolutely void. In such cases the individual affected must, for the time being, yield to the process and resort to proper proceedings to set it aside or to redress the injury.

For these reasons I think *the judgment should be reversed*, and a new trial granted; costs to abide the event.

Parker, Ch. J., and Haight, J., concur.

Cullen, J., concurring:

I vote for a reversal of the judgment appealed from. By Laws 1857, § 1, chap. 223, p. 488, it was enacted that the defendant, at every station on its road where it maintained a ticket office, should keep the same open for the sale of tickets for at least one hour prior to the departure of each passenger train. By § 2 it was provided that if any person should, at any station where a ticket office was established and open, enter the cars without first having purchased a ticket, it should be lawful for the company to demand and receive 5 cents in addition to the prescribed rate of fare. The plaintiff entered the cars without a ticket at a station where a ticket office was established, but, as we must assume, for the jury have so found, on an occasion when the same was not continuously kept open for the period of one hour before the departure of the train. He contends that therefore the demand for the extra 5 cents was excessive, and that principle has been held by this court. *Chase v. New York C. R. Co.* 26 N. 62 L. R. A.

Y. 523. Hence, had he paid that sum he could, under Laws 1857, chap. 185, p. 432, have recovered it back from the company, together with a penalty of \$50 for its exaction. I agree with Judge Bartlett that each party was bound to know and to determine for itself its legal rights, and also that, if the plaintiff was within his legal rights, he was justified in resisting any attempt to remove him from the cars. The question, as is said by Judge Bartlett, is not one of good taste (though I deny that good taste requires a passenger to submit to an imposition or unlawful exaction), but of legal right. The question, however, remains whether the conductor was justified in requiring the plaintiff to pay the additional 5 cents, though as between the plaintiff and the company it was an unlawful exaction. The object of the statute, that passengers should be induced, under the penalty of an additional fare, to purchase tickets before entering the train, was in the interest of the public, as well as in that of the company. There was a ticket office established at the station, and therefore the case of the plaintiff, *prima facie*, fell within the statutory provisions. The conductor did not know, and ordinarily could not know, whether the ticket office there had been kept open continuously for an hour before the departure of the train. He had a right to act on appearances. If he were obliged either to take the statement of every passenger that the office was for some part of the hour closed, or reject it at his peril, in case the statement should prove to be true, the provision requiring the purchase of tickets in advance of entering in the trains would entirely fail. In determining the unlawfulness of the act of the conductor, we must consider the common course of business of the country, and it seems to me fairly plain that the rule laid down in the courts below would be unreasonable and inconsistent with the ordinary and proper methods of conducting the transportation of passengers on railroads. If the conductor had attempted to exact as fare a sum in excess of that which by law he was, *prima facie*, entitled to demand, a very different question would be presented. In such a case I would agree with Judge Bartlett that the passenger would be justified in resisting an attempt to eject him from the train, and that the good faith or ignorance of the conductor would not relieve the defendant from liability.

Bartlett, J., dissenting:

The material facts are undisputed. The plaintiff arrived at the depot of defendant at Oriskany on the morning of a certain day at 8:50 or 8:53 to take the 9:01 train for Utica. From the time of plaintiff's arrival

until the departure of the train the ticket agent was absent from his office, and no opportunity was afforded plaintiff to purchase a ticket. The plaintiff took a seat in the train, and, when the conductor asked for his ticket, stated to him the facts accounting for its nonproduction, being corroborated by two friends. The plaintiff thereupon tendered the regular fare to the point of destination, but the conductor insisted on collecting the 5 cents extra imposed by the statute as a penalty for failing to purchase a ticket at the station. The plaintiff refused to pay the penalty and the conductor, against his protest and resistance, and with violence, ejected him from the train at Whitesboro, a station between Oriskany and Utica. The plaintiff thereupon brought this action against the defendant to recover damages for assault and battery.

We have thus presented a not unusual situation, arising between the common carrier and its passenger, involving the single legal question as to which party acted within legal right. If plaintiff failed to purchase a ticket before entering the train, opportunity having been afforded him to do so, he was liable to pay the statutory penalty of extra fare, and, refusing to do so, his ejection from the train was proper. On the other hand, if the defendant, by its act, rendered it impossible for the plaintiff to procure a ticket, his ejection from the train was wrongful, and this action lies. The argument on behalf of the defendant and appellant is, in brief, that the plaintiff should have paid the extra fare penalty, or left the train when requested to do so by the conductor, relying in either event upon his legal remedy; that the violence and indignity visited upon the plaintiff were of his own seeking, and he cannot recover damages therefor. This is not the law. The plaintiff and defendant were each bound in the emergency to determine the character of his or its legal rights, as it frequently happens that parties drifting into a legal controversy are driven to decide this question at their peril.

Much has been said as to the good taste of plaintiff in resisting so slight an invasion of his legal rights as was involved in the collection of the extra fare penalty. The matter of good taste is wholly aside from the questions presented by this appeal. Courts do not sit to enforce duties of imperfect obligation. As to the extent the rights of the person were invaded in this case was a question very properly submitted to the jury, and the plaintiff received at their hands a substantial verdict. We agree with and adopt the prevailing opinion of the learned appellate division.

The judgment appealed from should be affirmed, with costs to the plaintiff.
62 L. R. A.

Martin and Vann, JJ., concur with **Bartlett, J.**

James N. VEAZEY, Appt.,
v.

Henry ALLEN et al., Respts.

(173 N. Y. 359.)

1. A referee's finding in an action for an accounting of the profits of a contract, that defendants are entitled to judgment dismissing the complaint, and directing judgment to be entered accordingly, upon the ground that the contract is contrary to public policy and void, is simply a nonsuit, and entitles plaintiff to have it reviewed in the light of the facts and inferences most favorable to him.
2. Enforcement of contracts clearly repugnant to sound morality and civic honesty will be denied by the courts on the ground of public policy.
3. A contract to share the profits of a "short" sale of the stock of a corporation, the shares to meet which are to be purchased at a decline anticipated because of a legislative investigation of its affairs with one about to bring such affairs to the attention of the legislature with the intention of impairing the reputation of the corporation for the protection of his own business, in consideration of his furnishing advance information as to the probable course and development of the investigation, is void as contrary to public policy.

(February 10, 1903.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment entered in the office of the clerk of New York County upon the report of the referee dismissing the complaint in an action brought to compel an accounting of a speculation in stocks. *Affirmed.*

Statement by Werner, J.:

In this action the plaintiff seeks to compel the defendants to account to him for certain profits alleged to have been made by the latter in speculating in shares of the capital stock of two corporations known as the Distilling & Cattle Feeding Company and the American Sugar Refining Company. The defendants were copartners engaged as stockbrokers under the firm name of Henry Allen & Co., in the city of New York. The plaintiff's claim, briefly stated, is that the defendants, in consideration of his supplying them

NOTE.—As to validity of contract for services to procure legislation, or influence governmental action, see, in this series, *Houlton v. Dunn*, 30 L. R. A. 737, and *note*; *Houlton v. Nichol*, 33 L. R. A. 166; *Critchfield v. Bermudez Asphalt Paving Co.* 42 L. R. A. 347; and *Richardson v. Scotts Bluff County*, 48 L. R. A. 294.

with information concerning an investigation into the affairs of the corporations referred to, which he was to procure to be made by the United States Congress, would sell the stocks of those corporations, buy them again at a lower price,—the decline in price being caused by the congressional investigation,—and divide with him the profits so made. At the end of the plaintiff's case, the referee before whom the case was tried, upon motion of counsel for the defendants, dismissed the complaint on the ground that the contracts set forth therein were void as against public policy. The appellate division has affirmed the judgment entered upon that decision.

In 1891 the Distilling & Cattle Feeding Company was organized. This corporation was commonly known as the "whisky trust." Its chief business was the manufacture and sale of alcoholic liquors. It appears from the record that this company, instead of manufacturing these liquors by the ordinary processes, made them by mixing white spirits with various essences, syrups, oils, and other deleterious substances, in such a way that liquor of any kind, color, and apparent age could be produced upon demand. Its business was soon extended over a great part of this country, being transacted through distributing agents located at various commercial centers. These agents sold the products of the company on what was called a "rebate plan," which consisted in selling to customers on an agreement that, if they would not deal in goods of any other concern which competed with the whisky trust, they would receive a rebate or discount upon the price paid at the end of six months. This manner of transacting business soon became a serious menace to the business of those concerns which dealt in what was known as "straight goods;" that is, manufacturers of alcoholic liquors manufactured and disposed of in the ordinary way. Its effect was also to throw many traveling men employed by independent competitors out of employment. In the language of the plaintiff, "it had driven many men off the road." At that time the plaintiff was employed as a traveling salesman by the firm of Tullidge & Co., of Cincinnati, who were manufacturers of "straight" whisky. He and his employers were interested in checking the growth of the business of the whisky trust and shutting it out of the market. Plaintiff had been connected with the whisky business for a number of years, and had also been in the essential oil business, and was thoroughly conversant with the details of both. Almost from the inception of the so-called whisky trust he had been agitating the question of how to check its encroachments upon the business of the dealers in "straight goods." He had consulted with many persons upon the subject, 62 L. R. A.

and had been considering the plan of going to Washington to see if he could accomplish his object through the Federal authorities.

In 1892 the plaintiff became acquainted with Judge Veazey, a member of the interstate commerce commission, and his son-in-law, Walton. During that year plaintiff discussed with Walton the subject of a congressional investigation into the affairs of the whisky trust, and the probable effects of such an investigation upon the price of the stock of that corporation. Walton suggested to plaintiff that there might be some pecuniary benefit to plaintiff from such an investigation, and that he could introduce him to some persons in New York who could help him. In pursuance of this suggestion, the plaintiff went to New York, and was there introduced by Walton to a lawyer by the name of Flagg. The latter told plaintiff that there would probably be an opportunity to make considerable money out of the decline of the Distilling & Cattle Feeding Company's stock, providing that the representations he made in regard to that company and its methods were true; that they should be exposed; and that he thought it would be well for the plaintiff to consult some broker in New York. Soon after this conversation, which took place at Flagg's house, and on January 5, 1893, the latter introduced the plaintiff to the defendant Allen at the New York Club. Plaintiff told Allen that he thought he would bring about a congressional investigation into the affairs of the Distilling & Cattle Feeding Company, and that he would furnish him with all information in connection with that investigation that would tend to affect the stock of that company. Allen asked for information concerning the company, and plaintiff told him about its operations. Allen replied that, if the facts regarding the operation of the business of the trust were as represented by the plaintiff, and proved and publicly developed, it would undoubtedly result in seriously affecting the market value of that stock on the stock market; and he suggested that there would be an opportunity for the plaintiff to make some money, in giving him information relative to the possible action taken in Washington. Allen requested plaintiff to furnish him with any information he had, or that might come to his knowledge, affecting or tending to affect in any way the value of the stock of the Distilling & Cattle Feeding Company. Plaintiff thereupon asked Allen how he proposed that plaintiff should make any money. Allen replied that if the plaintiff would furnish him with information regarding that matter, when they proposed to introduce the resolution, and any subsequent steps that were taken in that matter in Washington, he would sell 3,000 shares of

the stock of that company when they were ready to begin investigation over there, without requiring plaintiff to put up any margin, and that Allen would return to the plaintiff the profits which would accrue from the sales of such stock. Plaintiff accepted this proposition, and testified that Allen stated to him that in making it he was acting on behalf of the firm of Henry Allen & Co. Plaintiff thereupon proceeded to Washington, where he was introduced to Mr. Burrows, a member of the House of Representatives, through Judge Veazey and Walton. He succeeded in interesting Mr. Burrows in the matter by fully informing him of the methods employed by the Distilling & Cattle Feeding Company in conducting its business, and demonstrated to him, by actual experiments, its method of producing different kinds of liquors by the use of the deleterious essential oils and compounds above described. Plaintiff talked with other members of Congress, and through his efforts Mr. Burrows, on January 13, 1893, introduced a resolution in the Federal House of Representatives calling for an investigation into the affairs of the Distilling & Cattle Feeding Company. This resolution was finally referred to a subcommittee of the judiciary committee of the House, before which hearings were had, commencing on February 4, and continuing at intervals until February 27, 1893, when the last hearing was had. Plaintiff appeared as a witness before the subcommittee and there gave testimony in connection with which he again demonstrated by actual experiments the methods employed by the Distilling & Cattle Feeding Company in producing its goods, and described its mode of conducting its business. He not only appeared as a witness himself, but suggested the names of other witnesses, attended during nearly all the hearings, supplied information to the committee from time to time, and did what he could to promote and continue the investigation. He was in fact the prosecuting witness, and was referred to as such by the chairman of the subcommittee.

Subsequent to the introduction of the resolution authorizing the congressional investigation, it was amended so as to give the committee power to investigate the affairs of all "trusts" doing business in restraint of trade, and under this amendment the affairs of the American Sugar Refining Company were inquired into somewhat, and plaintiff suggested witnesses and took some part upon this branch of the inquiry. In a letter written June 27, 1893, to the president and governing committee of the New York Stock Exchange, the plaintiff stated that, pursuant to his agreement with Allen, he had instituted this investigation, and, at his own ex- 62 L. R. A.

pense and by his own efforts, had furnished the testimony for the investigation, with the result that there was an immediate fall in price of the stock of said corporation. In the same letter the plaintiff stated that after January 17, 1893, he and Allen agreed to proceed upon the same basis against this stock; that further efforts were made by him, resulting in a further decline of the stock; and that on the 1st of February, 1893, the arrangement was continued as before. Again, in the same letter, the plaintiff stated that during the month of February, 1893, a heavy decline occurred in said stock, and that Mr. Allen then desired him, in addition, to aid in breaking the market in sugar, and would give him one half the profits which might result from the effort; that, pursuant to this agreement, he set such measures at work as were necessary, with the result that sugar declined heavily.

The record shows that, between the date of plaintiff's going to Washington, about January 5, 1893, and March 7th following, he was in almost constant communication with the defendants, by telegraph, telephone, mail, and personal interviews. In some of his telegraphic despatches he used a cipher code furnished him by defendants. From these communications it appears that plaintiff kept the defendants well supplied with information concerning the success of his efforts in bringing about the investigation, and the progress of the proceedings before the subcommittee, both in regard to the affairs of the distilling company and the American Sugar Refining Company. Many replies to these communications were received by him from the defendants, advising him of the condition of the stock market, and requiring further information. On January 17, 1893, plaintiff received a letter from Allen inclosing a certificate of deposit for the sum of \$6,237.50 for himself and Walton, whom the plaintiff had employed to aid him in his operations. This letter stated that the amount inclosed was the profit on the operations in the stock of the Distilling & Cattle Feeding Company. On or about February 1, 1893, plaintiff received from Allen personally a further sum of \$10,700.

After the first agreement of defendants to sell 3,000 shares of the stock of the distilling company for plaintiff's benefit, as above set forth, and on or about January 17th, defendants entered into another agreement with plaintiff to sell 3,000 more shares of stock on the same terms. On or about February 1, 1893, the defendants entered into a further agreement with plaintiff by which he was to receive one half of the profits made by them in their operations, not only in the stock of the distilling company, but also in the

stock of the American Sugar Refining Company. It is admitted that the defendants on the 13th and 14th of January, 1893, sold 3,000 shares of the distilling company's stock, and on the 24th and 25th of the same month they sold 3,000 shares more of the same stock, and that 6,000 shares were purchased between January 16th and 31st. It is also admitted that the defendants had transactions in the stock of the American Sugar Refining Company between February 1 and March 4, 1893.

The complaint set forth four separate causes of action: The first cause of action sets forth the facts relating to the sale by the defendants, for the plaintiff's benefit, of the 3,000 shares of stock of the Distilling & Cattle Feeding Company, and it is alleged that the \$6,237.50 received by plaintiff did not represent all the profit arising therefrom. The second relates to the sale of the second 3,000 shares of the same stock, and alleges that the \$10,700.00 received by plaintiff did not represent all the profit on such sale. The third relates to the further operations of the defendants in the same stock, wherein plaintiff was to have one half of the profits, which are claimed to have amounted to upwards of \$500,000. The fourth is, in substance, the same as the third, except that it relates to the operations in the stock of the American Sugar Refining Company. The answer puts in issue all the material allegations of the complaint. As separate defenses, it sets up settlement of accounts and payment, and that the contracts set forth in the complaint are illegal and void because they contemplated an agreement by plaintiff to solicit and influence members of Congress to pursue an investigation into the affairs of the Distilling & Cattle Feeding Company, in which plaintiff's sole object was to cause a decline in the value of the stock of that company.

Messrs. Sidney G. Stricker and Herbert R. Limburger, with **Messrs. Hoody, Lauterbach, & Johnson**, for appellant:

The agreements sued upon were legal, and it was error to hold them void as against public policy, for the reasons that: (a) The contracts did not contemplate the use of any unlawful means on the part of Veazey in persuading Congress to investigate the whisky trust; (b) nor did the fact that Veazey was to be paid in profits to be made by selling stocks short vitiate the agreement; (c) nor was the investigation sought for any unlawful purpose, its object being merely to elicit the truth regarding the practices of the whisky trust.

In the absence of any proof of corrupt intent, the courts are bound to presume that the intentions of the parties were honest.
62 L. R. A.

Dowley v. Schiffer, 30 N. Y. S. R. 869, 13 N. Y. Supp. 552; *Ormes v. Dauchy*, 82 N. Y. 443, 37 Am. Rep. 583; *Maloney v. Nelson*, 12 App. Div. 545, 42 N. Y. Supp. 418; *Curtis v. Gokey*, 68 N. Y. 300; *Chesebrough v. Conover*, 140 N. Y. 382, 35 N. E. 633; *Dunham v. Hastings Pav. Co.* 56 App. Div. 244, 67 N. Y. Supp. 632; *Southard v. Boyd*, 51 N. Y. 177; *Cummins v. Barkalow*, 1 Abb. App. Dec. 479; *Milbank v. Jones*, 127 N. Y. 370, 28 N. E. 31; *Trist v. Child*, 21 Wall. 441, 450, *sub nom. Burke v. Child*, 22 L. ed. 623, 624.

The undertaking of the plaintiff being merely to elicit the truth regarding the practices of the whisky trust, and not to secure legislation, it cannot in any aspect be held to be contrary to public policy.

Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 41 N. E. 188; *New York Ice Co. v. Cousins*, 23 App. Div. 560, 48 N. Y. Supp. 799.

The contracts having been executed, and their object having been accomplished, the defendants are not in a position to set up their alleged illegality.

Faikney v. Reynous, 4 Burr. 2069; *Petrie v. Hannay*, 3 T. R. 419; *Planters' Bank v. Union Bank*, 16 Wall. 483, 500, 21 L. ed. 473, 480; *Brooks v. Martin*, 2 Wall. 70, 17 L. ed. 732; *National Wall Paper Co. v. Hobbs*, 90 Hun, 288, 35 N. Y. Supp. 932; *Noble v. McGurk*, 16 Misc. 461, 39 N. Y. Supp. 921; *Wann v. Kelly*, 2 McCrary, 628, 5 Fed. 584; *McBlair v. Gibbes*, 17 How. 237, 15 L. ed. 134; *Brooks v. Martin*, 2 Wall. 70, 17 L. ed. 732.

Messrs. Charles F. Brown and John J. Crawford, with **Mr. Charles H. Brush**, for respondents:

The agreements were contrary to public policy, and void.

Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 507; *Oggsell v. New York, N. H. & H. R. Co.* 103 N. Y. 10, 8 N. E. 537; *Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 18, 9 L. R. A. 711, 25 N. E. 246; *Booth v. Rome, W. & O. Terminal R. Co.* 140 N. Y. 267, 24 L. R. A. 105, 35 N. E. 592.

A contract which has for its object the depreciation of the property of others is void.

Greenhood, Pub. Pol. rule 194; *Fremont v. Stone*, 42 Barb. 169; *Adams v. Paige*, 7 Pick. 542; *Lumley v. Gye*, 2 El. & Bl. 216.

It is not essential to show that the wrongful act contemplated by the contract was directed against some particular individual.

Providence Tool Co. v. Norris, 2 Wall. 45, 54, 55, 17 L. ed. 868, 870, 871; *Mills v. Mills*, 40 N. Y. 543, 100 Am. Dec. 535; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Richardson v. Crandall*, 48 N. Y. 348; *Greenhood*, Pub. Pol. rule 6.

The standard for official conduct, and for

the conduct of citizens in their dealings with legislators or public officials, fixed by the law, is a high one.

Trist v. Child, 21 Wall. 450, *sub nom. Burke v. Child*, 22 L. ed. 624; *Lyon v. Mitchell*, 36 N. Y. 237, 93 Am. Dec. 502; *Cary v. Western U. Teleg. Co.* 47 Hun, 615; *Meguire v. Corvine*, 101 U. S. 108, 25 L. ed. 899.

Werner, J., delivered the opinion of the court:

Before proceeding to discuss the question whether the contract under which the plaintiff makes his claim is void as being repugnant to public policy, it may be well to fix the point of view from which it is to be considered. The learned counsel for the appellant asserts that it makes a vital difference in the case whether the referee's decision is to be regarded as a determination upon the merits, or whether it is to be treated simply as a nonsuit. It appears that, after the plaintiff had rested his case, counsel for the defendants moved for a dismissal of the complaint on various grounds; one of them being that the contract testified to by the plaintiff was void as against public policy. After this motion had been made and discussed, the referee twice adjourned the further hearing of the case, when he made his decision in the short form, in which he finds and decides "that the defendants are entitled to judgment herein against the plaintiff, dismissing the plaintiff's complaint," and directs judgment accordingly, "upon the ground that each of the agreements set forth in the complaint was and is contrary to public policy and void, and that the plaintiff, therefore, has no cause of action against the defendants upon either of said agreements." As the "agreements" referred to in the decision are all of the same character, and involve but one question, we shall refer to it as a single contract. In form, and according to the decided cases, the referee's decision was simply a nonsuit, and the plaintiff is entitled to have it so treated. *Scofield v. Hernandez*, 47 N. Y. 313; *Place v. Hayward*, 117 N. Y. 487, 23 N. E. 25; *Raabe v. Squier*, 148 N. Y. 81, 42 N. E. 516. Such a decision gives a defeated plaintiff the right to have it reviewed in the light of the facts and inferences most favorable to him. In the case at bar this question is one of form, rather than substance, because in either event the ultimate question to be decided is whether the contract made by the parties under the conditions and circumstances testified to by the plaintiff is valid or void.

This contract is assailed on the ground of public policy. Lord Brougham defined "public policy" as "that principle of the law which holds that no subject can lawfully do

that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law." In many of its aspects, the term "public policy" is but another name for public sentiment; and, as that is often transitory or shifting, it lacks the permanency upon which fixed principles of law are, or should be, based. There are, however, other phases of public policy which are as enduring and immutable as the law of gravity. One of them is that, as applied to the law of contracts, courts of justice will never recognize or uphold any transaction which, in its object, operation, or tendency, is calculated to be prejudicial to the public welfare. That sound morality and civic honesty are corner stones of the social edifice is a truism which needs no re-enforcement by argument. It may, therefore, be taken for granted that, whenever our courts are called upon to scrutinize a contract which is clearly repugnant to sound morality and civic honesty, they need not look long for a well fitting definition of "public policy," nor hesitate in its practical application to the law of contracts. This is no new doctrine, for it was the law in the time of Lord Chief Justice Wilmot, when he said: "It is the duty of all courts of justice to keep their eye steadily upon the interest of the public, even in the administration of commutative justice; and when they find an action is founded upon a claim injurious to the public, and which has a bad tendency, to give it no countenance or assistance *in foro civili*." *Low v. Peers*, Wilmot's Notes, 378.

Let us now look at the contract which the plaintiff seeks to enforce in this action. It is, in effect and substance, a contract to pay the plaintiff the whole or a part of the profits resulting from speculations in the stock of a corporation, undertaken by the defendants pursuant to advance information furnished them by the plaintiff as to the probable course and developments of a congressional investigation into the affairs and methods of said corporation, instituted and encouraged by the plaintiff as a prosecuting witness, and in other ways. The investigation was intended to, and did, seriously impair the reputation of said corporation, and resulted in a substantial decline in the market price of its stock. This was the end aimed at in said contract. The plan agreed upon between the plaintiff and the defendants contemplated the sale, at a given price, of stock which they did not have, but which they expected to be able to purchase at a lower price in consequence of the investigation referred to. The anticipated profit was to be the difference between the selling and

purchasing price of the stock. The allegations of the complaint suggest the great extent to which the plaintiff believed he was to be benefited by the defendants' operations under this contract, and the answer admits enough to prove that plaintiff's interest in it was at least a substantial one. The fidelity and zeal with which the plaintiff performed his part of the contract is clearly shown by the voluminous telegraphic and written correspondence which appears in the record. In its final effect, we have here a case in which it is alleged and proved that the consideration of the contract sought to be enforced is the fruit of a legislative investigation instituted, prosecuted, and encouraged by the plaintiff. That such a contract is one which, in its object, operation, and tendency, is calculated to be prejudicial to the public welfare, ought not to be doubted for a moment. Why? Not because the plaintiff was in fact necessarily dishonest or corrupt in instituting and prosecuting the investigation, nor yet because the charges preferred against the offending corporation were not true, but because the plaintiff voluntarily acquired a pecuniary interest in the result of the investigation, which might subject not only him, but, through him, others, to the temptations and allurements which human experience has proved to be potent in sacrificing sound morality and honesty to that greed and cupidity which not infrequently beget perjury, bribery, and other moral delinquency incompatible with the public weal.

But just here counsel for the plaintiff interjects the suggestion that he is entitled to all the favorable inferences that may be drawn from the testimony; that, since his efforts to procure an investigation were begun before the making of the contract in suit, it is not to be presumed that he was or could be improperly influenced, or that he would be led to improperly influence others by the financial interest which he subsequently acquired in the results of the investigation. It is true that, under the rule entitling the plaintiff to all the favorable inferences that may legitimately be drawn from the testimony we must assume that plaintiff's first efforts to procure a legislative investigation of the corrupt and evil methods of the whisky trust were innocent and commendable, but it is equally true that before his laudable efforts had borne any fruit he changed his status from that of a disinterested citizen to that of an interested party. His original purpose, to protect and preserve the legitimate business with which he had long been identified, against the unlawful and insidious encroachments of an unscrupulous corporation, was commendable and worthy. Had he persevered in his first

designs and motives, their effect upon the public would have been above criticism. But favorable inferences cannot stand against positive testimony. It is in evidence that, before the plaintiff's early efforts to obtain governmental aid had promised any results, he entered into the contract in suit. Over his own signature the plaintiff declared his inability to proceed without financial aid, and later on, in the same unequivocal manner, he admitted that, pursuant to the contract under discussion, he instituted the investigation, at his own expense and efforts furnished the testimony, and procured the result which eventuated in the profit which he now seeks to recover. It is, as the referee herein has well said, "the right of every citizen to petition a legislative body in respect to any existing matter or condition of things within its jurisdiction, which may be prejudicial to his personal rights or interests, or which he may deem to be a public evil, and to lay before the body, by proper means and in a proper manner, the grounds of his complaint, and his reasons for demanding its intervention." Had the plaintiff maintained the attitude of such a petitioner, he could not now be criticised. But when he has voluntarily abdicated that position for one in which his every movement is coupled with an interest that cannot be disassociated from ultimate gain or loss, depending in some degree upon the success of his own efforts, it is not difficult to see that he is no longer purely an advocate for the public good, but an interested party, seeking to further his own ends by means that may be, if they are not in fact, immoral, corrupt, and destructive of public welfare.

Although there are no cases directly in point, we think the principle underlying these views is sustained by many authorities. In *Mills v. Mills*, 40 N. Y. 546, 100 Am. Dec. 535, the action was brought to enforce specific performance of a contract to convey land, the consideration for which was the plaintiff's agreement to give all the aid in his power, and to use his interest, influence, and exertions to procure the passage of a law granting to the defendant and others the right to build and operate a railroad. In holding the contract void, this court said: "It is not necessary to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper reports should be had. It is enough that the contract tends directly to those results. It furnishes a temptation to the plaintiff to resort to corrupt means or improper devices to influence legislative action." In *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678, it was held that an agreement between parties tending to lessen rivalry in bidding upon public

work was void as against public policy, even though it did not appear that the agreement was actually detrimental to public interests. In *Richardson v. Crandall*, 48 N. Y. 348, the plaintiff was engaged in furnishing men to fill the quotas of certain counties for military service under a call from the President. The defendant, as provost marshal, exacted from the plaintiff a bond that the men furnished would not desert. It was held that any discretion which the provost marshal had should have been exercised, uninfluenced by the security exacted, and the taking of the pledge was, therefore, against public policy. To the same effect is *Providence Tool Co. v. Norris*, 2 Wall. 54, 17 L. ed. 870, where it was held that an agreement to procure from the government a contract for firearms was offensive to public policy, and therefore void. So, a contract for "lobby services," to secure the passage of a bill providing for the payment of a claim, has been held void by the Supreme Court. *Trist v. Child*, 21 Wall. 441, *sub nom. Burke v. Child*, 22 L. ed. 623. In *Meguire v. Corwine*, 101 U. S. 108, 25 L. ed. 899, it was held that a contract between A and B, whereby the former agreed to secure the appointment of the latter as special counsel in certain government cases, and to assist him in the defense thereof, upon the consideration that A should have one half of the fee received by B, was contrary to public policy. To the same effect is *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539.

The authorities relied upon by the plaintiff (appellant) are distinguishable from the case at bar and those cited in support of the judgment herein. It is a fundamental principle of the common law that what a person may lawfully do for himself he may do through his agents and servants. Early in the history of this court that principle was applied to a contract by which one party agreed, for compensation, to aid another in prosecuting a claim against the state. This court said: "A party who has a claim against the state may employ persons to present and urge it, with proofs and arguments before the tribunal authorized to act upon it. This is not within the principle which renders agreements to compensate a person for privately soliciting individual members of the legislature, or other public bodies, to act in favor of a claim or measure, void." *Sedgwick v. Stanton*, 14 N. Y. 289. Similar cases in the supreme court are *Russell v.* 62 L. R. A.

Burton, 66 Barb. 539, and *Cory v. Western U. Teleg. Co.* 20 Abb. N. C. 337. In *Chesebrough v. Conover*, 140 N. Y. 382, 35 N. E. 633, which is strongly relied upon by the plaintiff, this court reiterated the rule that "it is the right of every citizen interested in any proposed legislation to employ, and agree to pay, an agent to draft a bill, and fairly and openly to explain it to a legislative committee or any member of the legislature, and ask to have it introduced; and a contract which does not call for more, and services under it which do not go further, are not against policy." In that case there was, however, a question of fact as to what the agreement was, and that question was fairly submitted to the jury, under proper instructions. By their verdict for the plaintiff the jury decided that the contract was one for purely professional services, and it was in the light of this finding that the judgment was sustained, although this court took occasion to say: "If the plaintiff was employed to render what are commonly called lobby services in procuring the legislation desired by the defendant, then he should have been defeated in his action. Such contracts are condemned as against public policy, and the rules applicable to them are laid down in many decisions;" citing cases.

The foregoing list of cases might be swelled by many others to illustrate the variety of conditions under which questions of public policy have had to be considered in determining the validity of contracts; but enough have been cited to show how different is the case at bar from all others that we have seen, and how obviously applicable to the contract in suit is the principle of public policy which forbids the enforcement of such contracts as may, in their nature, be injurious to the public. This is not the case of a person employed in a professional capacity to work openly and publicly in a matter of legislative concern, but of a man who agrees to furnish the testimony for a legislative investigation, in exchange for a share of the profits which such an investigation will produce to one who is favored with inside and advance information as to its probable progress and effect.

The judgment below should be affirmed, with costs.

Parker, Ch. J., and Gray, Haight, Martin, and Cullen, JJ., concur. Bartlett, J., not voting.

NEBRASKA SUPREME COURT.

E. ZABRISKIE

v.

GREATER AMERICA EXPOSITION COMPANY *et al.*, Appts.

(.....Neb.....)

*I. A mechanic's lien attaches to a leasehold interest and to buildings erected by one tenant and sold to another, who has acquired a lease of the same interest, and this notwithstanding the removal of the buildings at the end of the term is expressly required by the lease.

(February 17, 1903.)

*Headnote by LOBINGIER, C.

NOTE.—*Mechanics' liens upon buildings distinct from the land.*

- I. Scope, 369.
- II. Introduction, 369.
- III. In general, 369.
- IV. Erection upon land of a stranger, 370.
- V. Extension of erection upon adjoining land, 378.
- VI. Erection by husband upon wife's land, 374.
- VII. Erection upon homestead lands, 375.
- VIII. Erection upon leasehold estates, 375.
- IX. Erection by vendee of the land under a contract of purchase, 380.
- X. Erection upon land vested in third parties by deed of trust, 381.
- XI. Failure of description of the land in affidavit of claim, 382.
- XII. Summary, 382.

I. Scope.

This note aims to include all cases of the demand or allowance of a mechanic's lien upon a building without extending it to any interest in the land. Further, cases of the nature of *ZABRISKIE v. GREATER AMERICA EXPOSITION CO.*, discussing the right to attach the lien to buildings erected by a lessee and to his interest in the leased lands, are also included; but the attempt has been to confine the collation of decisions along this line to those where it is apparent that the lienor relied upon the building as his real source of reimbursement, the purchaser at the sale having the right to remove the structure from the premises, and where the question as to the right to thus practically reach a building without sensibly affecting the land upon which it is located arises in some degree. Those decisions to the effect that, where a prior encumbrance exists as to the land, the lienor may enforce his lien only against the building constructed by him, are not included, for the reason that they go to the question of the priority or manner of enforcement of the lien, rather than to its inherent nature.

II. Introduction.

Mechanics' liens, which are purely a creation of statute in the United States, were unknown either at common law or in equity, and no similar legislation is found in England. The principle of the *L. R. A.*

APPEAL by defendants from a decree of District Court for Douglas County in favor of plaintiff in an action brought to foreclose a mechanic's lien. *Affirmed.*

The facts are stated in the opinion.

Messrs. Woolworth & McHugh and T. J. Mahoney, for appellants:

The buildings in question are not properly subject to mechanics' liens.

Progress Press Brick & Mach. Co. v. Gratiot Brick & Quarry Co. 151 Mo. 501, 52 S. W. 401; *Springfield Foundry & Mach. Co. v. Cole*, 130 Mo. 1, 31 S. W. 922.

The magnitude of the improvements erected for trade purposes does not alter or affect their character as trade fixtures.

principle upon which the statutes are made, and their object, are to subject land to a lien for the material and labor expended in the construction of buildings which have, by being placed upon the land, become a part thereof. Thus, it follows that, where the building and land are not owned by the same party, or are in any way separate in interest, under the strict principle according to which the statutes were framed the lien must fail, which would, of course, very often operate as a hardship to the mechanic. Legislation has been adopted in some instances to meet these exceptional conditions, and decisions made thereunder, as well as those made by the courts in the absence of such legislation, construing and applying the general mechanics' lien laws to the exceptional facts, are, very largely, the material of this note.

III. In general.

In discussing generally the mechanics' lien law, and holding specifically that a floating dry dock is not a building or fixture within its meaning, the court, in *Coddington v. Beebe* (1863) 31 N. J. L. 477, states that it was because of the increased value of the land in the hands of the owner by reason of the building, that the lien was given by statute, and, therefore, if the land and building by any chance become separated, the lien is lost on both,—on the land because it has lost the building and increased value thereby given to it, and on the building because it is separate from the land. In regard to trade fixtures, the court says: "If the lien attaches to it while it is still a fixture, and so land, the special *fi. fa.* sells the building and the interest in the land of the owner of the building, and the purchaser under it can remove it, in the same manner as the owner could before the lien attached, by virtue of its being a trade fixture. But, if the owner of the building remove it as a trade fixture before the lien attaches, the lumber merchant cannot fasten it on anybody else's land. He cannot attach his lien to the land because the building is not there, nor to the building because the land liable to the lien is not there."

But in *Steigleman v. McBride* (1855) 17 Ill. 300, where the building was removed from the ground upon which it was originally erected, and was afterwards repaired upon the new loca-

Conrad v. Saginaw Min. Co. 54 Mich. 249, 52 Am. Rep. 817, 20 N. W. 40; *Vendome Turkish Bath Co. v. Schettler*, 2 Wash. 457, 27 Pac. 76; *Carroll v. Shooting the Chutes Co.* 85 Mo. App. 563.

Messrs. Hamilton & Maxwell, for appellee:

The buildings in question were subject to mechanics' liens.

Neb. Comp. Stat. chap. 54, § 1; *Stevens v. Burnham*, 62 Neb. 672, 87 N. W. 546; *Moore v. Vaughn*, 42 Neb. 696, 60 N. W. 914; *Waterman v. Stout*, 38 Neb. 397, 56 N. W. 987; *Henry & C. Co. v. Fisherdict*, 37 Neb. 207, 55 N. W. 643; *Pickens v. Plattsmouth Land & Invest. Co.* 31 Neb. 585, 48 N. W. 473; *Hathaway v. Davis*, 32 Kan. 693, 5 Pac. 31; *Choteau v. Thompson*, 2 Ohio St. 114.

tion, it was held that the liens, being against the land, were enforceable, not against the buildings, but against each of the premises to the extent of the repairs done upon each.

In Kentucky, by the act of 1831, the mechanic's lien attached, alone, to the building constructed or repaired for which materials had been furnished; but the act was amended by one of 1834, extending the lien to the interest of the employer in the premises upon which the building so constructed or repaired was situated. *Orr v. Batterton* (1853) 14 B. Mon. 100.

The foreclosure of a mechanic's lien upon the building alone was held erroneous in *Early v. Burt* (1886) 68 Iowa, 716, 28 N. W. 35, when there did not appear to be any prior lien on the land; as, by the sale of the building alone, and its removal from the premises, the owner's right to redeem from the sale would be defeated.

A mechanic's lien was attempted to be had only upon a mill, tramway, boarding house, and other structures belonging to a mining claim, in *Williams v. Mountaineer Gold Min. Co.* 102 Cal. 134, 34 Pac. 702, 36 Pac. 388, but the court held that the lien should have been taken out on the whole claim, under a statute providing that "any person who performs labor in any mining claim or claims has a lien upon the same, and the works owned and used by the owners for reducing the ores from such mining claim or claims, . . . or materials furnished," etc.

In deciding that a justice of the peace has not jurisdiction to enforce a mechanic's lien because real estate is involved, the court, in *Cotton v. Penzel* (1884) 44 Ark. 484, says that it was the obvious design of the mechanics' lien statute that the lien should attach in every instance to real estate, and not reach mere personal property, and that it is necessary that the person who builds should have some estate in the land.

But in *Smith v. Phelps* (1876) 63 Mo. 588, it is said, *arguendo*, that "in the mechanics' lien law it seems to have been the intent of our legislature to protect the title of the mechanic to a reimbursement for his expenditure in money or labor on the house he builds, by giving him a right to the house, if all other means of remedy fail."

And, in holding that a lien may not be taken against land for work done in tearing down an old house, it is said in *Holzhour v. Meer* (1875) 62 L. R. A.

Lobingier, C., filed the following opinion:

This is a suit to foreclose a statutory lien for materials furnished and labor performed in repairing certain buildings of the Greater America Exposition at Omaha. The company which promoted and carried on this exposition acquired its interest in these buildings and the land whereon the same were situated through an instrument executed by a purchaser from the Trans-Mississippi & International Exposition, which had maintained a similar enterprise on the same site during the previous year. This instrument purported to pass "all the buildings, fences, trees, shrubs, plants, colonnades, booths, water and sewer pipes, electric plant, wires, appliances, appurtenances, . . . and also all right, title, and interest, includ-

59 Mo. 434: "A lien may be taken against buildings or improvements without the land, but it cannot be taken against the land alone unless these necessary attachments are upon it." These decisions, however, do not represent the present doctrine in Missouri, as shown by later cases in division XI.

Also, a mechanic's lien was allowed against the buildings in *Buchanan v. Smith* (1870) 43 Miss. 90, where there had been a bona fide sale of the premises to an innocent purchaser without notice, for a valuable consideration.

In *Hughes v. Torgerson*, 96 Ala. 346, 16 L. R. A. 600, 11 So. 209, by the judgment in an action against an administrator for a sum due for work and labor and seeking to enforce a mechanic's lien upon a building and lot, the lien was declared only on the building, and not on the lot. And it appeared that a statement, previously filed in the office of the judge of probate, also claimed a lien on the building only, and not on the lot. It was stated, merely, that, under the statute, this could be done, and that the lien declared could not extend beyond the claim as asserted in the statement filed.

A similar action and judgment were had in *May & T. Hardware Co. v. McConnell*, 102 Ala. 577, 14 So. 768.

IV. Erection upon land of a stranger.

The decisions are about evenly divided as to the right of a mechanic to a lien upon the building alone, when the land is owned by a third party. Those more strictly construing the statutes hold that there can be no lien apart from the land, unless express provision therefor is made by statute.

In *Belding v. Cushing* (1854) 1 Gray, 576, the court declares that the intent of the statutes providing for mechanics' liens was to provide the means for imposing, in behalf of laborers and mechanics, a lien upon real estate only, and not upon personal property upon which they have bestowed labor and personal service; that the lien is not to be upon either the land or building, but upon what they both together constitute, which is the real estate. And a mechanic was not allowed a lien upon either the building or land, where the structure was erected for one who did not own the land, and had no authority from the owner thereof to contract for the construction of the build-

ing leaseholds, of the said Trans-Mississippi and International Exposition to or in the said exposition grounds." But this grant was expressly made "subject to the contracts, agreements, and obligations of the Trans-Mississippi and International Exposition with the various property holders in the city of Omaha to restore to their original condition the grounds, buildings, and property taken possession of or occupied by the said Trans-Mississippi and International Exposition." The Greater America Exposition Company also entered into a lease for one year with the fee owner of the grounds on which the buildings were situated, by which it undertook: "That it will use said lands for exposition purposes only; that by and upon the expiration of the term herein limited it will refill in a thoroughly good

and substantial manner all excavations at any place and time made on said lands since the entry thereon of said Trans-Mississippi & International Exposition; that by and upon the expiration of the term herein limited it will remove from said lands all buildings and structures and all *débris* of every description whatsoever." One of the buildings in which the materials used for was used is thus described by a witness, and the description will apply generally to the buildings in controversy: "The power-plant building was constructed of heavy timbers as framework, and sheeted outside with corrugated iron, also roofed with corrugated iron; and the foundation of the building consisted of piling driven in the ground, and the foundation timbers fastened to the same. The floor was of wood construction,—that is, the ma-

ing. But the statutes in force at the time of this decision were followed by later ones, and the decision itself is expressly superseded by *Forbes v. Mosquito Fleet Yacht Club* (1900) 175 Mass. 436, 56 N. E. 615, *infra*, VIII.

The erection of a house upon a lot to which the owner of the house had no title was held, in *Underhill v. Corwin* (1854) 15 Ill. 556, to give no lien upon either the house or lot; and, consequently, the removal of the house to another lot, which the builder did own, was held to transfer no lien.

In *Huff v. Jolly* (1889) 41 Kan. 537, 21 Pac. 646, in holding that one having no interest in a lot cannot create a lien on the lot or building for materials furnished, the court says: "Under the statute, no lien attaches to the building unless the person with whom the contract is made has some interest or estate in the land on which it is situate. The lien is upon the realty with the building attached, to the extent of the ownership of the one who contracted for the construction of the building, and no further; and, if there is no ownership, there is no lien on either land or building."

Following *Fathman & M. Planing Mill Co. v. Christophel*, 60 Mo. App. 106, *infra*, VI., it was held, in State use of *Long-Bell Lumber Co. v. Halley* (1897) 71 Mo. App. 200, that, with the exceptions made by statute of improvements placed on leased or mortgaged premises under contracts with the lessee or mortgagor, there cannot be a mechanic's lien upon a building separate from the land. In this instance the building and land were owned by separate parties, without, so far as appearing, either of the relations above stated, as required by the statute, existing between them.

A building was erected by a father upon his own land, with his own money, designed for the use of his son, who made the contract and superintended the building, but had no legal interest therein or in the land. The material man attempted to enforce his lien against the contractor and the son. But the court says that the lien law manifestly contemplates that the party by whom a building is erected, and against whom the lien is to be enforced, shall have some estate or interest in the land, as owner, tenant, or otherwise, and the lien must operate, not only upon the building, but also upon the interest or estate of the owner thereof in the land 62 L. R. A.

upon which it is situated. *Babbitt v. Condon* (1858) 27 N. J. L. 154.

Arguendo, it was said in *Front Street Cable R. Co. v. Johnson* (1891) 2 Wash. 112, 11 L. R. A. 693, 25 Pac. 1084: "The lien is given upon the structure and the land upon which it is erected, and, unless there can be a lien upon the land, there can be none upon the structure." This, however, was the case of the construction of a street railway, the fee to the land upon which it was constructed being in the city.

A mechanic's lien was sought to be imposed upon the building only, for materials entering into its construction, in *Gull River Lumber Co. v. Briggs* (1900) 9 N. D. 485, 84 N. W. 340, under the claim that the state was the owner in fee of the land upon which it was situated, and that the person authorizing the erection of the building did so without any contract to that effect with the state, and was, therefore, not the "owner" of the land, within the meaning of the statute providing for a lien upon both the land and structure. But the court denied the relief asked for, holding that, under the existing Revised Statutes, the building alone could be sold and removed only in two cases: (1) When the interest in the land of the owner of the building is only a leasehold which becomes forfeited; and, (2) where there are prior encumbrances upon the land. It was stated that, under former laws, a plaintiff could always enforce his lien upon the building alone, and remove it from the land.

For a decision under the former statute, see *Mahon v. Surerns*, 9 N. D. 57, 81 N. W. 64, *infra*, VII.

The facts in *Dustin v. Crosby* (1883) 75 Me. 75, were, that the debtor made a verbal purchase of a parcel of land, took possession of it, and erected a building upon it for the materials for which two mechanics' liens were attempted to be enforced. One creditor attached the building as personal property, and the other attached the building, together with the land, as the property of the debtor. It was held that neither creditor got a valid attachment, because, upon the erection of the building, it became a part of the real estate of the vendor, since the legal title was still in him. The court pointed out that this was not a case of a building placed upon land by the permission of the owner of the land, with an understanding between the parties that the title to the structure is to remain in the

chinery part of it,—with heavy joists or sleepers covered with heavy lumber; and the boiler room was constructed, the flooring was of concrete or slag,—some kind of stone.

The foundations for the engines and dynamos were built of brick and concrete. There were excavations made in the ground to considerable depth, enough to make them perfectly suitable, and bolts extending up from the foundations imbedded in the concrete, and these bolts extending up over the frame of the engines and also the frame of the dynamos." A decree was rendered below finding that plaintiff was entitled to a lien as prayed, and from this the exposition company and its vendee, the Chicago House Wrecking Company, appeal.

It is contended by appellants that the exposition buildings "were merely trade fix-

tures;" that as personal property they were not subject to a mechanic's lien, but that they must have entered into and become a part of the realty. We are cited to cases from certain jurisdictions holding that there can be no such lien on a building distinct from the land. *Kellogg v. Littell & S. Mfg. Co.* 1 Wash. 407, 25 Pac. 461; *Belding v. Cushing*, 1 Gray, 576; *Coddington v. Beebe*, 31 N. J. L. 477. These cases appear to be greatly in the minority. "The general rule undoubtedly is that a lien may exist upon a building alone under certain circumstances." 20 Am. & Eng. Enc. Law, 2d ed. p. 284, where the authorities are set out *in extenso*. The Massachusetts case above cited was decided under a statute no longer in force. The present doctrine in that jurisdiction is thus stated: "In our opinion, this makes it

builder: that in this case no agreement of that kind appeared. The court said that the statute gives "a lien upon the realty if the debtor owns realty, and upon the building as personalty if the debtor owns the building only;" but, as above pointed out, he was held in this instance to own neither.

Similarly, it was held in *Sheer v. Cummings* (1891) 80 Tex. 294, 16 S. W. 37, that buildings erected upon land without the knowledge of the owner thereof become a part of the realty, and may not be removed by the mechanic in satisfaction of his lien.

So, where, by mistake, a dwelling, which ought to have been constructed on lot 5, was constructed on lot 6, the property of a third party, it was held, in *Smith v. Barnes* (1888) 38 Minn. 240, 36 N. W. 346, that no lien would lie, as to the house, against a mortgagee who, supposing the house was on lot 5, took a mortgage against the same, and, upon discovering the mistake, purchased lot 6, thereby acquiring title to the house which had been placed upon the land by the trespassers, who, therefore, had no rights against the owner of the land.

It was contended in *Tritch v. Norton*, 10 Colo. 337, 15 Pac. 680, that a mechanic's lien might be enforced against a building merely, under a statute giving to all persons performing work upon, or furnishing materials for, the building of another, "a lien on such structure, where the other has no ownership, interest, tenancy, or claim of, in, or to such land;" but, it appearing that the buildings had, by mistake, been commenced on lots belonging to a third party, whereupon the employer purchased the lots, paying for them with borrowed money, and executed a deed of them in trust to the lender as security for the sum borrowed, after which a new contract with the builders was entered into, under which the building was completed, it was held that the employer was not, when work under the new contract commenced, a person without ownership, interest in, or claim to, the land, but that he was the equitable owner thereof, and, as such, did not own the house as something distinct from the land, within the meaning of the statute, upon which a lien could take effect.

But a more liberal construction of the statute than is shown in the foregoing cases is given in many of the decisions, to the effect that the mechanic may have his lien upon the

improvement placed upon the land by him when it appears that the owner thereof is not also the owner of the land, on the principle that his lien is primarily upon the building, and includes the land only to the extent of the ownership therein of the owner of the building.

No attempt was made in *Lane v. Snow* (1883) 66 Iowa, 544, 24 N. W. 35, to establish a lien against the land, but the question was, in the words of the opinion: "Can the person who wrongfully makes improvements upon the land of another defeat a mechanic's lien upon the improvements, by showing that he had no right to enter upon the land, and was a trespasser?" It was contended that the right to a mechanic's lien could only be acquired by a contract with the owner of the land; but the court held that the lien as to the improvements could not be thus defeated,—that the lien may exist by contract with the owner of the improvements.

The doctrine of *Lane v. Snow*, 66 Iowa, 544, 24 N. W. 35, is recognized and approved in *Smith v. St. Paul F. & M. Ins. Co.* (1898) 106 Iowa, 225, 76 N. W. 676, merely by way of obiter, however, as the specific question does not arise.

Where it did not appear that one who built a house upon certain land possessed any title in the land, the lien was held to attach to the building in preference to all other liens; but the purchaser at the sale was held to acquire no title in the land,—only the privilege of removing the building therefrom within a reasonable time. *Samuels v. Shelton* (1871) 48 Mo. 444.

The words "owner or proprietor," in the statute requiring that, before there can be any right to enforce a mechanic's lien against real estate or the buildings thereon, there must have been the doing of work or furnishing of materials under and by virtue of a contract with the owner or proprietor thereof, were held, in *Seaman v. Paddock* (1892) 51 Mo. App. 465, to include every person for whose immediate use, enjoyment, or benefit any building or improvement was made, and that, where the defendant appears to be the owner of the building, it is wholly immaterial whether he had any other interest in the premises or not. This decision, however, seems to be practically overruled by *Fathman & M. Planing Mill Co. v. Christophel* (1894) 60 Mo. App. 106, *infra*, VI., and *State*

clear that Gen. Stat. chap. 150, and Pub. Stat. chap. 191, were intended by the legislature to give a lien upon buildings the owner of which had no estate or interest in the land upon which the building was erected, as well as upon any interest which the owner of a building might have in land on which it might be erected; and that the lien might extend to a building erected upon land although the building was personal property." *Forbes v. Mosquito Fleet Yacht Club*, 175 Mass. 436, 56 N. E. 615. In our neighboring state of Iowa the statute provides, like our own, a lien "upon such building . . . , and upon the land." Code 1897, § 3089. This has been construed to subject a building to a lien, though the owner of it was a trespasser on the land whereon it was located. *Lane v. Snow*, 66 Iowa, 544, 24 N.

W. 35; *Smith v. St. Paul F. & M. Ins. Co.* 106 Iowa, 225, 76 N. W. 676. In *Mahon v. Surerus*, 9 N. D. 57, 81 N. W. 64, the court, in construing a statute which gives a lien "on the building and upon the land," adjudged a lien on a house on a government homestead, and said: "The lienholder might in any case have the building sold separately and removed. This was a valuable right. It often happened in the early settlement of Dakota territory, that expensive buildings were erected, and subsequent events—such as the locating of railroads, or changing of business centers—rendered them practically worthless where they were, but they would have value if they could be removed. Our construction of these statutes leads to the conclusion that plaintiffs had a lien upon the house that in no manner affected the

use of Long-Bell Lumber Co. v. Halley (1897) 71 Mo. App. 200, *supra*, this division.

The late case of *Shull v. Best* (1903; Neb.) 93 N. W. 753, is decided upon the authority of *Pickens v. Plattsmouth Land & Invest. Co.* 81 Neb. 585, 48 N. W. 478, *infra*, IX. From the facts it appears that material for a building was furnished to one who, at the time, was not the owner of the land upon which it was constructed. It was decreed that the mechanic's lien might be enforced out of the building upon a sale thereof by execution. The sale was subsequently had, but possession of the building was refused, in consequence of which the present action of replevin therefor was commenced, which turned on whether one who furnishes material for the erection of a house, to a person in possession of the real estate, who is not the owner thereof, can have a mechanic's lien upon the building so constructed apart from any lien upon the land upon which it is erected. Mainly upon the authority of the case above referred to, which liberal construction of the statute the court declared was correct and should be adhered to, it was held that the court had the power to enter the decree giving the mechanic's lien upon the building in question and foreclosing the same.

Likewise, it is held in *Kezartee v. Marks* (1888) 15 Or. 529, 16 Pac. 407, that if the building is owned by one person, and the land by another, the lien may extend to the improvement, leaving the land unaffected by the claim.

Where the pastor of a church purchased lumber, wherewith a church building was erected on a lot owned by a third party, a judgment against him, only, as defendant, condemning the building to be sold under special execution, was held proper in *Priebatsch v. Baptist Church* (1889) 66 Miss. 845, 6 So. 287; but the purchaser at the sale was held to have lost all his rights in the building by delaying a removal of the same for a period of two years, where the statute required that it be done "with reasonable despatch," and where it appeared that a subsequent purchaser had purchased the lot and building without knowledge of these prior proceedings.

Where buildings were put up by a widow residing upon her deceased husband's premises until dower should be assigned her, it was held, in *Weathersby v. Sinclair* (1870) 48 Miss. 189, that, although she could not bind the fee of 62 L. R. A.

the heirs by any encumbrance she might create, the mechanic's lien could be enforced against the buildings; and a special judgment was allowed condemning the house to be sold.

One furnishing materials to complete a building was held not entitled to a mechanic's lien upon the building only, under a statute providing for such a lien for the erection of a new building upon land to which the person contracting for such erection has no legal title. *Fuller v. Detroit Loan & Bldg. Assn.* (1898) 119 Mich. 71, 77 N. W. 642.

"The statute provides, primarily, for a lien upon the building. If, however, the land upon which it is constructed belongs to the person who caused the building to be erected, improved, altered, or repaired, then the land upon which the building is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, is also subject to the lien, to the extent of his interest therein;" and, even if the owner of the land is some person other than the owner of the building, his consent is presumed in the absence of notice to the contrary, if he have knowledge of the improvement. *Cross v. Tscharnig* (1895) 27 Or. 49, 39 Pac. 540.

And where a building was erected upon land of a third party with his consent, the court stated, in *Hooker v. McGlone*, 42 Conn. 95, that the lien attached to the building and to the interest, such as it was, which the employer had in the land, and ought to be enforced against him. It appearing that the land was afterwards deeded to the employer's wife, upon payment of the consideration by him, it was held that the lien would then attach to the land.

So, where a building was constructed upon the land of an owner, but several other buildings appurtenant to it were built across the street and on the land of a third party, the mechanic's lien was held enforceable against all the buildings and the interest of the owner in the land upon which they were situated. *Carpenter v. Leonard*, 5 Minn. 155, Gil. 119.

V. Extension of erection upon adjoining land.

"The mere fact that some portion of a building extends beyond the marginal line of the lot upon which the building is erected cannot, of itself, deprive a mechanic or a material man

land. It will be noticed that the right to remove the building is not dependent upon the manner in which the building is attached to the land. It may stand upon blocks, or it may rest upon the most substantial stone or brick foundation." In *Dustin v. Crosby*, 75 Me. 76, the court, in speaking of a lien such as our statute affords, observes: "It is a lien upon the realty if the debtor owns realty, and upon the building as personalty if the debtor owns the building only." The Alabama statute has been thus construed: "The declaration is clearly made in the statute that the lien shall be good upon these structures 'and' upon the land on which they are situated, to the extent of 1 acre. . . . Code, §§ 3440, 3444. It is a several, and not a joint, lien; and both the letter and spirit of the law contem-

plate that the improvements erected may, in proper cases, be subjected to sale and removal from the premises by the purchaser." *Redsole v. Peters*, 79 Ala. 136, 137; *Buchanan v. Smith*, 43 Miss. 90; *Ombony v. Jones*, 19 N. Y. 234.

The proposition that a building is not subject to a mechanic's lien unless it enters into and forms a part of the realty has not been adopted by this court. It is now well settled that a lien attaches to a leasehold interest and to buildings erected by the tenant. *Moore v. Vaughan*, 42 Neb. 696, 60 N. W. 914; *Waterman v. Stout*, 38 Neb. 306, 56 N. W. 987; *Henry & C. Co. v. Fisherdict*, 37 Neb. 207, 55 N. W. 643. Now, a leasehold interest is but a chattel, however long its term. "It is only personal estate if it be for a thousand years." 2 Kent, Com. 342.

of a lien for work done or materials furnished on that part of it." *Pullis v. Hoffman* (1888) 28 Mo. App. 666.

And where a husband and wife contracted for the erection of a building upon lot 9, owned by them, but the house extended largely upon their adjoining lot 10, without the wife's knowledge, and the contract expressly provided for a lien upon the improvements as well as upon the lots, it was held that the lien might be established upon lot 9, and upon the whole improvement, but not upon lot 10; and that the purchaser should be allowed to remove the improvement from lot 10. *Crooker v. Grant* (1893) 5 Tex. Civ. App. 182, 24 S. W. 689.

But in *Stevens v. Lincoln* (1874) 114 Mass. 478, where a schoolhouse stood partly on land of third parties, it was held that a lien for work done thereon could not be enforced, because "It is well settled that, if a party for whom work is done has an interest in a building only as personal property, the owner of the land never having consented to or authorized such work thereon, no lien can attach thereto, and this because such party has no interest which can be sold so as to render the lien effectual; and further, that it is not contemplated by the statutes that there shall be any severance of the building, or a sale of it, or of any interest in it, separate from an interest of the owner in the land itself." This decision, however, is criticised and overruled in *Forbes v. Mosquito Fleet Yacht Club*, 175 Mass. 436, 56 N. E. 615, *infra*, VIII.

VI. Erection by husband upon wife's land.

A mechanic, laborer, or furnisher who has done work or furnished materials for the improvement of a married woman's land, without a legal contract with her, and in ignorance of her right or claim, shall have the right, upon notice, and a decree of some court having jurisdiction, to take and remove the improvement or such parts of it as were made by his labor or from his materials, if the removal can be made without injury to the property, unless she will agree by legal contract to bind her property therefor; and the same right of removal is extended by statute to all other cases of disability or superior rights, where the mechanic was in ignorance of such disability or superior rights; and, also, to cases where a tenant or other person in possession of property procures

repairs or improvements to be made for which the owner declines to pay. *Cole Mfg. Co. v. Falls* (1891) 90 Tenn. 466, 16 S. W. 1045.

This last decision was followed in *Cary-Lombard Lumber Co. v. Thomas* (1893) 92 Tenn. 587, 22 S. W. 743, a case where materials were furnished and improvements made upon the property of a *feme covert*.

It was contended in *Getty v. Tramel* (1885) 67 Iowa, 288, 25 N. W. 245, where lumber was furnished to a husband for an addition to a barn on his wife's land, against her objection, that the lien ought at least to go against the addition, with the right to the purchaser to go upon the premises and detach and remove it; but the court held otherwise on the ground that the addition, upon being constructed, became a part of the wife's realty, and therefore that the lien could not be enforced against the land or building.

But in *Estabrook v. Riley* (1890) 81 Iowa, 479, 10 L. R. A. 83, 46 N. W. 1072, a judgment originally authorizing a mechanic's lien against both land and building was modified so as to exempt the land from its operation, and, as so modified, affirmed upon appeal, where it appeared that the wife was the owner of the land, and the building was erected by the husband for his own use and benefit, and with his own means.

In *Crooker v. Grant*, 5 Tex. Civ. App. 182, 24 S. W. 689, *supra*, V., a lien was allowed upon the erection only, when it extended upon an adjoining lot owned by the husband and wife jointly, without the wife's knowledge.

A lien against a building alone was declared in *Fischer v. Anslyn* (1888) 30 Mo. App. 316, where the wife, who was the owner of the land, joined with her husband in a mortgage to raise funds for the erection of a building on the lot, but the contract for its erection was entered into by the husband alone, and no express agency was shown in the husband.

A husband caused the erection of a building upon his wife's land for his own use and benefit. Judgment was rendered for the enforcement of the mechanic's lien against the building alone. On appeal, the court affirmed the judgment, stating that the right to enforce a lien against a building alone is not confined to leasehold property, but could, under the statute, be allowed in the present instance. *Kline v. Perry* (1892) 51 Mo. App. 422.

The doctrine contended for would, if carried to its logical conclusion, preclude the attaching of a mechanic's lien, unless the owner of the building were also the owner of the fee.

Stress is laid upon the fact that, by the terms of its lease, the Greater America Exposition Company is required to remove these buildings at the end of the term. This fact does not appear to have prevented the attaching of a lien in the cases already referred to. In *Lane v. Snow*, 66 Iowa, 544, 24 N. W. 35, the owner of the building was, as has been said, a trespasser. Under the conceded facts of that case, he had no right to erect the building on that land at all, and his duty to remove was immediate, and not, as here, fixed at a considerable time in the future. A lien was, nevertheless, allowed. In *Pickens v. Plattsmouth Land & Invest.*

Co. 31 Neb. 585, 48 N. W. 473, the owner of the building had, at the time the lien was enforced, apparently no interest in the land at all. When he built he had a contract of purchase with the owner of the land, but this was subsequently abandoned, and, as he does not seem to have acquired any new right, his duty, or, at least, right, of removal would seem to have arisen by virtue of the abandonment. A lien was declared, however, against the building, and the doctrine of the case in this regard is not changed on the second hearing in 37 Neb. 272, 55 N. W. 947. In *Hathaway v. Davis*, 32 Kan. 393, 5 Pac. 29, where a tenant expressly reserved the privilege of removing any and all improvements, the lien was held to attach, not only to the leasehold interest and the building erected by the tenant, but

But *Kilne v. Ferry*, 51 Mo. App. 422, is strongly disapproved of in *Fathman & M. Planing Mill Co. v. Christopher* (1894) 60 Mo. App. 106, where a similar state of facts is presented, except in this case the husband and wife occupied the premises as a homestead. It was insisted that the lien be allowed against the building alone, with right of removal in the purchaser, but the court was in favor of the doctrine of *Ranson v. Sheehan*, 78 Mo. 668, *infra*, XI., that there can be no lien apart from the land itself, and that the building may be removed therefrom by a purchaser at a mechanic's lien sale only in the case of prior encumbrances or leaseholds; and this later decision was considered as a return to the earlier doctrine after the departure therefrom shown in *Kansas City Hotel Co. v. Sauer*, 65 Mo. 288, *infra*, XI.

And the court, in *Fetter v. Willson* (1851) 12 B. Mon. 90, where it appeared that work and materials were furnished upon the sole credit of the husband, who directed the construction of a building upon his wife's land, was of the opinion that the statutes conferring mechanics' liens did not intend that there could be a separate sale of the house.

VII. Erection upon homestead lands.

The enforcement of a mechanic's lien against the building only was allowed in *Mahon v. Surerus* (1899) 9 N. D. 57, 81 N. W. 64, where the employer had merely a government-homestead filing upon the land during all the time of the construction and completion of the building, and a provision of the act under which he acquired the land provided that it should not become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor. The court held that the statutes regulating mechanics' liens, in force at the time the building contract was made, allowed the enforcement of the lien against the building only, stating: "The lien holder might, in any case, have the building sold separately and removed. This was a valuable right. It often happened, in the early settlement of Dakota territory, that expensive buildings were erected, and subsequent events, such as the locating of railroads, or changing of business centers, rendered them practically worthless where they were, but they would have value if they could be removed. Our construction of 62 L. R. A.

these statutes leads to the conclusion that plaintiffs had a lien upon the house that in no manner affected the land. It will be noticed that the right to remove the building is not dependent upon the manner in which the building is attached to the land. It may stand upon blocks, or it may rest upon the most substantial stone or brick foundation." *Gull River Lumber Co. v. Briggs*, 9 N. D. 485, 84 N. W. 349, *supra*, IV., is not in conflict with this holding, as it is decided under a later statute.

In *Jossman v. Rice* (1899) 121 Mich. 270, 80 N. W. 25, where a building was constructed upon a homestead without the wife's signature to the contract, as required by statute in order to enforce a lien thereon, the lien was held enforceable against the building only, under a statute providing that a lien for labor or materials may attach to the building for which they were furnished, in preference to any prior title, claim, lien, encumbrance, or mortgage upon the land upon which such building is put. And the court, therefore, held that, while no sale could be made of the homestead, the contractor and material men might be permitted to remove the building therefrom, and thus dispose of it.

But in *Kansas Lumber Co. v. Jones* (1884) 32 Kan. 195, 4 Pac. 74, where the debtor occupied a piece of government land under the United States homestead act, and was not entitled to a patent at the time he purchased lumber and materials for the construction of a dwelling, it was held that a lien would not attach either to the land or building; it appearing that the latter was permanently attached to the soil upon a solid stone foundation.

VIII. Erection upon leasehold estates.

The theory upon which mechanics' liens are allowed against buildings erected by tenants and lessees is that they lie, also, against the lessee's interest in the land whatever it may be.

Judgment was rendered for the enforcement of a mechanic's lien against an addition erected by a tenant from month to month of certain premises, and also against the tenant's interest in the land by reason of his tenancy, in *Deatherage v. Sheldley* (1892) 50 Mo. App. 490.

A mechanic's lien was decreed to be enforceable against structures placed upon leased premises entirely by lessee, and not upon the pre-

also to machinery and fixtures. In *Jessup v. Stone*, 13 Wis. 466, it is said concerning the owner of the building: "If his interest in the land is that of a mere occupant, having the right to remove whatever buildings he might place upon it, then this right of occupancy and removal would go to the mechanic, or those obtaining occupancy under his lien."

There would seem to be little, if any, legal difference whatever on this point between reserving the right to remove and imposing the duty to do so. In either case removal is so far contemplated as to afford room for the contention that the building is personalty. In either case, moreover, the fact of a failure to remove during the term of the lease would be the same,—the buildings would become the property of the lessor. See *Friedlander v. Ryder*, 30 Neb. 783, 9 L.

R. A. 700, 47 N. W. 83; *Free v. Stuart*, 39 Neb. 220, 57 N. W. 991. In a case like the one before us the lessor might also have an action for damages resulting from the failure to remove, but this could hardly change the legal character of the buildings.

Counsel for appellants have, with commendable industry, collected for us a large number of authorities determining questions concerning liens on fixtures. We have examined these with care, and are ready to concede that a lien cannot be acquired on merely portable and unattached articles. Many of these cases, however, were decided under statutes unlike our own, and others are rendered inapplicable here by the holding of this court in *United States Nat. Bank v. Bonacum*, 33 Neb. 820, 51 N. W. 233, that a lien will attach even to a furnace when placed in a building. This dis-

cise and specified materials furnished and used in their construction, in *Montana Lumber & Mfg. Co. v. Obellak Min. Concentrating Co.* (1894) 15 Mont. 20, 37 Pac. 897.

A mechanic's lien may be enforced against the interest of a tenant in land where he has caused a building to be erected on the premises; but the court has no power to decree that the fee of the premises be sold to discharge the lien. *Judson v. Stephens* (1874) 75 Ill. 255.

One given a written license to construct and use a hay warehouse upon a railroad company's land for a stated term, which may, however, be terminated upon notice at any time by the licensor, with the right in the licensee to remove his buildings upon such termination, was held in *Badger Lumber Co. v. Malone* (1898) 8 Kan. App. 121, 54 Pac. 692, to have an interest in the land sufficient to support a mechanic's lien for materials furnished in the erection of the warehouse.

The buildings in *Dean v. Pyncheon* (1850) 3 Chand. (Wis.) 9, were erected upon leased land, with permission to the tenant to remove them at the end of the term. It was contended that the right of sale in proceedings to enforce a mechanic's lien was confined to the buildings, on the ground that a repealed act provided expressly for a sale of the whole interest of the debtor, both in the building and the land, while the substituted act spoke only of the building; but the court declared that the mere possession of the ground for the erection and construction of the building, with the right to go upon the land and move it off, carried with it, inseparably, an interest in the ground, which might be levied upon and sold; and that the sale of the building is a sale of the possession, carrying with it the whole right of the judgment debtor, whatever it may be, in the premises.

The decision in *ZABRISKIE v. GREATER AMERICA EXPOSITION CO.* is consistent and harmonious with the doctrine of previous Nebraska cases where the right to enforce mechanics' liens upon buildings separately arose in some form, especially *Pickens v. Plattsmouth Land & Invest. Co.* 31 Neb. 585, 48 N. W. 473, *infra*, IX., and its recent adherent *Shull v. Best* (1903; Neb.) 93 N. W. 753, *supra*, IV., decided only a few days prior to *ZABRISKIE v. GREATER AMERICA EXPOSITION CO.*

ICA EXPOSITION CO., but not referred to, however, in the opinion in the latter case.

But the title to the building must, of course, be in the lessee in order to thus establish the lien against it for improvements made upon it by his direction. This is illustrated in *Moore v. Vaughn* (1894) 42 Neb. 696, 60 N. W. 914, where one having a lease of land for a year moved thereon a dwelling, the property of lessor, and made improvements and additions thereto, to which lessor was not a party. It was decreed that mechanics' liens for the materials entering into the improvements should be enforced out of the dwelling house, and interest of the tenant in the premises. Upon appeal this decree was reversed, upon the ground that, the original building being the property of lessor, all additions and repairs thereto became at once a part of the real estate, thereby becoming vested in lessor; so that the court was without authority to order the buildings sold to pay the amount of the lien, which could only be enforced upon the leasehold interest of the tenant in the premises.

In order to bind the land of a lessor knowledge on his part of the erection of the building by the lessee must be proved, and failure to file a notice refusing to be responsible for the erection; and, where such facts do not appear, a decree will be rendered foreclosing the lien against the building and the leasehold interest of lessee, with the privilege to sell the building separately from the land if the plaintiff so elect, but otherwise if the building and interest of lessee may be sold together. *Allen v. Rowe* (1890) 19 Or. 188, 23 Pac. 901.

In *Birch v. Magic Transit Co.* (1903; Cal.) 73 Pac. 238, where a lessee commenced the construction of a scenic railway on the leased land, it was held that the posting of a notice on the land by lessor, within three days after the construction was begun, that he would not be responsible for the same, was sufficient to relieve the land from liability, although he knew of the intention to construct some time prior thereto, under the Code provision that the interest of the owner of land shall be subject to a lien for any construction thereon, unless he, "within three days after he shall have obtained knowledge of the construction . . . or the intended construction, . . . give notice that

poses of cases like *Union Store Works v. Klingman*, 20 App. Div. 449, 46 N. Y. Supp. 721. We have already seen that, under the present Massachusetts doctrine, a lien attaches, even though the building be treated as personalty. And in *Ombony v. Jones*, 19 N. Y. 234, a lien was upheld on a ballroom, described as follows: "The ground was graded, and the building placed upon stone pillars, which were sunk into the ground from 1 to 2 feet. The pillars were laid up without any kind of cement, and the sills of the building placed thereon, but in no manner attached thereto, except by the weight of the building. The building was not attached to any other building upon the premises." This, it will be seen, was hardly, if at all, more permanent in character than the structures here in controversy. But the court said concerning it: "There was nothing

in the mode of its annexation to the soil, or to the main edifice, which necessarily imparted to it the legal characteristic of immovability. It could not be detached and taken away without injury to the reversion. Beyond all doubt it would be real estate, as between vendor and vendee of the land, or between the heir and the executor of the owner."

As the sole ground of complaint in this case is that the property is not subject to a mechanic's lien, we feel constrained to recommend that the decree be affirmed.

Hastings and Kirkpatrick, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, it is ordered that *the decree of the District Court be affirmed.*

he will not be responsible for the same, by posting a notice in writing to the effect, in some conspicuous place upon said land." The court remarks: "The general purpose of the mechanics' lien law is to give to contractors, laborers, and materialmen a lien on the land improved, as security for their labor and material. But the law also gives to the owner certain rights and privileges by which he may protect himself against the operation of such a lien. The law does not, and in fairness should not, make the land subject to the lien in any and every case of a building or other structure erected upon it."

The purchaser at the sale, however, acquires no greater rights than were vested in the lessee.

It was held in *Oswold v. Buckholz* (1862) 13 Iowa, 506, that one purchasing property on leased premises at a sale under a mechanic's lien acquires no higher rights therein than existed in the lessee; and, therefore, the removal of a building by the purchaser at such a sale was enjoined where the lessee had, under the lease, no right to remove the building until the expiration of his term, and the full payment of all rents, taxes, and assessments, and full compliance with all other conditions of the lease; and it appeared that the term had not expired, and there were other conditions of the lease not fully complied with.

A mechanic's lien may be enforced against a leasehold estate to the extent of the interest of lessee, but a purchaser at the sale acquires no greater rights than were vested in the lessee; so that, where the lessee had no right to remove the building for the erection of which the lien was claimed, the purchaser acquired no such right. *Dutro v. Wilson* (1854) 4 Ohio St. 102.

Where buildings, or other improvements, are erected on leased or rented lands, at the request and on the exclusive credit of the lessee, the contractor's lien is extended by the statute, not only to such improvements and erections as may be constructed by him, which are capable of identification and practical severance, but also to the unexpired leasehold term of the lot or land, not exceeding 1 acre, on which the improvements are made, subject, however, to all the conditions of the lease. *Rothe v. Bellingrath* (1881) 71 Ala. 55.

In *Ombony v. Jones* (1859) 19 N. Y. 234, it 62 L. R. A.

appeared that a tenant at will of hotel premises erected thereon a ballroom resting upon posts. The question whether the building and interest of the tenant in the land could be subjected to a mechanic's lien was decided in the affirmative, upon the theory that the ballroom was a trade fixture, and, therefore, removable by the tenant, and thus subject to the lien for materials furnished for its construction by the tenant, who was the "owner" within the meaning of the statute providing "that any person who shall, by virtue of any contract with the owner thereof, perform any labor or furnish materials in building . . . any house or other building . . . shall have a lien for the value of such labor and materials upon such house or building, and upon the lot of land upon which the same shall stand, to the extent of the right, title, and interest, at the time existing, of such owner," etc.

It was contended in *McCarty v. Burnet* (1882) 84 Ind. 23, where it appeared that a building upon which repairs had been made was owned by a tenant who leased the ground upon which it stood, that the mechanic was not entitled to a lien upon the house for his services independent of the ground upon which it stood; but the court held that, where a house is erected as a fixture, and by express covenant made personal property, with a right of removal before the expiration of the tenancy, the tenant unquestionably has an interest in it against which a lien may be enforced, and that the purchaser at the sale upon the foreclosure of the lien succeeds to the right of removal.

In *Forbes v. Mosquito Fleet Yacht Club* (1900) 175 Mass. 436, 56 N. E. 615, a lease giving an estate for years in land required the erection of a building by the lessee, the same not to become a part of the realty, however. It was held that mechanics' liens attached to the building and to the lessee's estate for years in the land, under statutes adopted after the decision in *Belding v. Cushing*, 1 Gray, 576, *supra*, IV., *Hayes v. Fessenden*, 106 Mass. 228, *infra*, IX., and *Stevens v. Lincoln*, 114 Mass. 476, *supra*, V., are criticised and overruled. The court says, in regard to the lien given under existing statutes, that it "is given upon any building or structure upon real estate, irrespective of the fact whether the building is real or

personal property, to any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used in the erection, alteration, or repair of such a building by virtue of an agreement with, or by consent of, the owner of such building or structure, or of any person having authority from, or rightfully acting for, such owner in procuring or furnishing such labor or materials. If the owner of the building has an interest in the land on which the building is situated the lien attaches, also, to that interest; and . . . can be enforced by a sale of the building alone, if its owner has no interest in the land on which it is situated, and by a sale of the building and of the interest of the owner of the building in the land, if he has an interest in the land."

Some statutes have provisions to the effect that mechanics' liens upon leasehold interests may, upon forfeiture of the lease, be enforced against the improvement alone.

Although a contract of sale of land stipulated that the interest of the grantee should be a leasehold interest until the execution of the deed, provided that, in case of an election to terminate the agreement, the improvements placed upon the lot were to be forfeited to the grantor, it was held, in *Oliver v. Davis* (1890) 81 Iowa, 287, 46 N. W. 1000, that such a provision would not prevent the enforcement of a mechanic's lien upon the improvement as against the grantor or his grantees, in the case of a forfeiture under the contract of sale, under a statute providing, in regard to mechanics' liens upon leasehold interests, that they shall not be impaired by a forfeiture of the lease for noncompliance with any of the conditions therein, so far as the lien concerns the improvements.

Where the improvements upon leasehold premises consisted of a doorway cut between two buildings, papering, painting, etc., it was held, in *Stenberg v. Liennemann* (1898) 20 Mont. 457, 52 Pac. 84, that, upon a forfeiture of the lease, no right to enforce the lien against the improvements could exist because they did not constitute "buildings, structures, and improvements" which could be removed from the premises within the meaning of the statute.

It seems from *Gaskill v. Davis* (1878) 61 Ga. 644, that a mechanic may enforce a lien upon a structure erected by him for a lessee, which will not attach to the land. The court held, however, that such a lien could not be enforced after the lessee's term had expired, against an incomplete structure erected by the claimant, such as the walls and chimney of a house, if it had afterwards been carried to completion by other parties; that different parts of a building could not be sold separately.

Arguendo, it is said in *Missoula Mercantile Co. v. O'Donnell* (1900) 24 Mont. 65, 60 Pac. 594, 991, that, "If the interest is a leasehold interest, and the lease becomes forfeited, the building or structure, only, is charged, and, if severable from the soil, may be sold and removed by the purchaser within twenty days after the sale."

It has seemed necessary, in order to present the situation in Pennsylvania, to give all of the decisions under the various statutes affecting mechanics' liens upon leasehold estates from 1803 down, some of which, perhaps, would not, apart from being connecting links, be entirely relevant and necessary in this note.

A tenant for life may bind the remainder-men 62 L. R. A.

and reversloners under a mechanic's lien for materials employed in the construction of a building upon the land. *Savoy v. Jones* (1830) 2 Rawle, 343. The court says: "The object of the legislature [1806] was to enable the mechanic or material man to follow his labor or materials into the building, which is pledged for the price without regard to the estate of the owner." This language is obscure until it is seen from later decisions that no idea existed, or was intended to be conveyed, of a separation of the land and building; that the land was, without exception, considered as appurtenant to the building.

In *Anshutz v. McClelland* (1836) 5 Watts, 487, the lessee of land, with the knowledge of lessor, contracted for the erection of a building upon the land. Several liens were entered against the property, under one of which it was sold for a sum insufficient to pay the liens, whereupon the present proceeding by another lienor by *scire facias* was brought to ascertain the amount due on his lien and to have another sale therefor. Upon appeal, it was held that a sale of the building under any one of several liens will release it from the whole of them, after which no right to proceed upon another lien by *scire facias* exists, because, by the act of 1808, the claim is a lien upon the house only, so that the moment such claim ceases the right to proceed by *scire facias* ceases also. In the lower court it was stated that a mechanic is not bound to search the records and ascertain the state of the legal title to the land; that it was the object of the legislature to enable the mechanic to follow his labor or materials into the building without regard to the estate of the owner, and the lien arises from the credit having been given, not to the owner, but to the building. This decision is also obscure from the standpoint of the subject of this annotation; but later authorities assume, without question, that the land was considered and sold appurtenant to the house, and that, prior to 1840, no other idea was entertained by the legislature.

The object of the legislature in the acts of 1803, 1806, and 1836, was to secure to the material man the fruit of his labor or materials by selling the building without regard to the ground, the latter being a subject of so little consideration as not to have been mentioned in any of them, and it was intended to be sold as an appurtenance of the building; therefore, one who has contracted for the purchase of land, but has not paid the purchase money, by erecting a house thereon, subjects the whole property to a mechanic's lien, at a sale under which the purchaser acquires a good title against which the vendor of the land cannot recover in ejectment. *Bickel v. James* (1838) 7 Watts, 9.

By the act of 1803, which was the first on the subject, the building, only, was subjected to the mechanic's lien for materials or work contracted for by the owner himself. But the clause giving the lien only where the debt was created by the owner himself was found too restrictive, because in most instances such debts were created upon contracts made with middlemen who had contracted with the owner to construct the building; therefore, the act of 1806 remedied this defect, allowing a lien for work done or material furnished, leaving out the words "contracted for by the owner or owners thereof." But it was not the intention of the

legislature to consider the owner of the building as separate from the owner of the land; and, therefore, a tenant for years of land, who erects a building thereon, subjects the entire property to a mechanic's lien thereon, and a sale thereof divests both legal and equitable owners of the land of all right and title thereto. *Holdship v. Abercrombie* (1839) 9 Watts, 52.

The act of 1836 gave the material man execution upon the building without regard to the quantum of the estate held by the contracting owner. In 1840, after *Anshuts v. McClelland*, (1836) 5 Watts, 487, *supra*, it was enacted that the act of 1836 should not extend to any other or greater estate in the ground on which any building might be erected than that of the person in possession at the time of commencing the said building, and at whose instance the same was erected. But merely leasehold estates, being chattel interests, are not within the purview of the legislation of 1836 as amended in 1840; and, therefore, buildings erected by a lessee for years are not the subject of mechanics' liens. *Church v. Griffith* (1848) 9 Pa. 117, 49 Am. Dec. 548.

And, according to *White's Appeal* (1849) 10 Pa. 252, the only effect of the act of 1840 is to modify the remedy for the recovery of a mechanic's lien, so that no greater estate in the premises charged with the lien can be sold than was vested in the person in possession at the time the building was erected, and the species of property upon which the lien attaches is left as before the passage of the act,—so that a lien may not be enforced against a lessee's interest in land and an engine house erected by him thereon, when the erection is the property of lessee, since such interests are chattels, and, therefore, not subject to a mechanic's lien.

It will be seen, from the remarks of the court in *O'Conner v. Warner* (1842) 4 Watts & S. 223, in regard to the passage of the act of 1840, that the idea of any separation of the building and land was entirely lacking in the whole course of legislative and judicial thought up to this time: "The debt secured by the act of 1806 was the debt of the building, not of any owner of it; the lien was on the building; the process was against the building; and the building itself, not the builder's interest in it, was directed to be sold. . . . To do otherwise would have required us to interpolate the very provision which has been recently, but incautiously, interpolated by the legislature. . . . The avowed object was to protect the mechanic or material man without regard to anyone else. . . . Our legislation for almost forty years breathed one uniform spirit of kindness to the operative; and it was not without our special wonder that we saw it, in 1840, breathe a hostile one. . . . When the mechanic can sell no more than a lease burdened with a rent to the extent of its value, his lien will be worthless."

The leasehold interest of a tenant, being a chattel real, was held, under the statute of 1840, not the subject of a mechanic's lien, in *Haworth v. Wallace* (1850) 14 Pa. 118, following *Church v. Griffith* (1848) 9 Pa. 117, 49 Am. Dec. 548, and *White's Appeal* (1849) 10 Pa. 252, *supra*. The court says: "A lessee seldom erects anything more valuable than a temporary or removable building, as an appurtenance to his mansion, his manufactory, or his warehouse; and it would be so worthless, as a separate tenement, that a purchaser of it would scarce know

what to do with it. In the usual course the term would expire before he could get possession of it. In possession he would be debtor for the rent, and he would have nothing for his money but the use of the improvements detached from the business they were intended to subserve. Should the legislature, however, think that such a lien would be worth the trouble of enforcing it, it will be easy for them to say so."

But *Rush v. Fisher* (1871) 8 Phila. 44, holds, giving as its authority *Anshuts v. McClelland* (1836) 5 Watts, 487, *supra*, that a mechanic's lien is sustainable against a leasehold interest, stating that, while the act of 1840 limited the lien to the estate of the person in possession at the time of commencing the building, it left *Anshuts v. McClelland* untouched. How this can be is not clear, for, in the latter case, the lien, while enforced against a lessee, was enforced, also, against the whole fee, which, by the act of 1840, is expressly prohibited. This decision conflicts with *Church v. Griffith* (1848) 9 Pa. 117, 49 Am. Dec. 548, and *Haworth v. Wallace* (1850) 14 Pa. 118, *supra*.

Where the tenant had a right, by contract, to take a certain part of the premises particularly described, on ground rent at an annual sum fixed by the contract, which was afterwards carried out by a conveyance in fee, buildings erected by him are subject to a mechanic's lien, since it was his right to a conveyance in fee that induced him to cause the erections, and it was also probably that right which the material men relied upon when furnishing material for the building. *Gaule v. Bilyeau* (1855) 25 Pa. 521.

The act of 1856, which is supplementary to the act of 1836, and should be construed in reference to it, does not authorize the enforcement of liens upon personality, and thus work a departure from the earlier statute, but is merely an extension of that act, "as fully as the same are now applicable to buildings, to every steam engine, coal-breaker, . . . fixture, or machinery in and about mills of any kind, . . . coal mines, and iron mines." *Summerville v. Wann* (1860) 37 Pa. 182.

The act of 1836, with its supplements of 1840 and 1856, is extended by the act of 1858 "to all improvements, engines, pumps, machinery, screens, and fixtures erected or put up by tenants of leased estates on land of others in the counties of Luzerne and Schuylkill," with a proviso limiting the lien to the interest of the tenant in the land; so that a mechanic's lien may be enforced against a large ice house constructed for purposes of trade, by the lessee for a term of years of land, and against the interest of lessee in the land. *Thomas v. Smith* (1862) 42 Pa. 68.

But, according to *Gaul v. Seyfert* (1862) 1 Woodw. Dec. 43, buildings erected by a lessee for years, upon ground leased to him, are not subject to a mechanic's lien under the act of 1858, since that act is limited to liens on improvements, engines, pumps, machinery, screens, and fixtures connected with mines and leased estates.

However, in *Esterley's Appeal* (1867) 54 Pa. 192, the doctrine again appears that the act of 1856 allows a mechanic's lien upon improvements erected by a tenant who has only a leasehold interest in the land, which is a chattel interest; and is, therefore, a departure from all earlier statutes, which have always restricted the lien to realty.

But in *Schenley's Appeal* (1871) 70 Pa. 98, it is held that neither the act of 1858 nor the one of 1865, extending the operation of the former act to the counties of Westmoreland and Alleghany, was intended to give a lien upon buildings put up by the lessees generally for the purposes of residence, that the language of those acts has clear reference to works erected on colliery leases only, which are numerous in the counties specified. Also, that the act of 1868, extending the mechanic's lien law "to all improvements, engines, pumps, tanks, machinery, . . . connected with or appurtenant to, oil or other refineries," etc., which is made applicable to tenants of leased premises as well as to the owners of the freehold, has no possible bearing upon a lease for the ordinary purpose of residence. No reference is made to *Thomas v. Smith*, 42 Pa. 68, *supra*, which is thus mutely overruled.

However, in *Schmidt v. Armstrong* (1872) 72 Pa. 355, it appeared that, when the decision was made in *Schenley's Appeal* (1871) 70 Pa. 98, *supra*, the decision of *Thomas v. Smith*, 42 Pa. 68, *supra*, was overlooked. The court, however, reiterated its decision that the act of 1858 was not intended to embrace private dwellings erected by tenants independently of the works referred to in the act, but expressly refrained from overruling *Thomas v. Smith*, stating that it would leave the special case of a large ice house, erected for purposes of trade, where that case placed it.

A blacksmith and wagon maker's shop built on leased ground is an improvement within the act of 1858. *Reed v. Clement* (1876) 3 W. N. C. 58, expressly following *Thomas v. Smith*, 42 Pa. 68, *supra*.

A building to be used for a market house and hall, erected on a leasehold, is subject to a mechanic's lien under the act of 1858, as held in *Mountain City Market House & Hall Assn. v. Kearns* (1883) 103 Pa. 403, on the authority of the two prior decisions, *Thomas v. Smith*, 42 Pa. 68, and *Reed v. Clement* (1876) 3 W. N. C. 58, *supra*, holding that the act applies to tenants of leased estates who erect buildings for business purposes on lands of others.

IX. Erection by vendee of the land under a contract of purchase.

A person in possession of land under a written contract to purchase is not, within the meaning of the mechanics' lien laws, the owner of the land or of the improvements he may place upon it, and, for this reason, he cannot fix a lien upon either. *Galveston Exhibition Assn. v. Perkins* (1891) 80 Tex. 62, 15 S. W. 633.

A decree ordering buildings to be sold by themselves under a mechanic's lien was held unauthorized in *Wagar v. Briscoe* (1878) 38 Mich. 587. The buildings were erected upon posts upon land which the owner of the buildings had contracted to purchase, which contract and possession of the land he afterwards surrendered. The court based its decision upon the ground that, under the statutes, the thing to be subjected to the intended lien must be real estate, and not separate chattels; and that there is no warrant for imposing a lien upon an adjunct of the land as though it were a piece of personality; and that all that it was possible to sell in this instance was the equitable interest of the owner of the buildings in them, and in the land subject to the rights of the owner of the land. But later and more liberal statutes ap-

pear from the decisions in *Fuller v. Detroit Loan & Bldg. Assn.* 119 Mich. 71, 77 N. W. 642, *supra*, IV., and *Josman v. Rice*, 121 Mich. 270, 80 N. W. 25, *supra*, VII.

A lien was not sustained in *Hayes v. Fessenden* (1870) 106 Mass. 228, where the labor and materials were expended upon a building upon land which the owner of the building had merely contracted to purchase, but to which he had no legal title. The court stated that the statutes did not contemplate any severance of the building or a sale of it, or of any interest in it, separate from an interest of the owner in the land itself. This decision, however, is overruled in *Forbes v. Mosquito Fleet Yacht Club* (1900) 175 Mass. 436, 56 N. E. 615, *supra*, VIII.

It was contended in *Rees v. Ludington* (1860) 13 Wis. 277, 80 Am. Dec. 741, where the erection was made by the vendee of the land under a contract of purchase, that the statute allowed a complete and absolute lien on the building, independently of any title or interest in the land upon which it was erected, so that the owner was not a trespasser or dispossessor, and then added or annexed to such absolute right a further lien upon such right, title, and interest in the land, if any, as belonged to him. But the court held that such a construction was incompatible with the section authorizing the officer making the sale to give to the purchaser "a deed of conveyance of the premises sold, which shall be valid and effectual to pass all the right, title, and interest of the defendant in and to said premises absolutely, whether the same be in fee simple, for life, or for years;" that this section treats the premises as an entirety, and, unless the title to the building had been previously separated by the agreement of competent parties, it is to be followed and governed by that of the land, and cannot be subsequently separated by the purchaser in any other way than the original owner might have separated it.

Rees v. Ludington (1860) 13 Wis. 277, 80 Am. Dec. 741, *supra*, is expressly approved in *Jessup v. Stone* (1861) 13 Wis. 466, and the doctrine is reiterated that it was not the intention of the legislature to give a lien upon the building which should be absolute and independent of that upon the title of interest of the owner in and to the land upon which it is erected. The court says: "If his [owner's] interest in the land is that of a mere occupant, having the right to remove whatever buildings he might place upon it, then this right of occupancy and removal would go to the mechanic or those obtaining occupancy under his lien. But, if his interest is something more than that of an occupant or possessor with authority to remove, and such that as between him and the owner of the fee, or others having rights in the land, he would not have this power of removal, then the mechanic, or purchaser under him would not. Their title and interest are identical with his, and are subject to all the obligations and disabilities under which his was placed at the time the building was commenced." The difficulties which would arise in case a lien were allowed upon the building alone, with power of removal, were discussed, as injury to the freehold, total destruction of the building by its removal, where there were several purchasers, etc.; and the court concluded that such a construction of the statute was impracticable, and not within the intent of the legislature when providing the remedy.

In *Shapleigh v. Hull*, (1895) 21 Colo. 419, 43

Pac. 1108, the party contracting to buy land was, under the contract, required to construct certain buildings. Therefore, it was held error to limit the mechanics' liens to the buildings alone, since the construction of the buildings was not only authorized, but enjoined, by the owner of the land.

But in *McGreary v. Osborne*, 9 Cal. 119, in discussing the mechanics' lien act of 1856, the 1st section of which gave a lien upon the superstructure itself as distinct from the land, and the 4th gave a lien also upon the land when the same was owned by the person who caused the superstructure to be erected, the court states that the object of the act was to give the mechanic a lien upon whatever interest the person had who had caused the superstructure to be made; that, if the party owned only the superstructure, the lien would attach to that, but that, if he also owned the land, the lien would also embrace it. In this instance a mechanic's lien was allowed when drawn up only against mill machinery, it appearing that the title to the land upon which the building containing the machinery stood, was in a third party, but was to vest in defendant upon due payment of a balance in the form of promissory notes, defendant having the right, upon any sale had upon a default in his payments, to any surplus that might remain after discharging the notes. The court held that the lien attached also to this equitable interest of defendant, and that those who might purchase the land afterward would take subject to the lien.

Where a contract to purchase land was not carried out by the party agreeing to purchase, and he had, in the meantime, caused buildings to be erected on the premises, it was held, in *Jodd v. Duncan* (1880) 9 Mo. App. 417, that, although no lien could be established against the land, the lien upon the buildings was not, therefore, lost and that the mechanic, upon obtaining his judgment, might have them sold under execution, the purchaser, if other than the owner of the land, being obliged to remove them within a reasonable time.

In *Sawyer-Austin Lumber Co. v. Clark* (1899) 82 Mo. App. 225, the improvements were made under contract with one who at the time had an equitable title to the land under a contract of purchase, which, however, was terminated when the lien suit was tried. The court says: "If his ownership had continued to the date of the trial of this suit, appellant might have subjected his title to the land for whatever it was worth, as well as the building, to a lien for its material, but its right to subject the building alone is not conditioned in the statute upon the continuance of the title of the owner of the land at the time it contracted with him for the erection of the building; and hence, appellant was not precluded from charging the building by the subsequent failure of Clark's title to the land." The remarks in *Ranson v. Sheehan*, 78 Mo. 668, *infra*, XI., to the effect that a lien on the building must always depend on the retention, by the owner, of the title to the land, were regarded as not authoritative, being in the teeth of the statute, and opposed to the latest previous decisions of the court (*Kansas City Hotel Co. v. Sauer*, 65 Mo. 279, *infra*, XI.). But the latest utterance of the Missouri courts on this subject (*Mayes v. Murphy* [1902] 93 Mo. App. 37, *infra*, XI.) follows the doctrine of *Ranson v. Sheehan*, and practically overrules *Kansas City Hotel Co. v. Sauer*.
62 L. R. A.

A building was constructed under contract with one who had orally agreed to purchase the land on which it was erected, in *Pickens v. Plattsmouth Land & Invest. Co.* (1891) 81 Neb. 585, 48 N. W. 473, but this unwritten contract of sale was subsequently totally abandoned. The judgment of the lower court, which decreed a lien against the whole property, was reversed as to the land, but allowed to stand against the building only.

But upon rehearing, reported in 87 Neb. 272, 55 N. W. 947, the judgment of the lower court was affirmed *in toto* on the theory that the building was erected by the vendee in the contract of sale as the agent of the vendor and owner of the land.

After the execution of a contract for the sale of land, upon which, however, no money was paid down, and the partial erection of a building as stipulated in the contract of sale, the vendee abandoned the contract and left the state. The question whether the land could be subjected to the mechanic's lien, on the theory that the vendee was agent of the vendor for the construction of the building was decided in the negative, the court stating that by statute provision was made for a lien upon the buildings or improvements and for a sale of them separately from the land, when the material was furnished or work done for a person whose interest in the land became forfeited; and that in those cases the mechanic was precluded from acquiring any lien upon the land itself. *Pinkerton v. Le Beau* (1893) 8 S. D. 440, 54 N. W. 97.

Although the owner of land has an agreement with a conditional purchaser thereof that the land shall not be liable for any material furnished or labor performed in building operations carried on by the purchaser, nevertheless, upon default of the latter, the land is not protected from mechanics' liens of laborers employed after the time of default, unless the owner gives the statutory notice, or its equivalent, disclaiming responsibility for the work. *Al Louis v. Harwood* (1903; Cal.) 74 Pac. 41.

X. Erection upon land vested in third parties by deed of trust.

In *Bridwell v. Clark* (1866) 39 Mo. 170, where third parties possessed the right to sell the land under a deed of trust for part of the purchase money, plaintiff asked that his mechanic's lien be allowed to attach merely to the buildings, but the court said it knew of no provision of law justifying such a proceeding; that it might be so in the case of leasehold property, but not under the circumstances shown in the case at bar. This decision is distinguished in *Kansas City Hotel Co. v. Sauer*, 65 Mo. 288, *infra*, XI., and declared applicable to St. Louis county alone.

But in *Ambrose Mfg. Co. v. Gapen* (1886) 22 Mo. App. 397, after the sale of land under a deed of trust given by the owner, who had in the meantime erected a brick structure on the premises, judgment was rendered to enforce a mechanic's lien against the building alone. It was objected that, as the structure was brick, it could not be removed without being totally destroyed, and that the statute could not have intended to give a remedy attended with such a result. But the court refused to sustain the contention, stating that the statute gives the lien upon any building without exception as to the kind; and that, if there results a destruct-

tion of the property, it is the loss of the purchaser at the sale, and does not harm any other person.

XI. Failure of description of the land in affidavit of claim.

In *Williams v. Porter* (1878) 51 Mo. 441, where the acre of ground upon which the lien was allowed by statute to extend was not described, the lien was held entirely to fail.

In *Ranson v. Sheehan* (1883) 78 Mo. 668, a mechanic's lien was not allowed to attach to the building alone, where the lienor, by a failure of description, had failed to affect the surrounding acre of land with his lien, upon the ground that difficulties would arise were one man permitted to sell and own the building while another owned the ground on which the building stood; that the only instances in which the statute allows the enforcement of a lien upon the building separately are in case of prior encumbrances and leaseholds, and, therefore, that "the inference is that the legislature did not contemplate any other contingency under which the building might be separated from the land." The earlier conflicting decision in *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279, *infra*, this division, is apparently overlooked, no reference being made thereto.

In *Mayer v. Murphy* (1902) 93 Mo. App. 37, where there was no attempt, in a petition for the enforcement of a mechanic's lien, to describe the acre of land upon which the building was situated, it was contended that the lien should be enforced upon the building alone, according to *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279, *infra*, this division, but the court held that a mechanic's lien could not be maintained against the building where the lien against the land failed through an inaccurate description, relying on *Ranson v. Sheehan*, 78 Mo. 668, *supra*, this division, and *Fathman & M. Planning Mill Co. v. Christophel*, 60 Mo. App. 106, *supra*, VI. This seems to be the last utterance of the Missouri courts in regard to this question, thus concurring in the mute overruling of *Kansas City Hotel Co. v. Sauer*, which was made in *Ranson v. Sheehan*.

A lien may be maintained upon a building, as such, apart from any interest in the land upon which it is situated, only when a statute in express terms so provides; and, no such statute existing in Washington, a lien upon the building may, in that state, be enforced only in connection with some interest in or right to, the land upon which it is situated. *Kellogg v. Littell & S. Mfg. Co.* (1890) 1 Wash. 407, 25 Pac. 461. This was an action to foreclose a mechanic's lien upon the building of a lessee and upon his leasehold interest, but, the description of the land being too indefinite, it was held that the lien could not be established against it, or against the building separately, for the above reasons.

But a number of decisions present a doctrine in direct conflict with the foregoing cases.

It was insisted in *Turner v. Robbins* (1885) 78 Ala. 592, that the lien on a building was defeated by a failure in the claim filed to give a description of the acre of land to which the statute extends the lien upon a compliance with its provisions. But the court decreed that, while earlier acts secured the lien exclusively to real estate, the tendency of later legislation was to extend the lien to the improvements and land, both or either, and that no reason was 62 L. R. A.

apparent why the lien might not be waived as to a part and claimed as to a residue of the property. Further, the section of the statute in regard to the filing of the claim of lien, providing "which statement of account and description, when so filed, shall be a lien upon the building or other improvements, with all the rights and privileges under this chapter," etc., was construed to authorize a lien upon the building or other improvements, independent of a completed lien on the land.

A mechanic's lien may be sustained upon the buildings or improvements when they are described with reasonable certainty, although it must fall as to the land because of the uncertain and insufficient description thereof, since, as declared in *Bedsole v. Peters* (1885) 79 Ala. 133, both the letter and spirit of the law contemplate that, in proper cases, the improvements, only, may be subjected to sale, and may be removed from the premises by the purchaser; and the court remarked that the defendant may not complain if the mechanic enforces the lien only on what he has placed on the premises, and not, also, on the premises in addition to the improvement.

In *Kansas City Hotel Co. v. Sauer* (1877) 65 Mo. 279, the description of the property throughout the whole proceedings for the enforcement of a mechanic's lien was: "The following described real estate, to wit, the Nelson House building, situated in lots 27 and 30," etc. The court refused to consider the lien void on account of the failure to include the realty, which was covered by the owner of the building, and construed the statute to mean that a mechanic's lien may be enforced against the building alone, with the right in the purchaser to remove the same within a reasonable time; and that this right of enforcement against, and removal of, the building is not confined to leasehold property. *Bridwell v. Clark*, 39 Mo. 170, *supra*, X., was practically overruled, although the court stated that that decision was based upon a mechanics' lien law applicable to St. Louis county alone; but, whether it was so restricted in its scope or not, the court declared that it regarded its own exposition of the law as the correct one. This decision, however, is mutually overruled in *Ranson v. Sheehan*, 78 Mo. 668, *supra*, this division, which latter decision and action of the court are expressly approved in the late case of *Mayer v. Murphy* (1902) 93 Mo. App. 37, *supra*, this division.

In *Hall Bros. v. McCrary* (1891) 45 Mo. App. 365, where the description of the land surrounding the building was too indefinite, it was declared that, if no proper proof of survey of the land defining the boundaries was made, then the jury should have been directed to find a lien against the building, since, in the absence of any controversy with third parties, a lienor may subject the building to sale under execution, and the purchaser may remove the same within a reasonable time thereafter. But this decision is also practically overruled by the later one of *Mayer v. Murphy* (1902) 93 Mo. App. 37, *supra*, this division.

XII. Summary.

In one sense, no doctrine can be said to predominate as to the right of a mechanic to a lien upon the building as distinct from the land upon which it is located, since the whole question is purely statutory, and each state, by its legislation and decisions, formulates its own

rule. But when no special legislation exists providing for the mechanic's rights where the building and land are not owned by the same party or other exceptional conditions exist, there are strong authorities in favor of a liberal construction of general mechanics' lien laws, to the end that the remedy intended to be granted the mechanic by the legislature be not rendered inoperative. For example, in Massachusetts, the law has been settled to this effect by *Forbes v. Mosquito Fleet Yacht Club*, 175 Mass. 438, 56 N. E. 615 (VIII.), and previous contrary holdings overruled. Other states in which a similar tendency is apparent; or where special legislation has been passed, are Alabama (III. VIII. XI.), Mississippi (IV.), Maine (IV.), Iowa (IV. VI.), Oregon (IV. VIII.), Michigan (IV. VII.), Connecticut (IV.), Minnesota (IV.), Texas (V.). Tennessee (VI.), Illinois (VIII.), Kansas (VIII.), Georgia (VIII.), Montana (VIII.), California (IX.), South Dakota (IX.), Colorado (IV.), New York (VIII.), Indiana (VIII.), and Nebraska (IV. IX.).

But, on the other hand, in Missouri, several strong decisions advocating a liberal construction of the mechanics' lien laws have been overruled, and the court has finally settled on the doctrine that the lien may not be enforced upon the building separately from the land, except in the cases expressly allowed by statute, of improvements made upon leased or mortgaged premises under contract with the lessee or mortgagor. And in Washington (XI.) a similar strict construction prevails. Other states with a tendency in this direction are New Jersey (III. IV.), Kentucky (III. VI.), Arkansas (III.), Wisconsin (VIII. IX.). In North Dakota, under former statutes, the mechanic could always enforce his lien upon the building alone, and remove it from the land (*Mahon v. Surerus*, 9 N. D. 57, 81 N. W. 64 VII.), but a later statute provides for such a course only in the case of leasehold interests or prior encumbrances (IV.).

In the mechanics' lien laws of Pennsylvania, the legislature started out in 1803 with no idea of, in any event, allowing a separation in interest of the building and land to affect the operation of the lien, and decisions under these early statutes decreed a sale of the whole fee when a lessee had caused buildings to be erected. In order to remedy this injustice it was then enacted, in 1840, that the lien should extend to no other or greater interest in the land than was vested in the person causing the building to be erected, at the time of its commencement. But the courts construed this statute not to apply to leasehold estates, because they were merely chattel interests, and allowed no liens upon buildings erected by lessees. However, under later local statutes, the courts are coming to allow liens upon buildings erected on leased lands by lessees, although somewhat cautiously, and upon the condition that the erections must be for business purposes.

Although legislation is coming to be provided more freely for those instances where the mechanic may not equitably claim his lien upon the whole fee, such as leasehold estates and prior encumbrances, in cases which still arise not specifically provided for, while there are some decisions advocating a strict construction of the general mechanics' lien laws, nevertheless, it is safe to say that the weight of authority is in favor of a liberal construction giving 62 L. R. A.

the mechanic the benefits which the legislature intended him to have, when that can be done without prejudice to the rights of others.

M. M. M.

Joseph WILLIAMS *et al.*, *Appts.*,

v.

Joseph H. MILES *et al.*

(.....Neb.....)

1. Where a will is shown to have been made and left in the custody of the testator, if it cannot be found after his death the presumption is that the testator destroyed it *animo revocandi*.
2. But this is a presumption of fact only. It may be overcome by evidence, circumstantial or otherwise, to the contrary; and declarations of the testator may be shown for this purpose.
3. If the testator destroys a subsequent will revoking a former one by implication, such act, of itself, will not operate to revive the former will.
4. Whether the former will is revived in such a case depends upon the intention of the testator, which is to be deduced from all the circumstances.
5. Term "common law of England," as used in Comp. Stat. 1901, chap. 15a, refers to that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or civil law system. Hence, the statute does not require adherence to the decisions of the English common-law courts prior to the Revolution in case this court considers subsequent decisions, either in England or America, better expositions of the general principles of that system.
6. A subsequent will which has the effect of revoking a prior will may be shown for the purpose of defeating probate of such prior will, although, by reason of its loss or destruction, the exact dispositions made therein cannot be shown and are incapable of execution. The revocation will be effectual, even though in other respects the will cannot be carried out.
7. Although the contents of a lost will cannot be proved solely by the declarations of the testator, such declarations are admissible to prove the existence of the will.
8. Persons who would take as heirs or next of kin in case of intestacy are not disqualified, under Code Civ. Proc. § 329, from testifying as to transactions and conversations with the deceased in a contest over an alleged will.
9. In such cases evidence as to declarations of the testator should be scrutinized carefully, and weighed cautiously.
10. If the instrument is in fact signed, attested, and subscribed as required by the

*Headnotes by POUND, C.

NOTE.—As to revival of will by destruction of revoking will, see also *note* to *Cheever v. North* (Mich.) 37 L. R. A. 561, and *Stetson v. Stetson* (Ill.) 61 L. R. A. 258.

statute, a formal attestation clause is not necessary.

11. Hence, the subscribing witnesses to a lost will may testify that the testator signed and they witnessed and subscribed in the required manner, without proving that there was an attestation clause, or establishing the contents thereof.
12. A subsequent will may have the effect of revoking a prior will, either by reason of an express clause of revocation, or of an inconsistent disposition of the testator's property.
13. Unless the subsequent will expressly revokes the former one, such former will is only revoked so far as it is inconsistent with the later. A complete revocation will not result unless the general tenor of the later will shows clearly that the testator so intended, or the two instruments are so plainly inconsistent as to be incapable of standing together.
14. Courts do not favor revocation by implication, and incline to such a construction as will give effect to both instruments.
15. The fact that a subsequent will was made is not sufficient, of itself, and without some proof of its actual contents, to show revocation of a former will.
16. Parol evidence to show that a former will was revoked by implication by reason of a subsequent will, which cannot be found, must be clear, unequivocal, and convincing.

(April 9, 1903.)

A PPEAL by plaintiffs and defendant Samuel A. Miles from a judgment of the District Court for Richardson County refusing to set aside an order admitting to probate an instrument purporting to be the last will and testament of Stephen B. Miles, deceased. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. J. H. Broady, A. J. Weaver, John L. Webster, and John H. Atwood for appellants.

Messrs. F. Martin, E. Falloon, and C. Gillispie for appellees.

Pound, C., filed the following opinion:

The general purpose and nature of this controversy are stated in the opinion of the court on another branch of the cause. *Williams v. Miles*, 63 Neb. 859, 89 N. W. 451. It will be sufficient to say, for the purposes of the present opinion, that the decree appealed from was rendered in a suit begun originally in the county court of Richardson county for the purpose, among other things, of having an order admitting a certain instrument to probate as the last will of Stephen B. Miles vacated and set aside. Stephen B. Miles died at Falls City, in this state, in 1898: leaving surviving him Joseph H. Miles, one of the appellees, and Samuel A. Miles, one of the appellants, his sons, and 62 L. R. A.

a number of descendants of two deceased daughters. In the year 1888 he had made a will at Rulo, in Richardson county, in which he gave substantially his entire estate, amounting at the time of his death to upwards of \$1,000,000, to Joseph H. Miles; excluding Samuel A. Miles, the issue of his two daughters, and many others who had claims upon his bounty. During the period intervening between the execution of this will and his death, he had ceased to take an active hand in business, and lived mostly at hotels in St. Louis, Missouri, or at Falls City. After his death, Joseph H. Miles, who was present when the will known as the "Rulo will" was executed, in 1888, and was acquainted with its contents, made an extensive search in every place in which papers of the deceased were known to be, or were likely to be found, for the purpose of ascertaining whether there was a will. As a result of this search, he testifies that he found the Rulo will in an unlocked valise in a room in a hotel at Falls City which had been occupied by the deceased, under circumstances which, to say the least, are somewhat extraordinary. He presented the will to the county court of Richardson county, and procured its probate. The appellants' case is that in 1897 the testator executed a new will at a hotel in St. Louis, where he was in the habit of spending his winters, which had the effect of revoking the Rulo will; that Joseph H. Miles learned of the existence of this will while searching for papers left by his father; and that he fraudulently concealed and withheld his knowledge thereof, and, by so doing, procured the will of which he was the beneficiary to be probated. It is also charged that he obtained possession of the will executed at St. Louis, and has retained the same, and concealed its contents from the plaintiffs, with the intent and purpose of cheating and defrauding them, the heirs at law, and other devisees and legatees of the testator. The later will, if there was one, has not been found.

The evidence with reference to the execution of what may be called the "St. Louis will" consists of the testimony of two witnesses,—the manager and clerk of the hotel in St. Louis, who appear to have been well acquainted with the testator. They testify that, within a few days after a conversation which one of them had with the testator regarding his will, the testator stated that he was going to make his will at once, and apparently went out of the hotel for that purpose; that several hours thereafter he came to the office in the hotel, and stated that he had made a will; that either the next day, or within two or three days, they were summoned to the testator's room, where they found him with some document drawn upon

legal-cap paper before him; that the testator said to them. "Gentlemen, I want you to witness the signature of my will;" and that he thereupon took a pen, and saying, "This is my last will, and I want you to witness the signature to it," signed his name, and procured the witnesses to subscribe theirs also. The testimony of these witnesses is very clear and circumstantial as to the execution of the instrument, but they do not claim to know anything of what the paper contained, further than the statement of the testator that it was his will. There is, however, not a little evidence as to declarations of the testator tending to show that he had made disposition of his property inconsistent with the terms of the Rulo will, and there is much circumstantial evidence to indicate substantial reasons moving him so to do. The trial court found for the defendants, and rendered a decree accordingly, which is now appealed from.

On behalf of the appellees it is urged that, assuming the St. Louis will has been proved, since the testimony by which it is shown establishes that the testator retained custody of, or had ready access to, it, and it could not be found at his death, we must take it to have been destroyed by the testator with the purpose of revoking it, and that such revocation, in the absence of a contrary statutory provision, and by virtue of chapter 15a, Comp. Stat. 1901, would have the effect of reviving the prior will. Each of these propositions requires some qualification. Where a will is shown to have been made and left in the custody of the testator, if it cannot be found after his death the presumption is that he destroyed it *animo revocandi*. 1 Jarman, Wills, *133; *Boyle v. Boyle*, 158 Ill. 228, 42 N. E. 140; *Collyer v. Collyer*, 110 N. Y. 481, 18 N. E. 110; *Behrens v. Behrens*, 47 Ohio St. 323, 25 N. E. 209; *Gardner v. Gardner*, 177 Pa. 218, 35 Atl. 558. If the will is traced out of the testator's custody, on the other hand, the burden is on him who asserts a revocation to show that it came once more under the testator's control, or was destroyed by his direction. 1 Jarman, Wills, *133. In such cases if the person into whose hands the will is traced had an interest in procuring its destruction, some courts have suggested that they would go very far in presumptions as to the contents of the lost will and the mode of its disappearance. *Chisholm v. Ben*, 7 B. Mon. 408. We need not examine this subject in the case at bar. Although there is some circumstantial evidence which might create a suspicion that the St. Louis will came into the bank at Falls City, where Joseph H. Miles would have had access to it, we do not think there is enough to call for application of the authorities referred to, 62 L. R. A.

even if we were prepared to follow them. *Clark v. Turner*, 50 Neb. 290, 299, 38 L. R. A. 433, 69 N. W. 843; *Collyer v. Collyer*, 110 N. Y. 481, 486, 18 N. E. 110. But if we take it that the St. Louis will—assuming that there was one—remained in the custody of the testator, it does not follow that such will must be regarded as revoked. The presumption of destruction *animo revocandi* is one of fact only. It governs in the absence of circumstances tending to a different conclusion, but may be overcome by circumstantial or other evidence to the contrary. 1 Jarman, Wills, *133; *Legare v. Ashe*, 1 Bay, 464; *Davis v. Sigourney*, 8 Met. 487; *Minkler v. Minkler*, 14 Vt. 125; *Gardner v. Gardner*, 177 Pa. 218, 35 Atl. 558. And declarations of the testator subsequent to the execution of the will are admissible for this purpose. *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460; *Harring v. Allen*, 25 Mich. 505; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336; *Boyle v. Boyle*, 159 Ill. 228, 42 N. E. 140; *Behrens v. Behrens*, 47 Ohio St. 323, 25 N. E. 209; *Gardner v. Gardner*, 177 Pa. 218, 35 Atl. 558. In the analogous case of a will found among the testator's papers in a mutilated condition, declarations of the testator manifesting good will toward the beneficiaries, showing a purpose of adhering to its provisions, or that he is entirely satisfied therewith, will be received to rebut the presumption of revocation. 1 Underhill, Wills, § 232. In the case at bar the declarations of the testator indicating that he had made and was adhering to dispositions not to be found in the Rulo will are numerous and well authenticated. Moreover, there are circumstances in evidence which would indicate that, in case there was a will subsequent to the Rulo will, it represented the final intentions of the testator. But even if we held that the St. Louis will, if there was one, was destroyed *animo revocandi*, would it follow that a former will, revoked by the St. Louis will, was revived by destruction of the latter? This raises a question of some difficulty which has given rise to no little discussion.

Our statute of wills follows the Massachusetts act of 1836, which, as to execution and revocation, is modeled on the statute of frauds. We have not adopted a modern statute along the lines of the English statute of 1837. Hence, the question must be settled in this state without reference to the later statutes, and decisions thereunder, except as they indicate a sound policy, in accord with the general objects and purposes of every statute on the subject. If the first will is destroyed, and a subsequent will is revoked or canceled, it has never been asserted that the first will is revived. But if the

first will remains in existence, and a second will, which operated to revoke it, is afterwards revoked or canceled, without execution of a new one, there has been much divergence of opinion. Lord Mansfield announced a rule, which was followed by the common-law courts when questions as to wills disposing of real property came before them, to the effect that if the first will is preserved, and a subsequent will, revoking it expressly or by implication, is destroyed or canceled, the revocation is repealed, and the original will revived and continued in force, by virtue of these circumstances. *Harwood v. Goodright*, 1 Cowp. 87, 91; *Goodright ex dem. Glazier v. Glazier*, 4 Burr. 2512. On the other hand, the ecclesiastical courts, which had jurisdiction over wills disposing of personalty, and from whose decisions our law of probate and administration is derived in large part, held to a more flexible rule; endeavoring in each case to ascertain the testator's intention, and making that intention the criterion. In a leading case the doctrine of those courts was stated thus: "The legal presumption is neither adverse to, nor in favor of, the revival of a former uncanceled, upon the cancelation of a later revocatory, will. Having furnished this principle, the law withdraws altogether, and leaves the question as one of intention purely, and open to a decision either way, solely according to facts and circumstances." *Usticke v. Bauden*, 2 Add. Eccl. Rep. 116. Counsel urge that chapter 15a, Comp. Stat. 1901, which makes the common law of England the rule of decision in all cases not governed by constitution or statutes, so far as applicable, requires us to follow the rule announced by Lord Mansfield, and that the decisions of common-law courts in England prior to the Revolution are controlling, as between such decisions and subsequent English authorities. We are unable to assent to this proposition.

What is the meaning of the term "common law of England," as used in chapter 15a, Comp. Stat. 1901? Does it mean the common law as it stood at the time of the Declaration of Independence, or as it stood when our statute was enacted, or are we to understand the common-law system, in its entirety, including all judicial improvements and modifications in this country and in England, to the present time, so far as applicable to our conditions? We cannot think, and we do not believe this court has ever understood, that the legislature intended to petrify the common law, as embodied in judicial decisions at any one time, and set it up in such inflexible form as a rule of decision. The theory of our system is that the law consists, not in the actual rules enforced by decisions of the courts at any one

time, but the principles from which those rules flow; that old principles are applied to new cases, and the rules resulting from such application are modified from time to time as changed conditions and new states of fact require. *Rensselaer Glass Factory v. Reid*, 5 Cow. 587. "We may look to American as well as English books, and to American as well as English jurists, to ascertain what this law is, for neither the opinions nor precedents of judges can be said, with strict propriety, to be the law. They are only evidence of law." *Forbes v. Scannell*, 13 Cal. 242, 286. On this ground it was held in *Sayward v. Carlson*, 1 Wash. 29, 23 Pac. 830, that a statutory provision in Washington making the common law of England the rule of decision in all courts did not confine the courts to the decisions of the English courts, and of those American courts which have followed them closely, for the interpretation of the law. Such has been the understanding of this court from the beginning. What Sir Frederick Pollock has called "the immemorial and yet freshly growing fabric of the common law" is to be our guide, not the decisions of any particular courts at any particular period. The term "common law of England," as used in the statute, refers to that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or civil law system, which was in force in this territory prior to the Louisiana purchase. Hence, the statute does not require adherence to the decisions of the English common-law courts prior to the Revolution, in case this court considers subsequent decisions, either in England or America, better expositions of the general principles of that system.

If, as between the rule of the old common-law courts and the rule of the English ecclesiastical courts, we are not required by statute to follow the former, we think the latter, on principle, greatly to be preferred; and it has the support of the weight of recent authority in America. A distinction was suggested at an early period between a will which revokes the former will expressly, and one which so operates by implication only. Leaving the question somewhat in doubt as to the latter case, the rule has been generally and vigorously assailed as to the former. 1 Powell, Devises, 528; 4 Kent, Com. 531; Randolph & T.'s note to 1 Jarman, Wills, *193; *Barksdale v. Hopkins*, 23 Ga. 332; *Beaumont v. Keim*, 50 Mo. 28; *Colvin v. Warford*, 20 Md. 357; *Scott v. Fink*, 45 Mich. 241, 7 N. W. 799; *Cheever v. North*, 106 Mich. 390, 37 L. R. A. 561, 64 N. W. 455. But the courts are by no means agreed on this distinction, and it has been considered as having no more force than to

affect the presumption, if any there is. *Pickens v. Davis*, 134 Mass. 252, 254, 45 Am. Rep. 322; Schouler, Wills, § 213. A few jurisdictions adhere to the rule as stated by Lord Mansfield. *Taylor v. Taylor*, 2 Nott & M'C. 482; *Randall v. Beatty*, 31 N. J. Eq. 643; *Peck's Appeal*, 50 Conn. 562, 47 Am. Rep. 685. But the strong tendency in the United States is to follow the rule of the English ecclesiastical courts, and hold that, if the testator destroys a subsequent will, revoking a former one either expressly or by implication, such act, of itself, will not revive the former will. *Re Gould*, 72 Vt. 316, 47 Atl. 1082; *McClure v. McClure*, 86 Tenn. 173, 6 S. W. 44; *Harrell v. Lively*, 30 Ga. 315, 76 Am. Dec. 649; *Bohanon v. Walcott*, 1 How. (Miss.) 336, 29 Am. Dec. 631; 1 Woerner, Probate & Administration, § 51. Following the English act of 1837, the statutes, wherever this subject has been dealt with by legislation, are all against the doctrine of constructive revival of the prior will. Hence, we may well regard Lord Mansfield's rule as disapproved, and the doctrine of the ecclesiastical courts as vindicated. Preferring the latter, we think the rule should be to look to the intention of the testator in every case. Whether the former will is revived depends upon his intention, which is to be deduced from all the circumstances. *Williams v. Williams*, 142 Mass. 515, 8 N. E. 424. So far as there is a presumption, it would seem that the presumption ought to be against revivor. *Re Gould*, 72 Vt. 316, 47 Atl. 1082; Schouler, Wills, § 413. Without regard to any presumption, however, we find nothing in the evidence sufficient to indicate an intention to revive the earlier will, if it had been revoked, and there is much to show that no such intention existed.

It follows that we are brought inevitably to the questions whether execution of the St. Louis will has been shown sufficiently, and, if so, whether the evidence shows sufficiently that it revoked the former will, expressly or by implication. Before taking up these questions, however, certain preliminary objections going to the mode of proof must be disposed of.

It is urged on behalf of the appellee that it is not sufficient to show a subsequent will revoking the instrument probated, but that the contents of such will must be established; that declarations of the testator are not admissible to prove the later will; that persons who would take as heirs or next of kin in case of intestacy, or as beneficiaries under the subsequent will, are not competent witnesses to transactions and conversations with the deceased; and that appellants must fail because they have not proved an attestation clause, nor established the contents

thereof. As will be seen presently, the first and second of these objections have other phases, in which they are well taken. It must be shown, not merely that there was another will, but also that it contained a revocation clause, or else its contents must be established so as to demonstrate an inconsistency between the instruments requiring the court to hold the one revoked by the other by implication. And the contents, whether with respect to the revocation clause, or the general provisions from which revocation is to be implied, cannot be shown solely by declarations of the testator. But further than this we cannot accept counsel's contentions. A subsequent will which has the effect of revoking a prior will may be shown for the purpose of defeating probate of such prior will, although, by reason of its loss or destruction, the exact dispositions made therein cannot be shown, and are incapable of execution. It is enough to prove that the lost will revoked the former one. If that much is shown, the contents need not be proved further. *Brown v. Brown*, 8 El. & Bl. 876; *Nelson v. McGiffert*, 3 Barb. Ch. 158, 40 Am. Dec. 170; *Barksdale v. Hopkins*, 23 Ga. 332. The revocation will be effectual, even though in other respects the will cannot be carried out. *Re Cunningham*, 38 Minn. 169, 36 N. W. 269; *Stevens v. Hope*, 52 Mich. 65, 17 N. W. 698. If the later will was destroyed by the testator, intending to revoke it, yet he may have intended to die intestate. *Legare v. Ashe*, 1 Bay, 464; Schouler, Wills, § 412. Consequently proof is admitted to show execution of the subsequent will, and that it revoked the former, and this proof may be by parol. *Brown v. Brown*, 8 El. & Bl. 876. But the burden is upon those who attack the earlier will to show that it was revoked, and, if they do not establish an express revocation clause, conjecture or probabilities are not sufficient; nor will such words as "this is my last will" have any weight whatever. 1 Jarman, Wills, *174; *Leslie v. Leslie*, Ir. Rep. 6 Eq. 332. As to the declarations of the testator, we must distinguish between their competency and their sufficiency, when standing alone, to prove the contents of the lost will. The contents of a lost will cannot be proved solely by the declarations of the testator. *Clark v. Turner*, 50 Neb. 290, 38 L. R. A. 433, 69 N. W. 843. But in the same case it was held that such declarations are admissible to corroborate more direct evidence of the contents of the will, and of themselves are competent to prove its existence. The court said: "We think all the cases hold that the declarations of a testator may be received in evidence to prove the existence of a will, and in proof of issues relating to the testator's competency or to undue influence,

but it has been doubted whether such declarations may be received to establish a revocation. It follows that, in all proceedings to probate a lost will, such declarations are admissible in evidence, because the existence of the will must necessarily be established by some such indirect method. The declarations having been admitted for that purpose, their sufficiency to establish the contents of the will is another question." The suggestion of doubt whether such declarations may be received to establish a revocation has reference to the fact that a mere intention to revoke is not sufficient, unless carried out in some one of the forms required by the statute. If a new will is made, without an express revocation clause, revocation is a question of intention, to be determined from the instruments themselves and from all the circumstances. If the subsequent will is lost, then, its tenor being shown, declarations are admissible in corroboration. But an intention to revoke in some other manner must be manifested by some act prescribed in the statute, and performed as the statute requires. *Belshaw v. Chitwood*, 141 Ind. 377, 40 N. E. 908; *Boylan v. Meeker*, 28 N. J. L. 274; *McCune v. House*, 8 Ohio, 144, 31 Am. Dec. 438; *Brown v. Thorndike*, 15 Pick. 388. The court evidently had this rule in mind in *Clark v. Turner*, and was not speaking with respect to such a question as that now before us. As to the competency of the testimony of those witnesses who would take but for the Rulo will, the case of *Re McCoy* (Neb.) 89 N. W. 665, is decisive. In that case it was held that persons who would take as heirs or next of kin in case of intestacy are not disqualified, under § 329, Code Civ. Proc., from testifying as to transactions and conversations with the deceased in a contest over an alleged will. We think, however, that in such cases evidence as to declarations of the testator should be scrutinized carefully and weighed cautiously. *Clark v. Turner*, 50 Neb. 290, 38 L. R. A. 433, 69 N. W. 843; 1 Greenl. Ev. § 200. As to the attestation clause, if the instrument was in fact signed, attested, and subscribed as required by the statute, a formal clause reciting the details of the transaction was not necessary. The statute does not require the attestation clause, but only required that the will be subscribed by the testator, and attested and subscribed in his presence by two or more credible witnesses. The necessary facts may be proved by the subscribing witnesses, although the attestation clause is omitted. *Robinson v. Breuster*, 110 Ill. 656, 30 N. E. 683; *Berberet v. Berberet*, 131 Mo. 399, 33 S. W. 61; *Re Lewis*, 51 Wis. 101, 113, 7 N. W. 829; 62 L. R. A.

Ela v. Edwards, 16 Gray, 91; *More v. More*, 92 Ill. App. 465. Hence, the subscribing witnesses to a lost will may testify that the testator signed and they witnessed and subscribed in the manner required, without proving that there was an attestation clause, or establishing the contents thereof.

Without going over the details, we may say that the evidence produces a strong conviction that a will of some sort was made at St. Louis. There is not only the testimony of the two subscribing witnesses, but a very considerable mass of circumstantial evidence. Moreover the declarations of the testator are well authenticated and circumstantial. Taking all these matters into account, and bearing in mind the apparent injustice of the disposition made in the instrument admitted to probate, the suspicious character of the many things connected with the finding of the Rulo will, and the disposition of the testator to make wills, as shown in evidence, if the question was merely whether a subsequent will was executed, we should hesitate to say that the decree could stand. The testimony of several of the most important witnesses was taken by deposition, and, as the trial court neither saw nor heard these witnesses, the ordinary rule that a decree based on conflicting testimony will be affirmed does not apply with full force. *Gibson v. Hammang*, 63 Neb. 349, 88 N. W. 501; *Delorao v. Conna*, 29 Neb. 811, 46 N. W. 255. But the appellants have much more to do than merely to prove that a subsequent will was executed at St. Louis in the prescribed legal form. They must show that the St. Louis will revoked the former will, and to that extent must prove its contents.

A subsequent will may have the effect of revoking a prior will, either by reason of an express clause of revocation, or of an inconsistent disposition of the testator's property. 1 Jarman, Wills, *172. Hence, to show that the Rulo will was superseded, it would be necessary to prove that the later instrument revoked it expressly, or else to show that the contents of the later instrument were such as to revoke it by implication. There is no proof of an express revocation clause. To show revocation by implication requires more detailed evidence as to the contents of the lost will, for, unless the subsequent will expressly revokes the former one, such former will is only revoked so far as it is inconsistent with the later. 1 Jarman, Wills, *175. The governing principle is the intention of the testator. It does not follow from the fact of a new will that full and entire revocation was intended. The purpose may have been to make supplemental provi-

sions, consistent with the former will in whole or in part, to dispose of other property, or to amend and alter the prior dispositions only. Hence, a complete revocation by implication will not result unless the general tenor of the later will shows clearly that the testator so intended, or the two instruments are so plainly inconsistent as to be incapable of standing together. *Brant v. Willson*, 8 Cow. 56; *Smith v. McChesney*, 15 N. J. Eq. 359; *Re Venable*, 127 N. C. 344, 37 S. E. 465. Courts do not favor revocation by implication, and incline to such a construction as will give effect to both instruments. Schouler, Wills, § 407; 1 Underhill, Wills, § 251. There are cases where, from the whole instrument, the court is able to say that the later was intended as an independent and final disposition of the testator's property. 1 Jarman, Wills, *175. But in order that a court may do this with assurance, it must have the later instrument before it, so that the testator's language may be fully and accurately apprehended. Hence, it was held in a number of early cases that it was not enough to find the existence of a subsequent will, but it must be found that the subsequent will differed from the former will, claimed to have been revoked, and that the nature of the difference must be found also. *Seymour v. Northcortly*, Hardr. 374; *Goodright ex dem. Rolfe v. Hurwood*, 3 Wils. 497; *Hurwood v. Goodright*, 1 Cowp. 89, 91. This rule has been adhered to. We may regard it as well settled that the mere fact that a subsequent will was made is not sufficient of itself, and without some proof of its actual contents to show revocation of a former will. 1 Wms. Exrs. 162, 166; *Nelson v. McGiffert*, 3 Barb. Ch. 158, 49 Am. Dec. 170; *Lane v. Hill*, 68 N. H. 275, 44 Atl. 303. We think the same considerations justify the requirement that the contents of the lost will, to such extent as is necessary to establish a revocation by implication, be clearly shown. Where parol evidence is relied on to show that a will in existence was revoked by implication by one which cannot be found, such evidence should be clear, unequivocal, and convincing, since a construction of the two, if both were actually before the court, might harmonize in whole or in part what, from the relation of those who speak from recollection of matters more or less distant in time, would appear inconsistent. *Southworth v. Adams*, 11 Biss. 256, Fed. Cas. No. 13,194; *Grant v. Grant*, 1 Sandf. Ch. 235; *Newell v. Homer*, 120 Mass. 277. In somewhat analogous cases, where a deed absolute is sought to be proved a mortgage, or a deed is sought to be reformed, or a trust established, contrary to

the terms of a written instrument, by parol, this court has uniformly insisted that the evidence be clear and convincing. *Doane v. Dunham* (Neb.) 89 N. W. 640, and cases cited; *Topping v. Jennette* (Neb.) 90 N. W. 911; *Columbia Nat. Bank v. Baldwin* (Neb.) 90 N. W. 890. This requirement is the more salutary where the evidence goes largely to declarations of a testator. In *Clark v. Turner*, 50 Neb. 290, 302, 38 L. R. A. 433, 69 N. W. 843, 846, the court says: "On no subject, perhaps, are statutes so strict in requiring a writing executed and attested in certain forms as in the case of wills; and, while it is firmly established that a lost will may be proved by secondary evidence, the courts have always required such evidence to be direct, clear, and convincing. As said by the Supreme Court of the United States in *Lea v. Pope County Copper Co.* 21 How. 403, 16 L. ed. 203, 'courts of justice lend a very unwilling ear to statements of what dead men have said.' Such evidence is always considered dangerous and subject to the closest scrutiny."

In view of the principles last discussed, we think the appellants have failed to show sufficiently that the Rulo will was revoked. Declarations of the testator alone will not suffice to show that the St. Louis will had that effect by implication, since, without showing the contents of that will, such a revocation cannot be established. But, as held in *Clark v. Turner*, 50 Neb. 290, 302, 38 L. R. A. 433, 69 N. W. 843, 846, the testimony of the subscribing witnesses in this case, except so far as they testify that the testator signed a paper, and they witnessed it in his presence and at his request, amounts only to evidence of his declaration that the paper was his will. The other testimony consists of declarations of the testator as to what he had done for or had left supposed beneficiaries of the lost will, or what would be their circumstances after his death. Beyond the declarations of the testator, which may supplement, but cannot entirely replace, more direct proof, there is no such clear, unequivocal, and convincing evidence of the contents of the will as the law must and does require. As there is no proof of an express revocation clause, it follows that the finding of the trial court is right.

We therefore recommend that the decree be affirmed.

Barnes and Oldham, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

UNION LIFE INSURANCE COMPANY,
Plff. in Err.,
v.
 Maggie D. PARKER.

(.....Neb.....)

- *1. **Delivery of an insurance policy to the insured by the insurer is prima facie evidence of the payment of the cash consideration recited in the instrument.**
2. **Where insured gave his note, due in ninety days, from the policy's delivery, payable to the order of the insurer's agent, for a part of the first premium, and the agent's employment contract entitled him to 100 per cent of the first premium as his commission, and he was charged with the amount of such premium, and sold the note, and insured died after its maturity without having paid it, and afterwards the insurer bought it from the agent's indorsee, and denied liability on the policy because it contained a stipulation for its suspension during default on any note given for premiums, a finding by the trial court against such contention of the insurer should be sustained.**

(November 19, 1902.)

ERROR to the District Court for Douglas County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of life insurance. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Mr. W. W. Morsman, for plaintiff in error:

A party relying for recovery on a waiver of a condition precedent in a life insurance policy must plead and prove such waiver, or it will be unavailing.

Anders v. Life Ins. Clearing Co. 62 Neb. 585, 87 N. W. 331.

Powell had no authority to take the note as payment, even if it had been sufficient in amount to cover the whole premium.

Hartford F. Ins. Co. v. Landfare, 63 Neb. 559, 88 N. W. 780.

The stipulation that the policy shall be suspended during the period that a note given for the payment of a premium shall be due and unpaid is valid, and the policy is not enforceable for any loss which occurs during the period of default.

Houston v. Farmers' F. & M. Ins. Co. (Neb.) 89 N. W. 635; *Antes v. State Ins.*

*Headnotes by HASTINGS, C.

NOTE.—Since the note in the above case was taken by the agent personally as a matter between him and the insured only, the case is entirely distinguishable from those in which premium notes are taken by an agent on behalf of the company. As to the effect of nonpayment of a note taken for the company, see *Stewart v. Union Mut. L. Ins. Co.* (N. Y.) 42 L. R. A. 147.
 62 L. R. A.

Co. 61 Neb. 55, 84 N. W. 412; *Home F. Ins. Co. v. Garbaaz*, 48 Neb. 837, 67 N. W. 864; *Phenix Ins. Co. v. Bachelder*, 32 Neb. 490, 49 N. W. 217.

Failure to answer the request of the assured for an extension of time on the note was not a waiver of the default.

East Texas F. Ins. Co. v. Perkey, 89 Tex. 604, 35 S. W. 1050.

The fact that the note given for the premium was given to the agent was immaterial.

Mooney v. Home Ins. Co. 72 Mo. App. 92.

On motion for rehearing.

It is erroneously held in the opinion that a provision of the policy requiring the prepayment of the first premium in money as a condition precedent to any obligation on the part of the company, was performed.

There was an agreed statement of facts, in which it was agreed by the parties that the assured gave his promissory note.

There is a stipulation in the application for the insurance, expressly made part of the policy contract, signed by the assured, that "the policy contract shall not take effect until the first premium shall have been paid." This stipulation created a condition precedent.

Anders v. Life Ins. Clearing Co. 62 Neb. 585, 87 N. W. 331.

The agent could not waive the express terms of the contract of insurance.

Hartford F. Ins. Co. v. Landfare, 63 Neb. 559, 88 N. W. 779.

It is erroneously held that a note given to the agent of defendant for premium is not within the provision of the policy for suspension during default in payment.

The assured did not owe anything to Powell in his personal character.

The conclusion that the note was a personal transaction with Powell, and, therefore, not within the provision of the policy for suspension, is certainly erroneous.

Messrs. O'Neill & Gilbert, for defendant in error:

The policy does not require payments in cash. That the premium be paid is its entire requirement. This requirement was complied with by the giving of the note and the payment of \$69.47 in addition thereto.

Union Cent. L. Ins. Co. v. Taggart, 55 Minn. 95, 56 N. W. 579; *Marskey v. Turner*, 81 Mich. 62, 45 N. W. 644.

The acknowledgment in the policy of the receipt of the premium estops the company to contest the validity of the policy on the ground of nonpayment of the premium.

Union L. Ins. Co. v. Haman, 54 Neb. 612, 74 N. W. 1090; *Kendrick v. Mutual Ben. L. Ins. Co.* 124 N. C. 315, 32 S. E. 728; *Farnum v. Phenix Ins. Co.* 83 Cal. 246, 23 Pac. 869; *Fidelity & C. Co. v. Chambers*, 93 Va.

138, 40 L. R. A. 432, 24 S. E. 896; *Meyer v. Great Western Ins. Co.* 104 Cal. 381, 38 Pac. 82.

The policy is not made void or ineffective up to such time as the note is paid. It is effective when issued, and so continues until default in payment of the note.

Johnson v. Southern Mut. L. Ins. Co. 79 Ky. 406; *Marskey v. Turner*, 81 Mich. 62, 45 N. W. 644.

Defendant is estopped from claiming suspension of the policy through nonpayment of the note by Parker.

The sale of the note by Powell and retention of the proceeds are inconsistent with the claim that the policy was not in force.

Phenix Ins. Co. v. Rollins, 44 Neb. 745, 63 N. W. 46; *Marskey v. Turner*, 81 Mich. 62, 45 N. W. 644.

Collection from Parker's estate would fix liability on the policy.

Phenix Ins. Co. v. Dungan, 37 Neb. 468, 55 N. W. 1069; *Phenix Ins. Co. v. Lansing*, 15 Neb. 494, 20 N. W. 22; *Schoneman v. Western Horse & Cattle Ins. Co.* 16 Neb. 404, 20 N. W. 284; *Phenix Ins. Co. v. Rollins*, 44 Neb. 745, 63 N. W. 46.

Defendant must have returned the note if it would insist on suspension.

McAllister v. New England Mut. L. Ins. Co. 101 Mass. 558, 3 Am. Rep. 404; *Johnson v. Southern Mut. L. Ins. Co.* 79 Ky. 406; *Phenix Ins. Co. v. Dungan*, 37 Neb. 468, 55 N. W. 1069; *Krause v. Equitable Life Assur. Soc.* 99 Mich. 461, 58 N. W. 496.

Powell, only, had an interest in the premium, and he could take a note for it or donate it, as he saw fit.

Pythian Life Assn. v. Preston, 47 Neb. 374, 66 N. W. 445; *Carrington v. Omaha Life Assn.* 59 Neb. 116, 80 N. W. 491.

The sale of the note was equivalent to asserting Parker's continued liability thereon, and an extension of the time of payment.

Marskey v. Turner, 81 Mich. 62, 45 N. W. 644.

Hastings, C., filed the following opinion:

This is a suit on a policy of life insurance, heard by the district court upon an agreed statement of facts. From the judgment for plaintiff, the defendant company brings error, and relies upon two grounds of defense: (1) That it does not appear from the evidence that the first premium was ever paid, and among the provisions of the policy is one that it shall not take effect until the first premium shall have been paid during the life and good health of the insured. (2) It is claimed, perhaps with a little inconsistency, that a note was given for a part of the first premium, and that when the insured died the note was past due and unpaid, and the policy contained a stipulation that any

note given for premiums should be made a part of the contract, and a failure to pay it or any interest, when due, should suspend the policy, and it should continue suspended during the default, without action on the company's part, or notice to the insured or beneficiary.

So far as the first defense is concerned, it is contended by the defendant in error that it is not pleaded. The petition contained a general allegation, under § 128 of the Code, that plaintiff and the assured had complied with all the conditions required by them to be performed. The answer to this is as follows: "The defendant denies that said Charles E. Parker, the assured, and Maggie D. Parker, the plaintiff, have duly performed all of the conditions of said policy of insurance upon their part to be performed." It is claimed that this traverse in *ipsis verbis* is not a denial of the fact alleged, but merely applies to the form of the allegation, and not to its substance, and, hence, is not a denial of the latter. *Knight v. Denman* (Neb.) 90 N. W. 863. Probably this contention is sound, and the denial should not be allowed to pass; but it was treated as a denial in the lower court, and its sufficiency can hardly be objected to for the first time in this one. We think, however, that counsel for the defendant company are in error when they say that there is no evidence of compliance with this condition. The delivery of the policy, and its possession by the insured in his lifetime, and by the beneficiary after his death, must be taken as *prima facie* evidence of payment of the cash consideration which is recited in the policy.

The second objection to plaintiff's right of recovery has caused more trouble. It is among the agreed facts in the record that E. V. M. Powell was defendant's manager at its St. Louis office, under a contract of agency which is set forth, and through a sub-agent he took the application for the policy sued on; that defendant sent to Powell this policy, with a receipt for the first premium, for delivery to the insured under the terms of the policy and application (the receipt to be valid only when countersigned by Powell); that Powell delivered the policy to the insured, and took the latter's promissory note for \$100.93 as part payment of the first premium. The note bore interest at 8 per cent per annum, and was for ninety days from July 18, 1898, no part of which was ever paid. It was payable to the order of E. V. M. Powell. In June, 1899, defendant obtained it by purchase from a third party to whom Powell had sold it. Powell in September, 1898, reported to defendant that the premium was paid, and the policy delivered; and defendant knew nothing to the contrary until February 14, 1899. On or about that

time some person came to defendant, unknown, pretending to represent insured, and tendered at defendant's office in Omaha \$170.40 in payment of first premium on the policy. This was refused. January 11, 1899, insured wrote Powell, from Little Rock, Arkansas, stating that he was in hard luck, had broken his leg, was in hospital and not in position to pay the note, and asking a six-months extension. The receipt for the first premium was retained by Powell until February, 1899, and then by him returned to defendant. Under Powell's contract with defendant, he was entitled to retain 100 per cent of the first premium. By the course of business with Powell, it was defendant's practice, on sending a policy and receipt for first premium, to charge Powell's account with the amount of the first premium. When the policy was reported delivered, Powell was credited with the amount of his commission, and a remittance made for any still due. If the policy was refused and returned with the receipt, Powell got credit for the amount charged to him on account of the first premium. Powell's account with the company from June 23, 1898, to the commencement of the action, showed a balance due the company of \$78; giving him credit for the amounts due him as commission on first premiums, and charging him with \$3 for each application, as defendant was entitled to do under the contract. The \$3 was by his contract due from Powell with each application, whether it was finally accepted or rejected. There had been no settlement since this policy was issued. The policy contained the following provisions: "And all notes which may be given for premiums or loans upon this policy are hereby made a part of this contract of insurance. and the failure to pay said notes, or any interest payments due thereon, at the time or before they shall fall due, shall cause this policy to become suspended, and continue suspended during default in such payments, without action on the part of the company, or notice to the insured or beneficiary hereunder. No agent has power to make contracts of insurance in behalf of the company, or notice to the insured or beneficiary hereextend the time for paying any premium, to waive any forfeiture, or to bind the company by making any promise whatever." The real question presented by this case is whether or not, under these circumstances, the company can avail itself of the default in the payment of the insured's note to Powell for \$100.93, to avoid its liability under this policy. It will be observed that, under Powell's contract with defendant, he was entitled to receive 100 per cent of this premium. It will be observed that he had re-

ported the premium paid, and the policy delivered. It will be observed that the note was drawn to his order, and had been sold by him. It was obtained by the defendant by purchase from a third party in June, 1899, and the insured died February 16, 1899, in Ottumwa, Iowa. Plaintiff in error relies upon the various cases decided by this court upholding and sustaining contract provisions between insurance companies and insured that policies shall be avoided by defaults upon notes given for premiums, or suspended during the continuance of such defaults. We are of the opinion that, under the issues and agreed facts in this case, this note was not of that character. The district court was undoubtedly warranted in finding that this note was accepted and received by the agent, Powell, as his own note, under his agreement for a commission of 100 per cent of the first premium. His sale of the note would, alone, be sufficient to warrant the trial court in such a holding. It seems clear that, while such note was in the hands of a third party, there would be no right on the part of either Powell or the defendant to avoid or suspend this policy for its nonpayment. As above indicated, it is clear that the note was purchased after the insured's death from a third party to whom Powell had sold it. In the case of *Pythian Life Asso. v. Preston*, 47 Neb. 390, 66 N. W. 445, it is held that where a similar note for a part of the first premium was given to an agent, who by his contract with his company was entitled to retain that premium as his commission, the whole transaction was between the agent and the insured, and, the premium being reported paid, the company could not avoid the policy for nonpayment of the first premium. In that case, it is true, the note was paid to the agent before the death of the insured, but after it became due. The ground, however, of the decision, is that a payment was made to the agent in the manner satisfactory to him, and the company, having no interest in it, could not object to the method. It was a mere personal indebtedness on the part of the insured to the agent, which was settled by the insured's note. Under the agreed statement of facts, the trial court in this case seems to us to have been entirely warranted in holding that this note was a personal transaction between Powell and the insured, that it was not one of the notes for premiums covered by the agreement in the policy, and that the defendant could no more avoid the policy by buying this note after the insured's death than it could by the buying of any other. As counsel suggests, the agreement in the policy cannot be held to have been meant to protect Powell's indorsee,

who held the note at the time of insured's death.

It is recommended that the judgment of the district court be affirmed.

Kirkpatrick, C., concurs.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

Petition for rehearing denied.

Mary J. FOXWORTHY, Plff. in Err.,
v.

Lucy C. COLBY.

(.....Neb.....)

*The unauthorized insertion of the word "gold" before the word "dollars" in an instrument, after its execution and delivery, is a material alteration.

(March 19, 1902.)

ERROR to the District Court for Lancaster County to review a judgment in favor of plaintiff in an action brought to foreclose a mortgage. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. Burr & Burr, for plaintiff in error:

No action can be maintained by defendant in error upon the note and mortgage set up in the petition. Defendant in error only had a cause of action for money had and received, or for original consideration, but not upon this forged, altered, and changed note and mortgage.

Griffith v. Short, 14 Neb. 259, 15 N. W. 335; *Homan v. Steele*, 18 Neb. 652, 26 N. W. 472; *Spencer v. Thistle*, 13 Neb. 201, 13 N. W. 208; *Wood v. Steele*, 6 Wall. 80, 18 L. ed. 725.

The law regards the security after it is altered as an entire forgery with respect to parties who have not consented, and, so far as they are concerned, deals with it accordingly.

Goodman v. Eastman, 4 N. H. 456; *Watterman v. Vose*, 43 Me. 504; *Outhwaite v. Luntley*, 4 Campb. 180; *Bank of United*

*Headnotes by DAY, C.

NOTE.—As to what constitutes a material alteration of a note, see also, in this series, *Ruby v. Talbott* (N. M.) 3 L. R. A. 724, and cases in note thereto; *Montgomery v. Crosthwait* (Ala.) 12 L. R. A. 140; *Sanders v. Bagwell* (S. C.) 7 L. R. A. 743; *Palmer v. Poor* (Ind.) 6 L. R. A. 469; *Wilson v. Hayes* (Minn.) 4 L. R. A. 196; *Walton Plow Co. v. Campbell* (Neb.) 16 L. R. A. 62.

States v. Russel, 3 Yeates, 391; *Mitchell v. Ringgold*, 3 Harr. & J. 159, 5 Am. Dec. 433; *Stephens v. Graham*, 7 Serg. & R. 509, 10 Am. Dec. 485; *Miller v. Gilleland*, 19 Pa. 119; *Heffner v. Wenrich*, 32 Pa. 423; *Stout v. Cloud*, 5 Litt. (Ky.) 207; *Lisle v. Rogers*, 18 B. Mon. 528; *Wood v. Steele*, 6 Wall. 80, 18 L. ed. 725.

Altering the currency in which payment is to be made, or if the note is payable in merchandise modifying the character or quality of goods, vitiates the note.

Darwin v. Rippey, 63 N. C. 318; *State v. Cilley*, Cited in *Martendale v. Follet*, 1 N. H. 95; *Schwalm v. McIntyre*, 17 Wis. 232; *Stephens v. Graham*, 7 Serg. & R. 505, 10 Am. Dec. 485; *Bogarth v. Breedlove*, 39 Tex. 561.

Messrs. Flansburg & Williams for defendant in error.

Day, C., filed the following opinion:

Lucy A. Colby brought this suit in the district court of Lancaster county against Mary J. Foxworthy to foreclose a real-estate mortgage executed by her in favor of the Lombard Investment Company, and by that company assigned to the plaintiff. The answer of the defendant alleged that, after the execution and delivery of the bond and mortgage they were, without the knowledge or consent of the defendant, fraudulently altered and changed by inserting therein the word "gold" before the word "dollars." The reply was a general denial, and also a plea that defendant had paid nine of the coupons as they became due, and that each of them contained the word "gold" before the word "dollars;" that no protest or objection was ever made by the defendant, but that at all times she expressed a willingness to pay the note and coupons and discharge the debt; by reason of which facts it is alleged the defendant is estopped from interposing the defense sought to be pleaded by the answer. Upon the trial a judgment of foreclosure was rendered, to review which the defendant has brought the case to this court by proceedings in error.

Upon the request of the defendant, a jury was called to determine disputed questions of fact. In response to a special interrogatory the jury found that the note and mortgage in controversy had been wrongfully altered and changed without the knowledge or consent of the defendant, by inserting therein the word "gold" before the word

A. 468; *Simmons v. Atkinson & L. Co.* (Miss.) 23 L. R. A. 599; *Erickson v. First Nat. Bank* (Neb.) 28 L. R. A. 577; *Citizens' Nat. Bank v. Williams* (Pa.) 35 L. R. A. 464, and note as to effect of alteration on bona fide holder; *Newman v. King* (Ohio) 35 L. R. A. 471; *Brown v. Johnson Bros.* (Ala.) 51 L. R. A. 403; and *Rochford v. McGee* (S. D.) 61 L. R. A. 335.

"dollars." The jury also returned a general verdict for the defendant. We deem the finding of the jury unimportant, as, in an equity case, it is only advisory. *Bank of Stockham v. Alter*, 61 Neb. 359, 85 N. W. 300. Besides, the finding of the court with respect to the alterations in the bond and mortgage was in accord with the finding of the jury. The court found that the defendant had paid the semiannual coupons, which had likewise been altered, and that all of said coupons had been delivered to the defendant, and that she "might have had knowledge of the change and alteration in said bond and mortgage by exercising due care and diligence," but made no complaint thereof, but continued to pay said coupons in manner and form as therein written. This latter finding constitutes the basis for the judgment of the court. One of the errors assigned is that this finding is not supported by sufficient evidence, and is contrary to the evidence. The record is clear that defendant had no knowledge that the coupons had been altered or changed. She swears positively that she never examined them when they were returned to her, except casually, to ascertain that they had been stamped paid. The finding of the court was not that she did know of the alteration, but that by exercising due care and diligence she might have known it. We do not think the defendant owed any duty to the plaintiff to examine the coupons as they were returned to her after payment; and, if not, she could not be charged with negligence in failing to examine them. Granting that an estoppel is properly pleaded, the facts proved do not sustain it.

It is practically conceded by counsel for the plaintiff that the reasons assigned in the judgment are hardly sufficient to sustain it, but it is insisted that the ultimate decree awarding a foreclosure was right, and should, therefore, be affirmed. It is contended by plaintiff that the alteration of the instruments by the insertion of the word "gold" is an immaterial alteration. We cannot assent to this. A material alteration of an instrument is any alteration which causes it to speak a language different in legal effect from that which it originally spoke. *Bridges v. Winters*, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598; *Murray v. Klinzing*, 64 Conn. 78, 29 Atl. 244; *Whetlock v. Freeman*, 13 Pick. 168, 23 Am. Dec. 674; *Oliver v. Hawley*, 5 Neb. 439; *Fisherick v. Hutton*, 44 Neb. 122, 62 N. W. 488. By the terms of the contract as it was originally made, it could have been satisfied and discharged by the payment of the sum named in any currency which was lawful money at the time of the payment. The contract, as modified, could only be dis-

charged by the payment of a specific kind of money. The defendant was by this change deprived of a legal privilege which she enjoyed under the contract she had made. By this alteration the legal effect of her contract was changed. The rule is well settled in this state that a material alteration of a promissory note renders it void, even in the hands of a bona fide purchaser. *Brown v. Straw*, 6 Neb. 536, 29 Am. Rep. 369; *State Sav. Bank v. Shaffer*, 9 Neb. 1, 31 Am. Rep. 394, 1 N. W. 980; *Hurlbut v. Hall*, 39 Neb. 889, 58 N. W. 538; *Erickson v. First Nat. Bank*, 44 Neb. 622, 28 L. R. A. 577, 62 N. W. 1078. The plaintiff cites the case of *Bridges v. Winters*, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598, to the point that the insertion of the words "in gold" in a promissory note is not a material alteration. An examination of the reasons announced by the court in the case does not support the contention made for it. In the course of the opinion the court says: "The legal liability of the plaintiffs in error on the note in question seems to us the same without the words 'in gold' inserted as with them. The law at the date of this note fixes the legal liability of the plaintiffs in error as to the kind of funds or money this note should be paid in. . . . Could Harris legally discharge or pay the money due on the note on the 25th day of May, 1860, in any other currency than gold? He could not." It thus appears that in that case the alteration was held to be immaterial, because it did not change the legal effect of the note as it was originally made. The rule is well established that contracts to pay a certain number of dollars in gold are enforceable. In *Bronson v. Kimpton*, 8 Wall. 444, 19 L. ed. 433, it was held that a mortgage given to secure a bond payable in gold was not satisfied by a tender of United States notes equal in nominal amount to the sum named in the bond. *Hittson v. Davenport*, 4 Colo. 169; *McGoon v. Shirk*, 54 Ill. 408, 5 Am. Rep. 122; *Phillips v. Dugan*, 21 Ohio St. 466, 8 Am. Rep. 66; *Walkup v. Houston*, 65 N. C. 501. It is urged by plaintiff's counsel that, conceding the alteration in the instruments to be material, still it is not shown that the change was made by any party to the transaction, or by any person in privity with him, or by his consent. And it is argued that, if the alteration was done by a stranger, it is a mere spoliation, and the rights of the parties are not affected thereby. There is no doubt that, if an instrument is changed by a stranger, without the consent of the parties to it, the rights of the holder will not be affected thereby. *Walton Plow Co. v. Campbell*, 35 Neb. 173, 16 L. R. A. 468, 52 N. W. 883. We fail to see the application of the rule here invoked to the case under

consideration. Not only was the contract as changed sought to be enforced, but proof was taken of the officers and employees of the Lombard Investment Company for the purpose of showing that the word "gold" was in the contracts at the time the instruments were executed. One of the witnesses testified that the word "gold" was stamped before the word "dollars" upon all the blanks and forms used by the company at the time the loan was made, and the form of the coupon and mortgage in suit was the form in use at that time. The disputed question in the court below was whether the word

"gold" was in the note and mortgage when the instruments were signed and delivered.

We therefore recommend that the judgment be reversed, and the cause remanded to the district court for further proceedings.

Hastings and Kirkpatrick, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, *the judgment of the District Court is reversed, and case remanded.*

Petition for rehearing denied.

IOWA SUPREME COURT.

Emma HOLMAN

v.

**OMAHA & COUNCIL BLUFFS RAILWAY
& BRIDGE COMPANY, Appt.**

(117 Iowa, 268.)

1. The admission in evidence of pleadings in another action, which contain averments which are properly admitted, cannot be questioned on appeal on the ground of immaterial matter in the reply, unless the special attention of the trial court was called thereto, and some action in that respect was asked.

2. Estoppel to plead the statutory bar to an action for personal injuries arises where, pending negotiations for settlement, defendant gave assurance that the bar would not be pleaded, and plaintiff, relying thereon, neglected to bring suit until the statutory period had elapsed, but brought it as soon as it became apparent that the negotiations would be ineffectual.

(May 31, 1902.)

A PPEAL by defendant from a judgment of the District Court for Pottawattamie County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

Statement by **McClain, J.:**

Action to recover damages for personal injuries alleged to have been received by plaintiff while on an electric car operated by defendant company, by reason of the negligence of the employees of said company in carelessly causing the electric car to be started forward suddenly, by reason of which plaintiff was thrown violently against the railing and steps of said car. Verdict on

a former trial was set aside by the court, and this action was affirmed. 110 Iowa, 485, 81 N. W. 704. On the next trial the verdict was for plaintiff for \$12,000, and from the judgment on such verdict defendant appeals. On suggestion of the death of plaintiff pending this appeal, her administrator has been substituted.

Messrs. Wright & Baldwin for appellant.

Messrs. Flickinger Bros., for appellee: Mere technical errors as to the admission or exclusion of evidence will not be sufficient to require reversal, where it appears that no substantial prejudice has resulted.

Bever v. Spangler, 93 Iowa, 576, 81 N. W. 1072; *Weitz v. Ewen*, 50 Iowa, 34; *Brayley v. Ross*, 33 Iowa, 505; *Hubbard v. Mason City*, 60 Iowa, 400, 14 N. W. 772; *Ellwood v. Wilson*, 21 Iowa, 523; *McCrary v. Deming*, 38 Iowa, 527; *Le Grand Quarry Co. v. Reichard*, 40 Iowa, 161; *Wallace v. Wallace*, 62 Iowa, 651, 17 N. W. 905; *Fulmer v. Fulmer*, 22 Iowa, 230; *Blackburn v. Powers*, 40 Iowa, 681; *State v. Struble*, 71 Iowa, 11, 32 N. W. 1.

The general superintendent had authority to settle claims.

Bailey, Personal Injuries Relating to Master & Servant, § 1595; *Ardesco Oil Co. v. Gilson*, 63 Pa. 146; *Atlantio & P. R. Co. v. Reisner*, 18 Kan. 458; *Black v. Des Moines Mfg. & Supply Co. (Iowa)* 77 N. W. 504; *Fireman's Fund Ins. Co. v. Norwood*, 16 C. C. A. 136, 32 U. S. App. 496, 69 Fed. 71; *Citizens' Nat. Bank v. Wintler*, 14 Wash. 558, 45 Pac. 38; *Bates v. Keith Iron Co.* 7 Met. 224; *Hascall v. Life Asso. of America*, 66 N. Y. 616; *Fay v. Noble*, 12 Cush. 1; *Leonard v. Burlington Mut. Loan Asso.* 55 Iowa, 594, 8 N. W. 463; *Poole v. West Point Butler & Cheese Asso.* 30 Fed. 513; *Rosemond v. Northwestern Autographic Register Co.* 62 Minn. 374, 64 N. W. 925; *Whitney v.*

NOTE.—For agreement to waive defense of statute of limitations, see also, in this series, *Kellogg v. Dickinson*, 1 L. R. A. 346; *Wells, F. & Co. v. Enright*, 49 L. R. A. 647. 62 L. R. A.

South Paris Mfg. Co. 39 Me. 316; *McGenness v. Adriatic Mills*, 116 Mass. 177; *Malecek v. Tower Grove & L. R. Co.* 57 Mo. 17; *Bullock v. Consumers' Lumber Co.* (Cal.) 31 Pac. 367; *Union Mut. L. Ins. Co. v. White*, 106 Ill. 67; *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. ed. 608, 11 Sup. Ct. Rep. 36; *Mutual Reserve Fund Life Asso. v. Cleveland Woolen Mills*, 27 C. C. A. 212, 54 U. S. App. 306, 82 Fed. 508; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; *Hartford Life Annuity Ins. Co. v. Unsell*, 144 U. S. 439, 36 L. ed. 496, 12 Sup. Ct. Rep. 671; *Morawetz, Priv. Corp.* §§ 251-258; *Abbott*, Trial Ev. 2d ed. pp. 40, 41.

Independent of the authority, actual or apparent, of Dimmock, he was in such a position and relation to the company that it was bound by his fraudulent representations and his fraudulent acts, and it is now estopped to deny his authority.

Breyfogle v. Walsh, 25 C. C. A. 357, 53 U. S. App. 43, 80 Fed. 172; *Bish v. Hawkeye Ins. Co.* 69 Iowa, 184, 28 N. W. 553; *Lucas v. White Line Transfer Co.* 70 Iowa, 547, 59 Am. Rep. 449, 30 N. W. 771; *Mohrenstecher v. Westervelt*, 30 C. C. A. 584, 57 U. S. App. 618, 87 Fed. 157; *Minneapolis Trust Co. v. Menage*, 73 Minn. 441, 76 N. W. 195; 17 Am. & Eng. Enc. Law, p. 145; *Hudson v. Northern P. R. Co.* 92 Iowa, 236, 60 N. W. 608; *Warfield v. Warfield*, 76 Iowa, 633, 41 N. W. 383.

A defendant who has agreed not to set up the statute of limitations shall not be allowed to do it; such agreement, although it does not amount to a new promise, operates by way of estoppel in cases in which the statute has not fully run, and the plaintiff forbore to sue in consequence of the promise.

2 Herman, Estoppel, § 825; *Covart v. Persine*, 21 N. J. Eq. 101; *Gaylord v. Van Loan*, 15 Wend. 308; *Quick v. Corlies*, 39 N. J. L. 11; *Randon v. Toby*, 11 How. 493, 13 L. ed. 784; *Warren v. Walker*, 23 Me. 453; *Hodgdon v. Chase*, 29 Me. 47; *Schroeder v. Young*, 161 U. S. 334, 40 L. ed. 721, 16 Sup. Ct. Rep. 512; *Bish v. Hawkeye Ins. Co.* 69 Iowa, 184, 28 N. W. 553; *Little v. Phenix Ins. Co.* 123 Mass. 380, 25 Am. Rep. 96; *Bridges v. Stephens*, 132 Mo. 524, 34 S. W. 555; *Cecil v. Henderson*, 121 N. C. 244, 28 S. E. 481; 1 Wood, Limitation of Actions, 2d ed. § 76; 13 Am. & Eng. Enc. Law, p. 718; *State Trust Co. v. Sheldon*, 68 Vt. 259, 35 Atl. 178; *Missouri P. R. Co. v. B. F. Coombs & Bro. Commission Co.* 71 Mo. App. 299; *Wells, F. & Co. v. Enright*, 127 Cal. 669, 49 L. R. A. 647, 60 Pac. 439.

Forbearance to sue was a sufficient consideration.

Bank of Woodland v. Heron, 122 Cal. 107, 54 Pac. 537; *Smith v. Lawrence*, 38 Cal. 24, 62 L. R. A.

99 Am. Dec. 344; *Wood v. Goodfellow*, 43 Cal. 185; *Randon v. Toby*, 11 How. 493, 13 L. ed. 784; Wood, Limitation of Actions, § 76; *State Loan & T. Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600.

McClain, J., delivered the opinion of the court:

This suit was instituted more than two years after the injury was received, and under the provisions of Code, § 3447, subd. 3, it was barred, unless something was shown by the plaintiff to take it out of the statute. For this purpose the plaintiff alleged in her petition that at the time of the injury, and subsequent thereto, one Dimmock was general superintendent and manager of the defendant corporation, and on behalf of the defendant, within two years after the injury, he negotiated with plaintiff with reference to a settlement of her claim, and, in the course of such negotiation, represented that the defendant would not interpose the plea of the statute of limitations, and that plaintiff, relying on such representation, failed to bring her action within two years, whereas she would otherwise have done so. With reference to this claim, it is first objected that Dimmock had no authority to waive the statute for defendant; but the court instructed that, while the jury would not be authorized in finding such authority in the general employment of Dimmock as general superintendent and manager, nor in any resolutions of the board of directors authorizing him to settle specific claims, yet his authority to negotiate for the settlement of this particular case, and, in connection therewith, to waive the statute of limitations, might be found from evidence showing that he was in the habit, with his principal's knowledge and consent, of negotiating such settlements without previous and specific authority, and without the necessity of subsequent ratification, and that the claims thus settled by him were of such a number and character, and so treated by the defendant, as to indicate a general intention and purpose upon the part of defendant's board of directors to intrust Dimmock generally with authority to make such settlements on his own responsibility. The correctness of this instruction as a statement of law is not questioned, and we find that there was sufficient evidence to sustain a finding by the jury that Dimmock did have the authority to settle the claim in question, and that he did, in connection with negotiations for a settlement had with plaintiff prior to the expiration of the statutory period, represent to her that, if she would delay bringing suit until such negotiations could be completed, the defendant would not interpose the bar of the statute of limitations, which might ac-

crue during such delay. It is not necessary that we set out the evidence, nor is it our practice to do so in such cases.

In support of plaintiff's contention that Dimmock had been allowed to act for defendant in making settlements of claims, the pleadings in an action brought by another claimant against this same defendant for personal injuries were offered in evidence, and received over the objection as to each on behalf of defendant that they were incompetent, immaterial, and irrelevant. It is not now contended in behalf of appellant that the petition or answer were incompetent, but it is urged that the reply contained an averment of matter reflecting on Dimmock, and therefore prejudicial to the defendant in this case, and not in any way material to the issue on which the pleadings were introduced in evidence; but the difficulty is that no objection was made to this particular matter, it being conceded that there were averments in the petition, answer, and reply which were competent evidence in this case. The action of the court in permitting all these pleadings to be introduced cannot be questioned, on account of immaterial matter in the reply, unless the lower court's special attention was called thereto, and some action in that respect was asked.

But an important question of law is involved, to wit, whether such a waiver, even if made with authority, is binding upon the defendant; that is, whether any representation or agreement that the statute of limitations will not be interposed is valid and effectual. On this question there is great conflict in the authorities. The courts have approached it from different points of view, and have reached inconsistent conclusions. In the early New York cases of *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652, and *Gaylord v. Van Loan*, 15 Wend. 308, it was held that an agreement not to plead the statute of limitations, made before the expiration of the statutory period, and relied on by the creditor until after the statutory period had expired, operated as an estoppel *in pais* as against the debtor, and precluded him from interposing the defense of the statute to defeat the action. This view was disapproved in the subsequent case of *Shapley v. Abbott*, 42 N. Y. 443, 1 Am. Rep. 548, which is the leading case now relied on by appellant. In that case it was thought that, as both parties were equally advised as to the law, the debtor had no right to assume that the creditor would be bound by way of estoppel by such an agreement; and this view received some countenance in *Andree v. Redfield*, 98 U. S. 225, 25 L. ed. 158. In *Crane v. French*, 38 Miss. 503, the view is expressed that an agreement not to plead the statute of limitations, not amounting to an acknowledgment

ment or new promise in writing, within statutory provisions, would be contrary to public policy, and therefore not effectual to defeat the bar. On the other hand, it has been held in a number of cases that, even though the statute requires an acknowledgment or new promise in such case to be in writing, yet the plea of the statute of limitations will not be allowed where, in view of a parol agreement not to plead the statute, relied on by the other party, the interposition of the defense would be "unconscientious and inequitable, and would perpetrate a fraud." *Cecil v. Henderson*, 121 N. C. 244, 28 S. E. 481; *State Trust Co. v. Sheldon*, 68 Vt. 259, 35 Atl. 177; *State Loan & T. Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600; *Quick v. Corlies*, 39 N. J. L. 11.

In view of the fact that the debtor may waive the benefit of the statute of limitations by failing to interpose the defense in the proper manner, we see no particular difficulty in the way of holding that the debtor may, at least, by an independent contract made after the statutory period has commenced to run, deprive himself, for a limited time, at any rate, of the right to interpose the statutory privilege. The argument as against such a contract, on the ground of public policy, can hardly be stronger than the claim of immunity from the result of fraud or unconscionable advantage arising out of the representation relied on by the other party, that the statutory bar would not be interposed. But we need not decide the question as to the validity of such a contract, for no such contract is involved in this case. We desire to insist on the distinction between a case of contract and a case of estoppel. It may be that such a contract, duly entered into, would operate as an estoppel, but it is clear that an estoppel may arise without contract. For instance, it has been held that a representation by which a debtor whose property has been sold under execution has been induced to let the statutory period of redemption expire without making redemption, in reliance on the representation of the purchaser that redemption would be allowed after the expiration of such period, would estop the purchaser from resisting redemption by the debtor after the statutory period. *Schroeder v. Young*, 161 U. S. 334, 40 L. ed. 721, 16 Sup. Ct. Rep. 512. The case just cited furnishes an excellent illustration of an estoppel where there is no contract, for, while the debtor did rely on the promise of the purchaser, there was evidently no agreement on the part of the debtor to do anything, and therefore no consideration for the purchaser's promise to allow the debtor to redeem. Adopting, as we think we well may, the analogy of the cited

case, we find no difficulty in the present case in holding that, although the defendant did not definitely promise to pay any sum by way of settlement, and the plaintiff did not promise to forbear suit for any specified period, nevertheless, if Dimmock, for the defendant, gave assurance that the statutory limitation would not be interposed, with the intention that plaintiff should rely on such assurance, and plaintiff, relying on such assurance, postponed the bringing of action until after the expiration of the statutory period, then the defendant estopped itself from interposing the statutory bar to this action, which was brought as soon as it became apparent that the negotiations for an adjustment of the claim would be ineffectual. By putting our decision squarely on the doctrine of estoppel, and not on that of contract, we avoid difficulties which have been experienced when a contract has been relied on, either as binding in itself, or as a basis of an estoppel. For instance, we are not troubled as the court was in *Kellogg v. Dickinson*, 147 Mass. 432, 1 L. R. A. 346, 18 N. E. 223, with the question whether the promise not to interpose the statutory bar is to be effectual without limit of time, for the estoppel would only be effective so long as the creditor reasonably relied upon defendant's representations as an excuse for not instituting the action. *Cocart v. Perrine*, 21 N. J. Eq. 101. Our conclusion finds support in *Cecil v. Henderson*, 121 N. C. 244, 28 S. E. 481; *Missouri P. R. Co. v. B. F. Coombs*

& *Bro. Commission Co.* 71 Mo. App. 299; *State Loan & T. Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600; and *Randon v. Toby*, 11 How. 493, 519, 13 L. ed. 784, 795; and, as already indicated, in *Gaylord v. Van Loan*, 15 Wend. 308, and *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652, in which we think the correct doctrine is recognized, although they are discredited, as we have seen, in the later case in the same state. The reasoning on which we rely is quite fully set out, and the authorities in support of it collected, in the first opinion in *Bridges v. Stephens*, 132 Mo. 524, 34 S. W. 555; but in that case the court was evenly divided on the question. Our conclusion is also supported, by analogy, in *Bish v. Hauckey Ins. Co.* 69 Iowa, 184, 28 N. W. 553; *Little v. Phoenix Ins. Co.* 123 Mass. 380, 25 Am. Rep. 96, and like cases, where it is held that an insurance company may estop itself to set up a contractual limitation of the time for bringing action by representations inducing the insured to believe that such limitation will not be relied on. We conclude, therefore, that the lower court did not err in overruling objections to evidence tending to show that such representations as we have referred to were made by Dimmock to plaintiff for the purpose of inducing her to refrain from bringing action until after the statutory limitation had expired.

We find no error in the action of the lower court, and the judgment is affirmed.

Petition for rehearing denied.

KENTUCKY COURT OF APPEALS.

Elizabeth THOMPSON'S EXECUTOR,
Appt.,
v.

William BROWN et al.

(.....Ky.....)

A devise of a fund to be distributed by the executor "to the poor," in his discretion, is valid, under a statute making valid gifts to charity "which shall have pointed out with reasonable certainty" the purpose of the charity and the beneficiaries thereof.

(June 17, 1903.)

A PPEAL by the executor of the estate of Elizabeth Thompson, deceased, from a decree of the Circuit Court for Marion County construing her will. *Reversed.*

The facts are stated in the opinion which was delivered by DU RELLE, J., at a former hearing, as follows:

The only question for decision is the construction of item 11 of the will of appellant's testator, which is as follows: "I will and direct that my house and lot in Raywick, Ky., be sold at such time and on such terms as my executor may deem best; and I

NOTE.—For earlier cases in this series as to definiteness of charitable gifts, see *note* to *Cottman v. Grace*, 3 L. R. A. 149; *Heiskell v. Chickasaw Lodge No. 8*, 4 L. R. A. 699, and *note*; *Stratton v. Physio-Medical Institute*, 5 L. R. A. 33; *Bullard v. Chandler*, 5 L. R. A. 104, and *note*; *General Assembly of Presby. Church v. Guthrie*, 6 L. R. A. 321; *Fosdick v. Hempstead*, 11 L. R. A. 715; *People ex rel. Atty. Gen. v. Dashaway Asso.* 12 L. R. A. 117; *Almy v. Jones*, 12 L. R. A. 414; *Tilden v. Green*, 14 L. R. A. 33; 62 L. R. A.

Gambel v. Trippe, 15 L. R. A. 235; *Kelly v. Nichols*, 19 L. R. A. 413; *McAllister v. Burgess*, 24 L. R. A. 158; *Bird v. Merkle*, 27 L. R. A. 423; *Hanson v. Little Sisters of the Poor*, 32 L. R. A. 293; *People v. Powers*, 35 L. R. A. 502; *People ex rel. Ellert v. Cogswell*, 35 L. R. A. 269; *McHugh v. McCole*, 40 L. R. A. 724; *Moran v. Moran*, 39 L. R. A. 204; *Harrington v. Pier*, 50 L. R. A. 307; *Woman's Foreign Missionary Soc. v. Mitchell*, 53 L. R. A. 711; and *Clayton v. Hallett*, 59 L. R. A. 407.

will that the proceeds, together with whatever other estate I may have after payment of the aforesaid bequest and funeral expenses, shall be collected by my executor, and by him distributed to the poor, in his discretion." The question is whether the gift in this clause is sufficiently definite to be enforceable by the courts. It is hardly necessary to go into an elaborate consideration of the statute of Elizabeth and the cases arising thereunder. It seems to be definitely established that charitable uses were administered by the courts before the statute of Elizabeth. That statute vastly extended the power of the Lord Chancellor, which up to that time had been the exercise of a purely judicial function, in adjudicating upon the legal questions arising upon charitable gifts. The statute added a ministerial function, and, as keeper of the King's conscience, the chancellor, representing the King as *parens patriæ*, by the exercise of the prerogative power, administered upon charities which did not come within his equity jurisdiction. As said by Mr. Perry (Perry, Tr. § 718): "No very clear line has been drawn between those [charities] established by him exercising his ordinary judicial power in the court of chancery and those established by the extraordinary or prerogative power of the Crown exercised through the chancellor. Thus, if gifts were made for charitable uses that were illegal or contrary to public policy, or that were impossible to be carried into effect, the King, as general supervisor of charities, could devote them to such other charitable purposes, *cy près* the original gift, as he pleased." This power does not exist in America, and the English cases in which gifts to illegal charities, or charities so indefinite as to be unenforceable, were devoted to other charitable purposes, either expressly under the prerogative power of the King, or by confusing that power with the judicial powers of the chancellor, are not authority here. Says Mr. Perry: "No such power exists in any American magistrates, judicial or ministerial, and none can exist until it is conferred by the legislature. The cases named are not law in America, and probably nothing like them will ever have a place in its jurisprudence." As matter of course, the exercise of such an arbitrary power of devoting an unenforceable charitable gift to purposes as near as might be to the intention of the donor led to many absurd results. A few examples will suffice: In *Da Costa v. De Pas*, 1 Ambl. 228, it appears that Elias De Pas, a Jew, by will established a fund of £1,200, "to be appropriated in order to apply and dedicate the revenue of that sum towards establishing a Jesuba, or assembly for reading the law, and for instructing people in our holy religion." It was held by

Lord Hardwicke that the gift was a charity, "but the mode in which it is to be disposed is such that, by the law of England, it cannot take effect, . . . it promoting a religion contrary to the established one. There the Crown, by sign manual, . . . may give orders in what charitable manner it shall be disposed." From a note to this case taken from the register's book it appears that £1,000 of the £1,200 was given to the Hospital for the Support of Exposed and Deserted Children "towards supporting a preacher, and to instruct the children under their care in the Christian religion, and for other incidental expenses attending the said chapel," etc. So, in *Isaac v. Gompertz* it was held that an annuity for the support and maintenance of the Jews' synagogue in Magpie alley "ought to be applied to some other charitable use, and that the appointing and directing that charitable use was in the Crown." 1 Ambl. 228, note. The great case of *Moggridge v. Thackwell*, 7 Ves. Jr. 36, the leading English case upon the subject of charitable uses,—much quoted and little read,—presents an illustration of the arbitrary mode in which an intention was supplied to a testatrix, "who seems to have been saturated and satiated with the idea of charity, and yet not to have had mind enough herself to determine upon the particular objects;" and that in a case where the royal prerogative was not called into play, but the charitable use was executed by a "scheme" devised and submitted to the master by the next of kin and the executor. Ann Cam made her will in 1779, disposing of a large estate in very numerous devises and legacies, in the course of which she recited that she was tenant in tail of the estates called "Hill Netherton" and "Laycelles," and by suffering a recovery could make herself tenant in fee of them, but, out of regard to her "Aunt Walker" and her family, she chose to let the estate tail continue. She gave the residue of her personal estate to a named trustee, "desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters." A decree was pronounced by Lord Thurlow sustaining the charitable use, and providing "that the master should approve of a scheme to effectuate the purposes of the said charity, with liberty for the parties to lay proposals before him for that purpose." The residue of the personal estate amounted to £50,000. It appears that years after the making of the will, her Aunt Walker having died, Mrs. Cam proceeded to suffer a recovery, and bar the entail of Hill Netherton and Laycelles. The trustee died before the testatrix. The "scheme" submitted by the executor and the next of kin, and approved by the master, allowed £5,000 of

this residue of personal estate to Thomas Walker, son of the Aunt Walker named, "under the peculiar circumstances of his case;" granted small annuities to several other persons related to the testatrix, or who had depended on her bounty during her life; established a school near her residence; gave £1,000 to an infirmary, and another £1,000 to a lunatic asylum; established a fund for the widows and orphans of clergymen, and another fund, with the remainder of the residuary, to be called "Mrs. Ann Cam's Benefaction to Poor Clergymen." It may be noticed that in many of the English cases there was a strong tendency in the "schemes" submitted to the master by the next of kin to provide for the poor relations of the testator. A sample of this is found in *Atty. Gen. v. Doyley*, 2 Eq. Cas. Abr. 194. Lord Rosslyn, having become lord chancellor, intimated that it was "fit this case should be reheard," and thought it impossible to execute the report, observing that it was "making, not construing, a will." But he did not rehear it. Lord Eldon became lord chancellor, and the case was reheard before him. He remarked that it was his "duty to consider this case very anxiously, and that is considerably increased by my conviction that if the decree is affirmed, it would be a considerable surprise upon the testatrix." He first provided for the payment of the costs of the rehearing and of all parties out of the fund. The lord chancellor then began: at the "period when, in this country, a portion of the residue of every man's estate was applied to charity, and the ordinary thought himself obliged so to apply it, upon the ground that there was a general principle of piety in the testator;" considered and discussed practically all the English authorities on the subject, criticising very many, if not most, of them; alluded to certain cases "where the *cy pres* doctrine is said to have been formerly carried to a monstrous length, in later cases much restrained," and was finally "reluctantly driven to say there is no substantial difference between these words" (in the residuary clause) and words which had been held to express a general intention to devote her property to charity; "and therefore this court will carry that general intention into effect." He then says, "The next question—by what means that is to be done—is a most difficult question," and concludes: "All I can say upon it is, I do not know what doctrine could be laid down that would not be met by some authority upon this point." When Lord Eldon prepares to state "the general principle thought most reconcilable to the cases,"—and which is fully set forth and repudiated by Chief Justice Robertson in *Moore v. Moore*, 4 Dana, 364, 29 Am. Dec. 417 *et seq.*,—he thus

states his view: "Therefore, I rather think the decree is right. I have conversed with many persons upon it. I have great difficulty in my own mind and have found great difficulty in the mind of every person I have consulted. . . . I doubt whether I could make a decree more satisfactory to my own mind than that which has been made." And, after declining to "take upon himself to reverse decisions that have been acted upon for centuries," he shifts the burden to the House of Lords: "If this decision is wrong, and if this strange doctrine,—as I should have called it if I had sat here two centuries ago,—that you can find a charitable purpose in a purpose that is to fail altogether, can be shaken, I can do no more than allow them to go to a higher tribunal." The decree was affirmed in the House of Lords. 13 Ves. Jr. 416.

In some of the American states, in which the courts maintain the existence of a judicial *cy pres* power, there have occurred perversions of the donor's intention almost as preposterous as the appropriation of a fund for instruction in the Jewish religion to the maintenance of a preacher to preach the gospel of Christ. It is not necessary to consider or discuss those cases, for as early as 1836, in *Moore v. Moore*, 4 Dana, our own great chancellor, Robertson, utterly repudiated the *cy pres* doctrine of England, and held that it is not, or should not be, a judicial doctrine, except solely to provide the means of carrying out "an available charity to an identified and ascertainable object," where the mode provided by the gift is inadequate, illegal, or inappropriate, or which happens to fail. Said the court in that case: "We are satisfied that the *cy pres* doctrine of England is not, or should not be, a judicial doctrine, except in one kind of case; and that is where there is an available charity to an identified or ascertainable object, and a particular mode, inadequate, illegal, or inappropriate, or which happens to fail, has been prescribed. In such a case a court of equity may substitute or sanction any other mode that may be lawful and suitable, and will effectuate the declared intention of the donor, and not arbitrarily and in the dark, presuming on his motives or wishes, declare an object for him. A court may act judicially as long as it effectuates the lawful intention of the donor. But it does not act judicially when it applies his bounty to a specific object of charity, selected by itself merely because he had dedicated it to charity generally, or to a specified purpose which cannot be effectuated; for the court cannot know or decide that he would have been willing that it should be applied to the object to which the judge, in the plenitude of his unregulated discretion and peculiar

benevolence, has seen fit to decree its appropriation; whereby he, and not the donor, in effect, and at last, creates the charity." And in *Cromie v. Louisville Orphans' Soc.* 3 Bush. 374, the same great judge, referred to the "ultra judicial *cy près* doctrines which royal prerogative attached as excrescences to the statute of Elizabeth," and quoted with approval from the New York court (*Beckman v. Bonsor*, 23 N. Y. 298, 80 Am. Dec. 269): "That *cy près* power which constitutes the peculiar feature of the English system, and is exerted in determining gifts to charity when the donor has failed to define them, and in framing schemes of approximation near to or remote from the donor's true design, is unsuited to our institutions, and has no existence in the jurisprudence of the state on this subject." Again, Judge Robertson says: "Under the British statute the *cy près* doctrine became so arbitrary and latitudinarian as to prevent [pervert] the evident object of donors to charities which they never contemplated, and to which they would never have contributed. That judicial legislation, or, rather, loyal usurpation of the prerogative of changing or making wills, was repudiated by this court, while the statute of Elizabeth was itself recognized as the law of this state."

Applying these principles to the will in question, we are unable to find an available charity to an identified or ascertainable object. The scope of the gift is too broad and indefinite to be enforceable. It comes strictly within the rule laid down in *Spalding v. St. Joseph's Industrial School*, 107 Ky. 382, 54 S. W. 200, in which all the Kentucky cases upon the subject are considered and discussed. In note 2 to that case in 6 Am. & Eng. Dec. in Eq. 198, it is said: "Where the *cy près* doctrine is not recognized, the purposes of a charitable gift must be expressed with such certainty and definiteness that the court can enforce its application thereto, or the gift will be void for indefiniteness: . . . while if it be sufficiently definite to be enforced without resort to the *cy près* principle, it will be enforced."—referring to a number of the Kentucky cases. It was held in the *Cromie Case* that "the aim of our own statute for upholding charities is to make such as it enumerates available whenever so defined as to be judicially identified and applied." And this statement of the object of the statute was reiterated by Judge Lewis in *Leeds v. Shaw*, 82 Ky. 82. It provides (1 Rev. Stat. p. 236; Gen. Stat. chap. 13, § 2; Ky. Stat. § 318): "No charity shall be defeated for the want of a trustee or other person in whom the title may vest; but courts of equity may uphold the same by appointing trustees if there be none, or by taking control of the fund or property,

and directing its management, and settling who is the beneficiary thereof." The *Moore Case*, construing this statute, held that, "where there is an available charity to an identified or ascertainable object, and a particular mode, inadequate, illegal, or inappropriate, or which happens to fail, has been prescribed," the court could, under the statute, carry out the charitable use for the benefit of the identified or ascertainable object. In the case at bar there is no identified or ascertainable object. The object of the general charitable purpose, which would undoubtedly have been recognized under the English doctrine, is not "so defined as to be judicially identified." The "poor" named in the will are not designated by age, number, color, sex, creed, church, district, county, state, or nation. We cannot judicially identify or apply this charity without exercising the "arbitrary and latitudinarian" doctrine of the English courts, and virtually making a will, which in the language of Lord Eldon, "would be a considerable surprise upon the testatrix." This we have no right to do, under the authorities in this commonwealth. "No such power," says Mr. Perry, "exists in any American magistrates, judicial or ministerial, and none can exist until it is conferred by the legislature." Perry, Tr. § 718.

It is proper to consider a question of statutory construction arising under the present statute of charitable uses, although we do not consider it essential to the decision of this case. The statute (43 Eliz. chap. 4, to be found in 1 Morehead & B. Ky. Stat. p. 308) was held to be in force in Kentucky until the Revised Statutes of 1852 (1 Stanton's Rev. Stat. p. 235). The English statute referred to—and which was the culmination of a series of statutes upon the same subject—recited in the preamble a list of charities, which has come to be considered "an enumeration or kind of definition, standard, or test to which all gifts and grants in trust could be brought in order to determine whether they were charitable." 2 Perry, Tr. § 696. It recites abuses of such charitable gifts, in that they had not been employed according to the charitable intent of the givers, by reason of frauds, breaches of trust, and negligence, and provided a remedy for those abuses, to be applied by the lord chancellor, or keeper of the great seal, and the chancellor of the Duchy of Lancaster, by the appointment of a commission to inquire into the abuses. The Revised Statutes of 1852 simply repeated the preamble, declared that all grants, etc., made "in due form of law" for such purposes should be valid; that no charity should be defeated for the want of a trustee; and gave equity jurisdiction to uphold such trusts, with certain specified

limitations in the nature of mortmain statutes. By the act of May 12, 1893 (Ky. Stat. § 317), the provision of the earlier statute that such gifts shall be valid was further limited by the following words: "If the grant, conveyance, devise, gift, appointment or assignment shall point out with reasonable certainty, the purposes of the charity and the beneficiaries thereof, except as hereinafter restricted." These added words seem clearly to us to indicate the legislative intent to put a further limitation upon such gifts by requiring that the purposes of the charity and the beneficiaries thereof should be pointed out with at least reasonable certainty. But, as we have said, we do not regard a consideration of this change in the statute as necessary to the decision of this case.

For the reasons given, the judgment is affirmed.

BURNAM, J., dissenting:

This suit was instituted by the executor of Elizabeth Thompson, who died in September, 1897, for the sole purpose of having a judicial construction of the eleventh clause of her will, which reads as follows: "I will and direct that my house and lot in Raywick, Ky., be sold at such time and on such terms as my executor may deem best; and I will that the proceeds, together with whatever other estate I may have after the payment of the aforesaid bequest and funeral expenses, shall be collected by my executor, and by him distributed to the poor, in his discretion." Devises for the relief of the poor and unfortunate have always been favorite modes of dispensing charity by benevolent persons, and trusts created for this purpose have always been upheld by the court when the purpose of the charity and the beneficiaries thereof were pointed out with reasonable certainty. Thus, gifts to the poor of certain localities, churches, or religious beliefs have been uniformly upheld, except in those states where the doctrine of charitable uses has been repudiated. And in many cases gifts for the benefit of poor persons in general have been upheld. See 5 An. & Eng. Enc. Law, p. 932, and 2 Am. & Eng. Dec. in. Eq. pp. 13-16. The essence of a charitable bequest is that the beneficiaries should be designated as a class only, leaving the number and individuals to be determined by the trustees who administered it. Consequently, such a bequest will not be invalidated by the facts that the beneficiaries are indefinite in number. See *Bedford v. Bedford*, 99 Ky. 273, 35 S. W. 926. As said by Judge Robertson in *Moore v. Moore*, 4 Dana, 354, 29 Am. Dec. 417: "When an ascertainable object is designated by the donor in general or collective terms as the poor of a

given county or parish, or when a person is appointed by him to select a described portion or kind or number from a designated class, the chancellor sitting as judge in equity will interpose on the ground of trust." In the case of *Curling v. Curling*, 8 Dana, 38, 33 Am. Dec. 475, James Curling left the residue of his estate for the use and benefit of a public seminary, not designating where it was to be located. The circuit judge held the devise void for uncertainty, but upon appeal to this court Judge Robertson, delivering the opinion of the court, said: "The testator, by designating a general object of charity (a public seminary), must be understood as intending, either a seminary, or the seminary of his county, or any seminary which his executors or a court of equity, in the exercise of sound discretion, should select as best adapted to effect the object of charity, and upon either of these hypotheses the testator's purpose as declared and circumscribed by himself may be fulfilled by applying the fund to a specific object without any hazard or perverting his bounty in a manner not contemplated by him, and authorized by his will. . . . Therefore, according to principles well established as perfectly judicial, we are of the opinion that the devise created a charitable trust, which may be executed according to law, and without violating the will of the testator, or making a will for him; . . . and therefore we conclude that the circuit court ought to have decreed the appropriation of the profits of the devise to the use of the Trigg Seminary, and appointed a trustee to execute the trust." In the very recent case of *Spalding v. St. Joseph's Industrial School*, 107 Ky. 382, 54 S. W. 200, Judge Du Relle uses this language: "All the Kentucky cases have sustained the charitable uses therein considered because the court held that a charitable object was indicated, or a class of charitable objects designated, from which choice was authorized to be made. . . . In some of them there is room for difference of opinion as to the certainty of the objects of the charitable uses sustained, but the courts have always held that they were certain, either as being designated by the donor or one of a class designated by him from which choice was authorized to be made." In *Bedford v. Bedford*, 99 Ky. 273, 35 S. W. 926, the devise was to the state of Kentucky in trust for the use and benefit of the state, the profits therefrom to be appropriated annually forever towards the education of the children of the state, particularly the poor and most unintelligent. The devise in this case was sustained as sufficiently definite. The court said: Trusts must be for the benefit of an indefinite number of persons, for, if the beneficiaries are personally designated,

the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity, and which distinguishes it from a mere private trust. There has been considerable diversity in the decisions of the courts of the various states of the Union as to the extent they will go in upholding an indefinite trust. In some states—particularly Maryland, Michigan, New York, and Wisconsin—it has been held that courts of equity have no greater jurisdiction to enforce public than private trusts. On the other hand, in Kentucky, Maine, Massachusetts, Missouri, Pennsylvania, and many other states of the Union, where the principles of 43 Eliz. chap. 4, are accepted, they have gone to the farthest limit in this regard. In this state 16 decisions have been reported upon the question of charitable uses, beginning with the case of *Gass v. Wilhite*, 2 Dana, 170, 26 Am. Dec. 446, and ending with *Crawford v. Thomas*, 21 Ky. L. Rep. 1100, 54 S. W. 197, in which charitable bequests have been uniformly upheld. But it is insisted that the amendment to § 317 of the Kentucky Statutes passed by the general assembly in 1893, which is in these words: "If the grant, devise, gift, appointment, or assignment shall have pointed out with reasonable certainty the purposes of the charity and the beneficiaries thereof," etc., was intended by the lawmaking department of the government to change the rule which has heretofore prevailed in this state. The words of the amendment are the same as those used in several opinions sustaining bequests to various charities, and it would be more consistent with reason and common sense to believe that the legislature simply intended to crystallize into the statute law the doctrine which has been so often announced by some of the ablest and most distinguished judges who ever sat upon this bench, and whose opinions on this subject had been accepted with approval by the profession, the general assembly, the public at large, and by most eminent text writers. As well said by Judge Mills in *Tribble v. Taul*, 7 T. B. Mon. 456: "If we were convinced that on this point the law was settled wrong originally, we should not feel ourselves at liberty to depart from it; aware that it is of greater importance to society that the rule should be uniform and stable than that it should be the best possible rule that could be adopted. In the supreme court of a state, as this is, possessing, with but few exceptions, appellate judicial power coextensive with the state, the influence which its decisions must have is evident. Its mandates are conclusive, and even its *dicta* are attended to in all the inferior courts. No sooner is a decision published than it operates as a pattern and standard in all other tribunals, 62 L. R. A.

and, as a matter of course, all other decisions conform to it. If, in this court, a settled course of adjudication is overturned, then the trouble and confusion of reversing former causes succeeds in the inferior tribunals; and even the credit and respect due to this court is shaken by the phenomenon that A has lost his cause on the same ground that B gains his. And not only do these consequences follow, but some still more serious may ensue; for perhaps no court may strike the vitals of society with a deeper wound than a capricious departure in this court from one of its established adjudications. We ought, therefore, to be cautious not to leave a course well understood; and nothing but the imperious demands of justice could justify it. Here there is no such demand upon us."

For reasons indicated, I dissent from the opinion of the majority.

PAYNTER, J., concurs in this dissent.

Messrs. Thompson & Spalding for appellant.

Mr. H. P. Cooper for appellees.

BURNAM, Ch. J., delivered the opinion of the court:

The eleventh clause of the will of Elizabeth Thompson, who died in September, 1897, reads as follows: "I will and direct that my house and lot in Raywick, Ky., be sold at such time and on such terms as my executor may deem best, and I will that the proceeds together with whatever other estate I may have after the payment of the aforesaid bequest and funeral expenses shall be collected by my executor, and by him distributed to the poor, in his discretion." The only question for decision upon this appeal is whether the gift in this clause is sufficiently definite to be enforceable under § 317 of the Kentucky Statutes of 1899, which requires that such gifts shall point out with reasonable certainty the purpose of the charity and the beneficiaries thereof. Very different rules from those that are applied in establishing and administering private trusts will be applied in order to give effect to the intention of a donor to establish a public charity. In discussing this question, Perry on Trusts, § 687, uses this language: "If in a gift for private benefit the *cestuis que trust* are so uncertain that they cannot be identified, or cannot come into court and claim the benefit conferred upon them, the gift will fail. . . . But if a gift is made for a public, charitable purpose, it is immaterial that the trustee is uncertain or incapable of taking, or that the objects of the charity are uncertain and indefinite. Indeed, it is said that vagueness is in some respects essential to a good gift for a public charity,

and that a public charity begins where uncertainty in the recipient begins." The general doctrine upon the question of charitable bequests is that the beneficiaries should be designated as a class only, leaving the number and individuals to be determined by the trustees who administer it. Devises for the poor have always been favorite modes of dispensing charity by benevolent persons, and trusts created for this purpose have been generally upheld by the courts. In *Moore v. Moore*, 4 Dana, 354, 29 Am. Dec. 417, it was decided: "When an ascertainable object is designated by the donor in general or collectible terms, as the poor of a given county or parish, or when a person is appointed by him to select a described portion or kind or number from a designated class, the chancellor, sitting as judge in equity, will interpose on the ground of trust." In the case of *Curling v. Curling*, 8 Dana, 38, 33 Am. Dec. 475, James Curling left the residue of his estate for the use and benefit of a public seminary, not designating where it was to be located. The circuit judge held the devise void for uncertainty, but, upon appeal to this court, Judge Robertson, delivering the opinion of the court, said: "The testator, by designating a general object of charity (a public seminary), must be understood as intending either a seminary, or the seminary of his county, or any seminary which his executor or a court of equity, in the exercise of a sound discretion, should select as best adapted to effect the object of the charity. And, upon either of these hypotheses, the testator's purpose, as declared and circumscribed by himself, may be fulfilled by applying the fund to a specific object, without any hazard of perverting his bounty in a manner not contemplated by him and authorized by his will. . . . Therefore, according to principles well established as perfectly judicial, we are of the opinion that the device created a charitable trust, which may be executed according to law, and without violating the will of the testator or making a will for him, . . . and, therefore, we conclude that the circuit court ought to have decreed the appropriation of the profits of the devise to the use of the Trigg Seminary, and appointed a trustee to execute the trust." In the very recent case of *Spalding v. St. Joseph's Industrial School*, 107 Ky. 382, 54 S. W. 206, Judge Du Relle uses this language: "All of the Kentucky cases have sustained the charitable uses therein considered because the court held that a charitable object was indicated, or a class of charitable objects designated from which choice was authorized to be made. . . . In some of them there is room for difference of opinion as to the certainty of the objects of the charitable uses sustained, but the courts have 62 L. R. A.

always held that they were certain, either as being designated by the donor, or one of a class designated by him from which choice was authorized to be made." In *Bedford v. Bedford*, 99 Ky. 273, 35 S. W. 926, the devise was to the state of Kentucky in trust for the benefit of the state, the profits therefrom to be appropriated annually forever towards the education of the children of the state,—particularly the poor and most unintelligent. The devise in this case was sustained as sufficiently definite. The court said: Trusts must be for the benefit of an indefinite number of persons, for, if the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity, and which distinguishes it from a mere private trust. There has been considerable diversity in the decisions of the courts of the various states of the Union as to the extent they will go in upholding an indefinite trust. In some states—particularly Maryland, Virginia, Michigan, New York, and Wisconsin—it has been held that courts of equity have no greater jurisdiction to enforce public than private trusts. On the other hand, in Kentucky, Maine, Massachusetts, Missouri, Pennsylvania, and many other states where the principles of 43 Eliz. chap. 4, are accepted, they have gone to the farthest limit in this regard. In this state 16 decisions have been reported upon this question of charitable uses, beginning with the case of *Goss v. Wilhite*, 2 Dana, 170, 26 Am. Dec. 446, in which charitable bequests have been uniformly upheld. But it is insisted that the amendment to § 317 of the Kentucky Statutes passed by the general assembly in 1893, which is in these words: "If the grant, devise, gift, appointment or assignment, shall have pointed out with reasonable certainty the purposes of the charity and the beneficiaries thereof," etc., was intended by the lawmaking department of the government to change the rule which has heretofore prevailed in this state. The words of the amendment are the same as those used in several opinions sustaining bequests to various charities, and it would be more consistent with reason and common sense to believe that the legislature simply intended to crystallize into the statute law the doctrine which has been so often announced by this court, and which has been accepted with approval by the profession, the general assembly, the public at large, and by most eminent text writers. The gift in this case is to the poor as a class, and the testatrix has appointed her executor to select from this class the persons who are to receive the benefit of the charity. In our opinion, the judgment of the trial court is in conflict with what has become the settled legislative pol-

icy in this state with respect to public charities; and *Spalding v. St. Joseph's Industrial School*, 107 Ky. 382, 54 S. W. 206, relied on to support the judgment of the trial court, is not in conflict with the other cases, and the devise in this case should be upheld.

For reasons indicated, *the judgment is reversed*, and cause remanded for proceedings consistent with this opinion.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appt.*,
v.

Elizabeth LALOGUE.

(.....Ky.....)

One intending to take passage on a railroad train cannot claim the relation of passenger, so as to require the company to protect him from the assaults of strangers, by resorting to its premises an unreasonable time before the departure of the train, in the absence of an agreement, express or implied, on its part to do so; and, when the statute fixes the time during which the station must be open, that time will be regarded as the reasonable time during which the carrier's responsibility exists.

(October 2, 1902.)

APPEAL by defendant from a judgment of the Circuit Court for Muhlenberg County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's failure to protect plaintiff from the acts of disorderly persons while she was in its station waiting for a train. *Reversed*.

The facts are stated in the opinion.

Messrs. **Pirtle & Trabue**, with Messrs. **Jonson & Wickliffe**, for appellant:

The petition did not show that appellee presented herself at a proper time, under proper circumstances, and in a proper manner, to demand that she be accepted as a passenger; all of which were necessary before she could charge the carrier.

4 Elliott, Railroads, § 1580, p. 2460, *Phillips v. Southern R. Co.* 124 N. C. 123, 45 L. R. A. 163, 32 S. E. 388; *Webster v. Fitchburg R. Co.* 161 Mass. 298, 24 L. R. A. 521, 37 N. E. 165; *Dodge v. Boston & B. S. R. Co.* 148 Mass. 209, 2 L. R. A. 83, 19 N. E. 373; *Hutchinson, Carr.* § 562; *Harris v.*

Stevens, 31 Vt. 79, 73 Am. Dec. 340; 1 Fetter, Carr. Pass. p. 229, § 96.

To entitle a passenger to protection from assaults by fellow passengers or strangers, the carrier must have knowledge of the danger, or it must arise out of some circumstances of which it is his duty to have knowledge.

Kinney v. Louisville & N. R. Co. 99 Ky. 59, 34 S. W. 1066; *Sira v. Wabash R. Co.* 115 Mo. 127, 21 S. W. 905; *Winnegar v. Central Pass. R. Co.* 85 Ky. 553, 4 S. W. 237; *Sherley v. Billings*, 8 Bush, 147; *Hutchinson, Carr.* §§ 552, 562.

Mr. R. Y. Thomas, Jr., for appellee.

O'Rear, J., delivered the opinion of the court:

Appellee claims to have been assaulted and insulted by a number of drunken and disorderly persons—loafers—while she was waiting at appellant's station for a train on which she contemplated taking passage over appellant's line of road from Central City to Paducah. She says that she arrived at Central City the morning of the 16th of February, 1900, her husband arriving later in the day. They did not stop at any hotel or other place, it seems, but loitered about appellant's depot at Central City, and at other points in the town during the day. About 8 o'clock in the evening they went to appellant's depot for the purpose, she says, of waiting for the train upon which she and her husband intended taking passage. That train was not due till about 1:05 of the clock the following morning. According to her testimony, she and her husband were in the public waiting room of appellant's depot after 8 o'clock, when Mr. Nunz, appellant's station agent, passed through the room; that her husband asked him what time the Paducah train would come along, and whether they would have time to go out in the town. She says the agent answered that the Paducah train would not be due till "12:05 or 1:05 in the morning,"—she did not remember which he said. They went out in the town, and returned about 10 o'clock, or earlier; that no other notification was given to the company's agent, or any of them, of appellee's intention or purpose to become a passenger. She says she and her husband had money enough to pay their passage to Paducah, but it was taken from

NOTE.—For a case somewhat similar to the above, as to liability for ejection from railroad depot of intending passenger who goes thereto several hours before train time, when a rule of the company requires the waiting room to be closed until thirty minutes before the departure of each train, see, in this series, *Phillips v. Southern R. Co.* 45 L. R. A. 163.

As to the general question when a person who has started for a train becomes a passenger, see 62 L. R. A.

Webster v. Fitchburg R. Co. 24 L. R. A. 521, and note; *Wood v. Pennsylvania R. Co.* 35 L. R. A. 199; *Western & A. R. Co. v. Volls*, 35 L. R. A. 635; *Southern R. Co. v. Smith*, 40 L. R. A. 746; *Young v. New York, N. H. & H. R. Co.* 41 L. R. A. 103; *Keator v. Scranton Traction Co.* 44 L. R. A. 546; *Phillips v. Southern R. Co.* 45 L. R. A. 163; *Chicago & E. I. R. Co. v. Jennings*, 54 L. R. A. 827; and *Exton v. Central R. Co.* 56 L. R. A. 508.

them or lost in the fight that occurred when they were assaulted at about 10:15 P. M., while still in the depot waiting room, waiting for the train. She claimed that the boys who assaulted her and her husband were making a great deal of noise, carousing and swearing. It was not shown that any agent of appellant knew of this disturbance before the assault, or that they could have known it by the exercise of ordinary diligence, except the opinion of appellee, expressed, that the noise was loud enough for them to have heard it in the adjoining room, where a number of telegraph instruments were at work. The case was submitted to the jury, and a verdict was awarded appellee. Appellant asked for a peremptory instruction.

This appeal raises, first, the question, What was appellant's duty to appellee? It is argued for her that it was that duty owed by a common carrier to its passenger; that she was the passenger of appellant from the time she entered its depot with the intention to take passage on a train over a portion of its road. It may be stated that it is not necessary, always, that the person claiming the protection of privileges of a passenger shall have purchased a ticket. *Hutchinson, Carr.* § 558. But at least such person must have a bona fide intention of taking a train shortly, to leave the carrier's station at the point where the complainant may be, and have the means at hand with which to pay his passage, and announce to the carrier's agent having such matter in charge, or that such agent shall be notified, of such person's purpose. This must be true because the carrier must have some consideration to support its agreement or obligation to the proposed passenger; this consideration must be either the payment of the fare, which is of itself notice, or the communication of the fact of such purpose to the carrier, that it may know to whom it certainly owes the duties imposed by its contracts, and to whom it may lawfully look for such payment on demand. *Hutchinson, Carr.* § 565. Even this statement must be subject to another qualification: The proposed passenger must present himself at the place appointed by the carrier for receiving such passengers, and within a reasonable time therefor.

By statute in this state it is made the duty of all common carriers to provide waiting rooms for their passengers. These rooms must, of necessity, be open to the public. Generally, the carrier cannot know who of those who attend them contemplate taking passage on its trains. Its waiting rooms are, in consequence, used more or less by persons not authorized. To this latter class the carrier owes no duty save such as it owes to licensees,—that is, to so conduct its business

as to not wantonly or purposely or recklessly injure them. To the passenger, whether on its train or at its station, its duty is materially different. It must use every care to prevent their injury, and if it has notice of its passenger being in danger of violence, or indecent treatment, whether at the hands of a fellow passenger, or another on its premises or within its control, it must use its best endeavors to protect the passenger. *Kinney v. Louisville & N. R. Co.* 90 Ky. 59, 34 S. W. 1066. In *Phillips v. Southern R. Co.* 124 N. C. 123, 45 L. R. A. 163, 32 S. E. 388, the plaintiff was ejected from the carrier's waiting room although he had purchased his ticket for passage on one of its trains. The facts were: The train which plaintiff was to take was not due for some five hours after the act complained of. The carrier had a rule to close its waiting room till thirty minutes before the time of departure of each train. The plaintiff was ejected, and, it being a cold night, and he being thinly clad and having no place to go to, contracted a severe cold, and resultant illness. The court held that the rule of the railway company was not an unreasonable one. On the point pertinent to the case in hand, that court said: "A party coming to the railroad station with the intention of taking the defendant's next train becomes, in contemplation of law, a passenger on defendant's road, provided that his coming is within a reasonable time before the time for departure of said train. To constitute him such passenger, it is not necessary that he should have purchased his ticket, as seems to have been considered by his honor. 1 Fetter, Carr. Pass. § 228. But the purchase of the ticket would probably be considered the highest evidence of his intention. But still it is his coming to the station within a reasonable time before, with the intention to take the next train, that creates the relation of passenger and carrier."

But we have in this state what may be regarded as legislative construction of the length of time that should be considered reasonable for the carrier to be required to look out for, and safeguard, its passengers before they have taken actual passage. Ky. Stat. § 784: "All companies shall keep their ticket offices open for the sale of tickets at least thirty minutes immediately preceding the schedule time of departure of all passenger trains from every regular passenger depot from which such trains start or at which they regularly stop; and shall open the waiting room for passengers at the same time as the ticket office, and keep it open and comfortably warmed in cold weather until the train departs." The carrier is not an innkeeper. It cannot, in the discharge of its other duties required by the law, be held

to furnish accommodation for the entertainment, for an indefinite length of time, of those who contemplate in the future becoming its passengers. It would have been just as reasonable to have held appellant liable for the safety and comfort of appellees at any time, while at its depot, from 9 o'clock in the morning of the 16th to 12:30 in the morning of the 17th, as for the time sued for. We do not mean to hold that, if the carrier agrees to accommodate the proposed passenger by a longer time than the statute provides, it would not be liable for any injuries sustained because of its negligence during such time. But in the absence of such agreement, express or implied, we hold that

the proposed passenger cannot claim the benefit of that relation by coming onto the carrier's premises an unreasonable length of time before the train which he expects to take passage on is due to depart, and that such reasonable time has been fixed by the statute above quoted. It follows that the peremptory instruction asked for by appellant should have been given. In view of the conclusion to which we have arrived, the other errors complained of need not be noticed.

Reversed and remanded for proceedings consistent herewith.

Petition for rehearing denied.

MISSISSIPPI SUPREME COURT.

Elizabeth BALLARD *et al.*, *Appts.*,

v.

MISSISSIPPI COTTON OIL COMPANY.

(81 Miss. 507.)

1. Making all corporations liable for injuries to employees through defective machinery, notwithstanding the employees had knowledge of the defect, when the same liability is not placed on private individuals, and there is no distinctive difference in the business which will warrant the classification, denies the corporations the equal protection of the laws.
2. The amendment of a statute relating to railroad companies alone, by re-enacting it with the insertion of the word "all" in place of the word "railroad," cannot be restricted by construction so as to apply only to railroad corporations and others of that kind.
3. A statute rendering all corporations liable for injuries to employees from defective appliances, whether the employees knew of the defect or not, cannot be saved from unconstitutionality because of discrimination in favor of individual employers by the courts determining in each particular case whether or not the corporation is engaged in a business so dangerous that such a rule might properly be applied to it.

(April 27, 1903.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Yazoo County in favor of defendant in an action brought to recover damages for the death of plaintiff's

NOTE.—As to constitutionality of statute making railroad companies liable for injuries to employee through fellow servant's negligence, see, in this series, *Johnson v. St. Paul & D. R. Co.* (Minn.) 8 L. R. A. 419.

As to liability of employers generally for defects in the condition of their plant, see *note to Coley v. North Carolina R. Co.* (N. C.) 57 L. R. A. 817.
62 L. R. A.

intestate, which was alleged to have been caused by defendant's negligence. *Affirmed.*

John Ballard, who was the son of Elizabeth Ballard, was employed by defendant. A part of his duty was to oil machinery, for which purpose he was furnished with a step-ladder which was alleged not to be a safe, sound, and proper appliance for the performance of his work. While attempting to make use of it, he was in some manner thrown against the revolving shaft, receiving injuries which caused his death.

Further facts appear in the opinion.

Messrs. R. N. Miller and Campbell & George, for appellants:

The 14th Amendment was not designed to restrain the state's power of classification for special laws.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 155, 41 L. ed. 668, 17 Sup. Ct. Rep. 255; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Pacific Exp. Co. v. Scibert*, 142 U. S. 330, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Giozza v. Tierman*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396; *Marchant v. Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243.

This classification must be reasonable, and not arbitrary,—“must rest on some difference which bears a just and proper relation

to the act in respect to which the classification is proposed."

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

Acts 1898, chap. 66, p. 85, does not arbitrarily or unreasonably classify the employees to whom its benefits are extended.

Ibid; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585.

The Constitution is not violated by special legislation applying equally to all artificial bodies.

Pacific Exp. Co. v. Seibert, 142 U. S. 352, 35 L. ed. 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *State v. Moore*, 104 N. C. 714, 10 S. E. 143; *Allen v. Pioneer-Press Co.* 40 Minn. 117, 3 L. R. A. 532, 41 N. W. 936; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *Western U. Teleg. Co. v. Indiana*, 165 U. S. 309, 41 L. ed. 727, 17 Sup. Ct. Rep. 345; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 295, 42 L. ed. 1043, 18 Sup. Ct. Rep. 594; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 353, 44 L. ed. 194, 20 Sup. Ct. Rep. 136.

There are several substantial reasons why a different liability should be imposed on corporate masters from that imposed on individual masters:

(1) It is the duty of all masters to take every reasonable precaution for their servant's safety, by selecting with due care reliable and competent fellow servants, furnishing safe places to work, safe appliances, in fact, everything dictated by prudence not to expose him to peril. These are elementary rules growing out of the relation of master and servant. These duties lie equally upon corporate and individual masters.

Texas McCican R. Co. v. Whitmore, 58 Tex. 276.

(2) Corporations are artificial bodies created by the state, upon which special favors of limited liability, etc., are conferred, and, as is said in *Missouri P. R. Co. v. Mackey*, 127 U. S. 208, 32 L. ed. 108, 8 Sup. Ct. Rep. 1162: It cannot be successfully contended that the state may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, when no limitation is placed upon its power in this respect by their charters.

Missouri P. R. Co. v. Humes, 115 U. S. 62 L. R. A.

512, 523, 29 L. ed. 463, 466, 6 Sup. Ct. Rep. 110; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Boyer v. Boyer*, 113 U. S. 703, 28 L. ed. 1093, 5 Sup. Ct. Rep. 706; *Petit v. Minnesota*, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666; *L'Hote v. New Orleans*, 177 U. S. 587, 44 L. ed. 899, 20 Sup. Ct. Rep. 788.

The sufficiency of the reason for a classification is not a question of judicial discretion, but is one of legislative discretion.

State ex rel. Lamb v. Cunningham, 83 Wis. 90, 17 L. R. A. 145, 53 N. W. 35; *People, Moloney, v. Kirk*, 162 Ill. 138, 45 N. E. 830; *Lommen v. Minneapolis Gaslight Co.* 65 Minn. 196, 33 L. R. A. 437, 68 N. W. 53.

It is sufficient to satisfy the demands of the Constitution if the classifications were practical, and not arbitrary.

Tullis v. Lake Erie & W. R. Co. 175 U. S. 353, 44 L. ed. 194, 20 Sup. Ct. Rep. 136, 109 Fed. 389; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 287, 42 L. ed. 1040, 18 Sup. Ct. Rep. 594.

Any and all classifications mean discrimination *ex necessitate*. Apparent hardship and discrimination do not, therefore, work denial of "equal protection of the laws."

Missouri P. R. Co. v. Mackey, 127 U. S. 208, 32 L. ed. 108, 8 Sup. Ct. Rep. 1163.

Mr. T. H. Campbell, in separate brief for appellants:

Any attempt to classify the corporation as to the nature of its business must necessarily have rendered the statute obnoxious to the amendment, unless the classification is so general that it amounts to about the same as the act under consideration.

The Constitution of the state gives the legislative branch the authority to extend its provisions to any other class of employees. Miss. Const. § 193.

The intention was to give the legislature this authority, so as to protect employees of corporations other than railroad, if it was found that these corporations were neglectful of the rights and safety of their employees. Shall this authority be made nugatory because of the impossibility of enumerating the different corporations whose business is such that they are tempted to disregard the safety of their employees? The fact that natural persons are not included in the act does not render it unconstitutional.

Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 189, 31 L. ed. 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136.

If it is not class legislation to put restrictions upon corporations operating railroads, when the same restrictions are not put upon natural persons operating railroads, why is

it class legislation to put restrictions upon other corporations in the matter of negligence of fellow servants and knowledge of defective machinery, when natural persons are not named?

Missouri P. R. Co. v. Mackey, 127 U. S. 210, 32 L. ed. 100, 8 Sup. Ct. Rep. 1161; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136.

The vast difference between natural persons and corporate persons would render this classification reasonable.

The corporation being also the creature of legislative enactment, the legislature can pass many laws and restrictions upon its management and control which it would not be proper to enact as to the conduct of individuals.

Missouri P. R. Co. v. Mackey, 127 U. S. 208, 32 L. ed. 108, 8 Sup. Ct. Rep. 1102.

If the act should be constitutional as to some corporations, and unconstitutional as to others, the court may, in each particular case, say the act is constitutional as to this case, but is not constitutional as to the other cases,—that this corporation is engaged in a business inherently dangerous to its employees, and is a proper subject of legislative control, and the other corporation is not engaged in such business, and should not have the restrictions placed upon it.

Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136.

Unless the unconstitutionality of the act is very clear, the courts should not declare it unconstitutional, if the act can be upheld consistently with the constitutional requirements.

Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176, 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110.

Mr. R. N. Miller, in separate brief for appellants:

The classification need not in every instance be based upon "some difference inhering in the very nature of the business, as, for instance, the dangerous character of steam as an agency." The basis of classification need not "inhere in the nature of the business."

Missouri P. R. Co. v. Mackey, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1163; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 155, 41 L. ed. 668, 17 Sup. Ct. Rep. 255; *Magoon v. Illinois Trust & Sav. Bank*, 170 U. S. 293-296, 42 L. ed. 1042, 1043, 18 Sup. Ct. Rep. 594.

The very fact that corporations get their rights and privileges from the state gives the right to the state to dictate the terms on which they may transact their business. 62 L. R. A.

This right, of course, does not apply to individuals.

Pacific Exp. Co. v. Seibert, 142 U. S. 352, 35 L. ed. 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Union Cent. L. Ins. Co. v. Chourning*, 80 Tex. 654, 24 L. R. A. 505, 26 S. W. 982; *McPherson v. Blacker*, 146 U. S. 38, 36 L. ed. 878, 13 Sup. Ct. Rep. 3.

The statute is separable.

Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136.

Messrs. Smith, Hirsh, & Landau, for appellee:

The distinction for classification must be based on some difference inhering in the very nature of the business, as, for instance, the dangerous character of steam as an agency in railroads.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Akeson v. Chicago, B. & Q. R. Co.* 106 Iowa, 54, 75 N. W. 676; *State v. Nelson*, 52 Ohio St. 88, 26 L. R. A. 317, 39 N. E. 22; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; *Holden v. Hardy*, 169 U. S. 393, 42 L. ed. 791, 18 Sup. Ct. Rep. 388; *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, *sub nom. Cotting v. Godard*, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Soon Hing v. Crowley*, 113 U. S. 709, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730.

Since the statute, on its face, is general, applying, without reference to the inherent nature of the business, to all corporations, it cannot be separated and severed so as to be constitutional as to some and unconstitutional as to others.

If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of a statute are capable of being separated within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other; but, if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion; and if they are so mutually connected with, and dependent on, each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole; and, if all could not be carried into effect the legislature would not pass the residue independently,—then, if some parts are unconstitutional, all of the provisions which are thus dependent,

conditional, or connected must fall with them.

Cooley, Const. Lim. 5th ed. *178; *Com. v. Hitchings*, 5 Gray, 485.

We defy the most careful scrutiny, and the most microscopic investigation of chap. 66, p. 85, of the act of 1898 to show that the legislature of Mississippi had any other purpose or design than to embrace all corporations. No particular class or classes of corporations can by the most violent presumption be held to have been intended by the legislature to have been included in the act, and all others to be exempted from its operations.

The court cannot determine, by looking into the evidence in each case, that one corporation falls within the statute constitutionally, and another does not. It is the duty of the judicial department to expound the law, or, in other words, to declare what the law is.

United States v. Reese, 92 U. S. 214, 23 L. ed. 563.

The same rules govern the interpretation of the statutes which govern the interpretation of contracts or other written instruments. The rule is well expressed in *Cooley*, Const. Lim. p. 68: Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and, consequently, no room is left for construction. Possible, or even probable, meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere. Whether we are considering an agreement between parties, a statute, or constitution, with a view to its interpretation, the thing which we are to seek is the thought which it expresses.

Atchison, T. & S. F. R. Co. v. Matthews, 58 Kan. 447, 49 Pac. 602; *Missouri P. R. Co. v. Merrill*, 40 Kan. 404, 19 Pac. 793.

Acts 1898, chap. 66, is unconstitutional. It is unconstitutional because it is violative of the 14th Amendment to the Constitution of the United States. The record shows that the defendant was chartered as a corporation on February 18, 1902. The act of the legislature (chap. 66) was passed in January, 1898, and singles out and confers certain rights of action in favor of employees of corporations, and imposes liabilities upon corporations in certain states of case therein stated, but does not impose the same liabilities upon persons. In other words, it arbitrarily singles out corporations, and puts them upon another and a different footing from that of persons.

Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. 62 L. R. A.

S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Soqn Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 780, 22 S. W. 350; *Cooley*, Const. Lim. 6th ed. p. 484; *Vanzant v. Waddel*, 2 Yerg. 260; *Ragio v. State*, 86 Tenn. 272, 6 S. W. 401; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 497, *sub nom. Dibrell v. Lanier*, 12 L. R. A. 70, 15 S. W. 87; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

Whitfield, Ch. J., delivered the opinion of the court:

We are clearly of the opinion that the stepladder furnished the deceased employee, John W. Ballard, was a wholly unsafe and dangerous appliance; but it is equally clear that he had knowledge of its dangerous character. Under the common law, his suit would therefore fail; but he sues under the provisions of the act of 1898 (Laws 1898, chap. 66, p. 85). Section 1 is amendatory of chapter 87 of the Laws of 1896 (Laws 1896, p. 97), which itself is amendatory of § 3559 of the Code of 1892, which is a mere rescript of § 193 of the Constitution of 1890.

Section 193 is in these words: "Every employee of any railroad corporation shall have the same right and remedies, for any injury suffered by him from the act or omission of said corporation or its employees, as are allowed by law to other persons not employees, where the injury results from the negligence of a superior agent or officer; or of a person having the right to control or direct the services of the party injured; and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers, in charge of dangerous or unsafe cars, or engines voluntarily operated by them. Where death ensues from any injury to employees, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, express or implied, made by any employee to waive the benefit of this section, shall be null and void; and this section shall not be construed to deprive any employee of a corporation, or his legal or personal representative, of any

legal right or remedy that he now has by the law of the land. The legislature may extend the remedies herein provided for to any other class of employees."

Section 1 of the act of 1898 (Laws 1898, chap. 66, p. 85,) is as follows: "Sec. 1. Be it enacted by the legislature of the state of Mississippi, that § 3559 of the Annotated Code of 1892 be amended so that the same shall read as follows, to wit: Every employee of any corporation shall have the same rights and remedies for an injury suffered by him from the act or omission of the corporation or its employees, as are allowed by law to other persons not employees, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured; and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances, or of the improper loading of cars, shall not be a defense to an action for injury caused thereby, except as to conductors or engineers, in charge of dangerous or unsafe cars, or engines voluntarily operated by them. When death ensues from an injury to an employee, an action may be brought in the name of the widow of such employee for the death of the husband, or by the husband for the death of his wife, or by the parent for the death of a child, or in the name of the child for the death of an only parent, for such damages as may be suffered by them respectively by reason of such death, the damages to be for the use of such widow, husband, or child, except that in case the widow should have children the damages shall be distributed as personal property of the husband. The legal or personal representative of the person injured shall have the same rights and remedies as are allowed by the law to such representatives of other persons. In every such action the jury may give such damages as shall be fair and just with reference to the injury resulting from such death to the person suing. Any contract or agreement, expressed or implied, made by any employee to waive the benefit of this section shall be null and void; and this section shall not deprive an employee of a corporation, or his legal or personal representative, of any right or remedy that he now has by law."

The only effect of the amendment of § 3559 of the Code of 1892 is to substitute the words "any corporation," in § 1 of said act of 1898, for the words "a railroad," in § 32 L. R. A.

3559, and to add, in § 1 of the act of 1898, this clause, "or of the improper loading of cars."

Section 193 of the Constitution of 1890 was adopted after the decision of the United States Supreme Court, in *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, in 1888, and was manifestly intended to authorize legislation along the lines held constitutional in that case,—that is to say, to abolish the fellow-servant rule in the case of employees of railroad corporations whose business was known to be inherently dangerous; and the purpose of the last clause of § 193 was to extend the remedies therein provided for to any other class of employees of corporations or persons whose business was, like that of railroads, inherently dangerous, or whose business was so different from the business of other corporations or persons as to furnish the basis for a classification of the businesses of such corporations or persons, under which their employees might be permitted to sue without reference to the fellow-servant rule, while the employees of corporations or persons not having that sort of business could not so sue; in other words, to permit a classification based on "some difference bearing a reasonable and just relation to the act in respect to which the classification is proposed." *Ellis's Case*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255. The use of the word "class," in the last clause of § 193 of the Constitution of 1890, clearly indicates that it was not the purpose of the section to extend its provisions to all employees of all persons or corporations, but only to such employees of persons or corporations as operated businesses, between which and the businesses of all other persons or corporations there exists some difference—some substantial difference—such as would be held a warrant for a classification conferring upon such employees of the first class, and denying to employees of the latter class, the benefits of § 193 of the Constitution. The thought was that a classification might be made, giving to the employees of some corporations and of some persons the right to recover, and denying it to the employees of all other corporations or persons, provided that classification was based upon some distinctive difference between the kinds of business conducted by the one set of corporations or individual employers, and those conducted by the other set of corporations or individual employers. Section 193 was itself a special classification of railroad employees, based on the known hazardous character of the operation of railroad cars. It was the direct product of the *Mackey Case*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161. It is not, therefore, to be supposed that the

last clause of the section meant any more than that there might be other classifications of the employees of corporations or individual persons, based also on some distinguishing difference in the nature of the businesses. We do not understand the Supreme Court of the United States, in its many decisions on this subject, to mean that the dangerousness of a particular business would be the only basis for distinguishing between the businesses of corporations or individual employers in the classification, but rather that any substantial difference between particular businesses which would serve as a reasonable basis for a classification, allowing the employees in the one case to recover, and in the other case not, is sufficient. This we understand to be the doctrine of the *Ellis Case*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, and of the *Magoun Case*, 170 U. S. 293, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594, and of *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419, in which last case the difference was held to consist in the fact that the corporation was engaged in a public business, and that the public character of that business made a sufficient difference for upholding that statute. Whilst this case seems an extension of the doctrine of the *Mackey Case*, it is clearly an application of the same principle. Neither held that the employees of all corporations could be given this right to recover. One held that the employees of a railroad corporation might be given the right to recover because of the dangerous character of that business; the other, that the employees might recover, under the Arkansas statute involved, because "of the fact that these corporations [railroad] were clothed with a public trust, and discharged duties of public consequence affecting the community at large;" it being said, following the supreme court of Arkansas, that "the regulation, as promoting the public interest in the protection of employees, to the limited extent stated, . . . [was] properly within the power to amend reserved under the state Constitution." It will be observed that this decision is criticised as pressing the doctrine beyond its utmost legal tension, in a note of Mr. Freeman to this same case at the top of page 181, 62 Am. St. Rep.; but the criticism should be rather of the supreme court of Arkansas than of the United States Supreme Court, as we shall show later herein.

The act of 1898 under review is assailed as violating the 14th Amendment of the Constitution of the United States, because it denies—as alleged—to corporations the equal protection of the laws in two respects: First, in that it applies to the employees of all corporations, without reference to any differ-

ences in the respective businesses of the corporations; second, because it discriminates between employees of natural persons and of corporations, and the argument is put briefly thus by way of illustration: "Suppose one man has an independent fortune, and has a large body of pine land, say in Clarke county, Mississippi, and being desirous of converting the timber upon these lands into lumber, and recognizing that the sawmill business is hazardous, and likely to impose large liability upon him, he incorporates this business under the name of the Clarke County Sawmilling Company. Alongside of him and his property in Clarke county is an individual owning an equal body of land, who does not see fit to take this precaution. Suppose the boilers of these two sawmills are notoriously weak, and all the employees of both parties are aware of it, and yet they continue to work. Suppose, now, at the same time and from identically the same cause a boiler explosion takes place in both mills. The Clarke County Sawmilling Company would, under the act of 1898, be ruled in damages, but the individual would not be liable." And it is urged that the act applies to all corporations, but to no natural persons, and, since the natural person and the corporation might be both engaged in precisely the same business, a discrimination in such cases does not rest on any difference in the business. Possibly the clearest statement of the doctrine contended for by appellee is that stated in *Soon Hing v. Crowley*, 113 U. S. 708, 709, 28 L. ed. 1146, 1147, 5 Sup. Ct. Rep. 733, as follows: "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws." In the *Ellis Case*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, it is said that the classification must always rest upon "some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily."

Multiplied citations from the United States Supreme Court could be made, but the thought running through them all, as we understand them, clearly is that the classification is not to be made, except upon the basis of some difference between the business of those favored and the business of those not favored,—a substantial difference warranting the classification. We have read critically all the decisions cited in the briefs from the United States Supreme Court without finding any decision holding

expressly that a statute providing that the employees of all corporations may so recover can be upheld. We have read carefully, also, the decisions from the state supreme courts cited, and others not cited, by counsel. We will quote briefly from a few of these to show that the line of distinction is the one we have indicated.

In *Holden v. Hardy*, 169 U. S. 303, 42 L. ed. 791, 18 Sup. Ct. Rep. 388, the court says: "While the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, and in Virginia, North Carolina, and Massachusetts even earlier than this, both mining and manufacturing were carried on in such a limited way and by such primitive methods that no special laws were considered necessary, prior to the adoption of the Constitution, for the protection of the operatives; but in the vast proportions which these industries have since assumed it has been found that they can no longer be carried on with due regard to the safety and health of those engaged in them without special protection against the dangers necessarily incident to these employments. In consequence of this, laws have been enacted in most of the states designed to meet these exigencies, and to secure the safety of persons peculiarly exposed to those dangers. Within this general category are ordinances providing for fire escapes for hotels, theaters, factories, and other large buildings, a municipal inspection of boilers and appliances designed to secure passengers upon railways and steamboats against the dangers necessarily incident to these methods of transportation. In states where manufacturing is carried on to a large extent, provision is made for the protection of dangerous machinery against accidental contact: for the cleanliness and ventilation of working rooms; for the guarding of well holes, stairways, elevator shafts, and for the employment of sanitary appliances. In others, where mining is the principal industry, special provision is made for the shoring up of dangerous walls, for ventilation shafts, bore holes, escapement shafts, means of signaling the surface for the supply of fresh air, and the elimination, as far as possible, of dangerous gases; for safe means of hoisting and lowering cages; for a limitation upon the number of persons permitted to enter a cage, that cages shall be covered; and that there shall be fences and gates around the top of shafts, besides other similar precautions. . . . These statutes have been repeatedly enforced by the courts of the several states, their validity assumed, and, so far as we are informed, they have been uniformly held to be constitutional." All the instances set forth here illustrate the principle that the discrimination in favor of cer-

tain employees is always based upon some distinctive difference in the business about which they are employed,—a difference inhering in the very nature of the business.

In the case of *Smith v. Louisville & N. R. Co.* 75 Ala. 449, the court says: "This statute creates an entirely new cause of action,—one theretofore unknown. Before its enactment—February 24, 1872—neither the father nor mother could recover damages for such killing. Not only does the statute create a new cause of action, but it confines the right to maintain such suit to the father, if living, and, if not, to the mother. If neither be living, no one else can maintain the suit. And the statute is highly penal in its terms, and must be construed as a penal statute. Is the act copied above constitutional? It will be observed that under the statute the action lies only against certain classes,—corporations and private associations of persons. These are held accountable for the wrongful acts and omissions of their officers and agents. Individuals engaged in the same business, having the same description of officers or agents, may cause the death of a minor child by the wrongful act or omission of such officer or agent, and there will be no liability for such death. To illustrate: Manufacturing establishments, in all their extensive variety, mining enterprises, cotton compresses, mills, steam vessels, and even railroads, may be owned and operated without incorporation, and by a single proprietor. These are not within the law: and for the death of a minor child, caused by the wrongful act or omission of an agent of such enterprise, neither the father nor the mother can maintain a suit. If, however, there be more owners than one, or if the enterprise be incorporated, then the statute gives a right of action to the father, if living, and to the mother, if he be dead. This precise difference the statute makes, although the character of business and the wrongful act or omission of the agent be in each case the same. How this will work will readily suggest itself. If the employer, being a single individual, be not responsible for the wrongful act or omission of the agent he employs, how can the same act by the same agent employed under the same circumstances, impose a penalty on the innocent employer, merely because two or more owned the business and united in employing the agent? If so, on what principle? Is individual enterprise less amenable to legislative surveillance than associated capital? Within the last twenty years very important constitutional provisions, Federal and state, have been adopted. Article 14 of the Amendments to the Constitution of the United States declares (§ 1) that 'no state shall . . . deny to any person within its

jurisdiction the equal protection of the laws.' Speaking of this provision, Justice Field, of the United States Supreme Court, in *San Mateo County v. Southern P. R. Co.*, said: 'It not only implies the right of each to resort on the same terms with others to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances.' 8 Sawy. 238, 13 Fed. 722." In the case of *Deppe v. Chicago, R. I. & P. R. Co.* 36 Iowa, 54, the court says: "The defendant asked the court to instruct the jury that this plaintiff, in view of his employment (shoveling dirt at a bank) at the time of his injury, was not within the purpose and meaning of the act, and hence they should find for the defendant. This was refused, and thereon arises the first assigned error. It was said in the case of *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 338, which was an action by the administratrix of a brakeman: 'If there is an employer and employee, but no business of a railroad company to be engaged in, then the case is not within the act. But the same liability is extended by the act, upon the same terms, to all in the same situation.' And in another case, decided on the same day (*Ney v. Dubuque & S. O. R. Co.* 20 Iowa, 347), it was held that 'in connection with railroads, the term "employee" applies to conductors, agents, superintendents, and others engaged in operating the road, and the like, and not to contractors or persons building or constructing the roadbed, or laying down the ties and rails.' It was under this construction of the language of the statute, that it was held constitutional, as before explained. But if the statute should be so construed as to apply to all persons in the employ of railroad corporations, without regard to the business they were employed in, then it would be a clear case of class legislation, and would not apply upon the same terms to all in the same situation, and hence would be unconstitutional, and manifestly so. To illustrate: Suppose a railroad company employ several persons to cut the timber on its right of way where it is about to extend its road, and the landowner employs a like number of persons to cut the timber on a strip of equal length alongside such right of way. If one of each set of employees shall be injured by the negligence of a coemployee, and the employee of the railroad company can, under the statute, maintain an action against his employer, and the other cannot, then it is clear that the law does not apply upon the same terms to all in the same situation. The law, then, would not have uniform

operation, but would be violative of the Constitution, just as much as a law that should prescribe, under the same circumstances, different liabilities for merchants, for mechanics, and for laborers. The manifest purpose of the statute was to give its benefits to employees engaged in the hazardous business of operating railroads. When thus limited, it is constitutional; when extended further, it becomes unconstitutional."

We must confess that the argument upholding the constitutionality of the statute before us is exceptionally able, and presents many objections to the view we have stated, but objections all of which we think answerable. For example, it is said, first, that, since the act of 1898 is amendatory of § 3559 of the Code, the court would be warranted in limiting the words "any corporation" to such corporations as, like railroads, are engaged in a hazardous business. The argument is that, since § 3559 applies alone to railroads, and since the only pertinent amendment is the change of the words "a railroad" into the words "any corporation," the act retaining bodily the language used in § 3559 as applicable to railroads only, the act of 1898 must mean, in the use of the words "any corporation," any corporation *ejusdem generis* with railroad corporations,—corporations of that kind, whose business is hazardous. But the complete answer to this very ingenious suggestion is that the method of amending a statute has been changed by § 61 of the Constitution, so as to make the whole of the law on the subject appear in the amendment; so that the only form in which we have § 3559 is in § 1 of said act of 1898. The language is that "§ 3559 of the Code of 1892 be amended so that the same shall read as follows, to wit. Every employee of any corporation," etc. Section 3559 does not exist in the body of our law, except as set out in § 1 of the act of 1898. Another objection to this view is that it would have been extremely easy, if such had been the legislative purpose, to have said, "Every employee of any corporation whose business is inherently dangerous." We think we must read the language as the legislature has written it, and, so read, the legislature clearly meant to extend the remedy to the employees of all corporations, without reference to any distinction existing between the different businesses of corporations.

Second. In respect to the cases of *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, and *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136, it is very earnestly insisted that the *Tullis Case*, 175 U. S. 350, 44 L. ed. 192, 20 Sup. Ct. Rep. 136, upholds the view that a statute like this, ap-

plicable to all corporations, is not unconstitutional; and it is said that these two cases further uphold the view that the court may, by a process of judicial inclusion and exclusion, look to the evidence in each case to determine in that way—from the evidence, showing the nature of the business—whether any particular corporation falls within or without the constitutional line of demarkation. This argument for appellant is put with such clearness and power that we do not think the presentation could be improved upon, and so we quote it entire. Says learned counsel:

"The mere fact that natural persons are not included in the act does not render it obnoxious to the provisions of the 14th Amendment. If so, why does the Supreme Court, in the case of *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136, uphold almost a similar statute as to railroads? The language of the Indiana act was 'railroad and other corporations.' It did not include individuals. There are a number of individuals in the United States who have the means to operate railroads, and doubtless there are instances where railroads are owned and operated by individuals; yet the Supreme Court of the United States, in the above-cited case, holds such legislation as is under consideration now not in contravention of the Constitution. The illustration of opposing counsel will apply just as forcibly to an individual operating a railroad as it does to a sawmill and commercial corporation. The case of *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136, is, we think, in point to uphold the constitutionality of the act under consideration. While the court does use the language that, considering the act of Indiana as applying only to railroad corporations, it cannot be regarded as in conflict with the 14th Amendment, yet it is evident that the court intended to convey the idea that it was not called upon to consider it, except so far as railroad corporations were concerned, and it is not to be taken at all as an intimation that it would hold the act of Indiana unconstitutional as to other corporations. The only ground upon which counsel attacks the act of 1898 is that it does not extend its provisions to natural persons, and, therefore, it is class legislation; and the court, in its order remanding the case, seems to intimate that the fact that natural persons are not included in the act would render it unconstitutional, as it applies to all corporations and to no natural persons. But on this point the case of *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136, it seems to me, is decisive. If the fact that the omission from the act of 62 L. R. A.

natural persons would render the act in conflict with the 14th Amendment, then the court would have said that the act imposed liabilities and restrictions upon corporations operating railroads, but did not impose the same liabilities and restrictions upon natural persons operating railroads, and was, therefore, unconstitutional. If the addition of the words 'natural persons' to the act of 1898 under consideration would make it consistent with the provisions of the 14th Amendment, as the court would seem to think, and counsel for appellee undoubtedly think, then the omission of the words 'natural persons' from the Indiana act construed in *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136, should certainly have rendered the Indiana act obnoxious to the 14th Amendment; yet the Supreme Court of the United States did not so hold. It seems to me there is no escape from this argument. . . . At first thought I was impressed with the fact that it was absurd to make the constitutionality of the act depend upon the evidence deduced in each particular case; but, after considering the matter, I have come to the conclusion that that is what the court or legislature does, when it says, as it did in *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136, that the business was dangerous. The act simply says 'railroad corporations,' and the court says that the legislature had the right to restrict such corporations in their dealings with their employees, because of the dangerous and hazardous character of the employment and business in which such corporations are engaged. But how do you know that railroad corporations are engaged in a dangerous and hazardous business? You must know it either as a matter of general knowledge or from the testimony of witnesses in any particular case. If the court takes cognizance from general knowledge that a railroad corporation is engaged in a dangerous and hazardous business to its employees, why can it not take notice from general knowledge that a corporation engaged in the manufacture of oil from cotton seed, or of furniture from various woods, is engaged in a hazardous business? If the court does not know this of its own general knowledge, what is the objection to ascertaining it from the facts of each particular case as testified to by witnesses? It would be impossible for the legislature to have enumerated, *eo nomine*, each and every corporation to which it is intended the act should apply. If it did not do this, then there were only two courses to pursue: To say 'all corporations using the dangerous agency of steam in operating its machinery.' Then the court would have to take cognizance from general

knowledge, that any specific corporation, from its name or the character of its business, used steam in operating its machinery, or else would have to inform itself, as to this, from testimony of witnesses in any given case. If the legislature should pursue the only other course, to wit, of saying 'any corporation,' and the court should deem that there might be some corporation to which it would be unconstitutional to apply such an act, then what is the objection to determining, either from general knowledge or the specific testimony of witnesses, that such corporation falls within the terms of the act, constitutionally or unconstitutionally, according to the fact whether or not it is engaged in a business hazardous and dangerous to its employees?"

We, however, think the meaning of the *Tullis Case* is, distinctly, that if the Indiana statute had not had in it, on its face, the words "railroad corporations," it would have been held by the Supreme Court of the United States unconstitutional. It is true the objection in that case was made that it was unconstitutional because the language, "railroad corporations and other corporations," was exactly equivalent to the words "all corporations," which would present a statute just like ours. But it is to be distinctly noted that the Indiana supreme court held, and the United States Supreme Court counted on that holding, that that objection could not be made by a railroad company; in other words, the Indiana supreme court declined to entertain the objection, since the party making the objection was a railroad corporation, and the Supreme Court of the United States accepted the state supreme court's construction of its state's statute. The words "railroad corporation" appearing also on the face of the statute, as to the objection that individuals own railroads, and that, consequently, the Supreme Court of the United States in *Tullis Case*, 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136, must be assumed to have held that such legislation is valid, though applying to corporations owning railroads, and not to individuals owning railroads, although both are in exactly the same business, we must confess that it is extremely difficult to make answer for the Supreme Court of the United States. It may be that the instances of individual ownership of interests so vast as railroad interests usually are are so very rare as not to have been thought worthy by the Supreme Court of the United States of special consideration, though this surely ought not to affect the principle. At all events, it is too plain for debate that in all the decisions of the Federal Supreme Court the ground on which such legislation as this has been vindicated is some essential and substantial

difference between the businesses of the corporations favored and the businesses of the corporations discriminated against.

Third. But the most difficult proposition to answer, made by learned counsel for appellant, is this: That the Supreme Court of the United States, in *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585, held that, in severing the unconstitutional from the constitutional parts of a statute, a court may, although the language of the statute clearly embraces all corporations, effect such severance, by looking to the evidence in each particular case, and thus "judicially excluding or including" a particular corporation, according as the evidence in each case may show that the business of such corporation does, or does not, bring it within the purview of the statute. The statute of Kansas in that case is as follows: "Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company, in consequence of any negligence of its agents, or by any mismanagement of its engineers, or other employees, to any persons sustaining such damage." And the court said: "It is now contended that the plaintiff was a bridge builder; that the legislation only applied to employees exposed to the peculiar hazards incident to the use and operation of railroads; that the railroad company could not be subjected to any greater liability to its employees, who were engaged in building its bridges, than any other private individual or corporation engaged in the same business; and that the statute had been so construed in this case as to make the company liable to its employees, when engaged in building its bridges, notwithstanding bridge-building was not accompanied, and had not been treated by legislation as accompanied, by peculiar perils, thus discriminating against the particular corporation, irrespective of the character of the employment, in contravention of the 14th Amendment. But the difficulty with the argument is that the state supreme court found upon the facts that, although the plaintiff's general employment was that of a bridge carpenter, he was engaged at the time the accident occurred, not in building a bridge, but in loading timbers on a car for transportation over the line of defendant's road; and *Missouri P. R. Co. v. Haley*, 25 Kan. 35, *Union P. R. Co. v. Harris*, 33 Kan. 416, 6 Pac. 571, and *Atchison, T. & S. F. R. Co. v. Koehler*, 37 Kan. 463, 15 Pac. 507, were cited, in which cases it was held that a person employed upon a construction train to carry water for the men working with the train, and to gather up tools and put them in the caboose or tool car, a section man employed by a

railroad company to repair its roadbed, and to take up old rails out of its track and put in new ones, and a person injured while loading rails on a car to be taken to other portions of the company's road, were all within the provisions of the act in question; and the court said: 'In this case the plaintiff was injured while on a car assisting in loading timbers to be transported over the defendant's road to some other point. The mere fact that the plaintiff's regular employment was as a bridge carpenter does not affect the case, nor does it matter that the road was newly constructed, or whether it was in regular operation or not. The injury happened to the plaintiff while he was engaged in labor directly connected with the operation of the road, and the statute applies, even though it should be given the construction counsel places on it.' And see *Chicago, R. I. & P. R. Co. v. Stahley*, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363."

It is certainly true that in the cases cited from Kansas, as also the case we have heretofore referred to of *Deppe*, 36 Iowa, 54, and also in the two cases of *McAunich* and *Ney v. Dubuque & S. C. R. Co.* 20 Iowa, 338, 347, the court did look to the evidence to see whether the person suing was or was not an employee, and, further, whether, though an employee, he was such an employee as was actually engaged at the time in the operative service of the railroad,—that is, service connected with the running of the cars. It might be said that the thing which distinguishes that statute from ours is that in the Kansas statute and the Iowa statute the words "railroad company" appear on the face of the statute, and that in all these cases from Kansas and Iowa the courts had, therefore, statutes on the face of which the words "railroad company" appeared, and that as the court judicially knew that the business of railroading was a hazardous business, inherently such, and as the statute was, hence, the exact equivalent of a statute framed thus, "Every employee of any corporation or individual whose business is inherently dangerous," therefore all the court did was to see, from the evidence, whether the employee was an employee of a railroad corporation,—that is, equivalently, of a corporation whose business was inherently dangerous. In other words, those courts might say—and this would be the controlling thought on that view—that they found the boundary by which to sever in the language of the statute itself, "railroad company," and all that they looked to the evidence for was to be sure that the particular employee was an employee of the kind of corporation named in the statute; and hence those courts would say that in none of these decisions did the court sever the unconsti-

tional provisions of the statute from the constitutional, by looking to the evidence, but solely by the words "railroad company" found on the face of the statutes.

We have said that above line of thought might be indulged in, for the purpose of supporting the decisions of the supreme courts of Kansas and Iowa in the construction of their statutes. And we may say that that line of thought might be also invoked in the hope of supporting the following cases: *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75, and *St. Louis, I. M. & S. R. Co. v. Paul*, 64 Ark. 83, 37 L. R. A. 504, 40 S. W. 705, and also *Minneapolis & St. L. R. Co. v. Herrick*, from Minnesota, Affirmed in 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176, and *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585, Affirmed from the supreme court of Kansas. But, with all deference, it is impossible for us to regard any of these decisions as sound on this point. The court did not, in those cases, sever the statute, so as to divide constitutional provisions from unconstitutional provisions. The act of the court in each and every one of these cases was distinctly not a severance of a statute, separating constitutional from unconstitutional provisions in the statute; all of the provisions appearing upon the face of the statute. The act of the court was an alleged judicial limitation of general words in a statute, by the evidence in each case, so as to hold one employee within, and another employee without, such general words. Limitation, by judicial construction is not severance of a statute. Severance of a statute takes place only where both sets of provisions, constitutional and unconstitutional, appear upon the face of the statute itself, and the court separates, if the provisions are not interdependent, the constitutional from the unconstitutional, and strikes from the statute the unconstitutional provisions, leaving the constitutional provisions in the statute. But where, as in all these cases, there are just two general words, "any employee," what the court does is simply to look to the evidence in each case, and from that evidence determine, not from the provisions on the face of the statute, whether the particular employee is, or is not, the kind of employee falling within the supposed, not the declared, intent of the act, that furnishes a case, not for a severance of a statute, but for the limitation, by alleged judicial construction of general words, by the evidence in the case. We say alleged judicial construction. We think it is judicial legislation. The latter—that is to say, the so-called limitation by judicial construction; judicial legislation as we conceive it—is never permissible. And hence

we think all the decisions we have referred to on this point clearly unsound. The difficulty is in finding the true test as to when a statute may be severed. That test clearly is this: That whenever the court finds on the face of a statute a number of different provisions, some constitutional and some unconstitutional, there it may sever, if they be not interdependent, between these provisions, striking out the unconstitutional; and, let it be marked, that in every such case, there is something to sever between on the face of the statute. That is what is meant by the severance of a statute. But wherever a court, in order to uphold the provisions of a statute as constitutional, has to interpolate in such statute provisions not put there by the legislature, in order, by such interpolation, to make the provision which the legislature did put there constitutional, this is no case of severance, in any proper legal sense; nor is it, in any legal or logical sense, a proper limitation of the provisions which are in a statute by judicial construction. Such action by a court is nothing less than judicial legislation pure and simple.

That we have stated the true test clearly appears from two decisions of the United States Supreme Court: The first, *United States v. Reese*, 92 U. S. 221, 23 L. ed. 566, where the court says, as to the test of severance of a statute: "The proposed effect is not to be attained by striking out, or disregarding, words that are in the section, but by inserting those that are not now there. . . . The question, then, to be determined, is whether we can introduce words of limitation into a penal statute, so as to make it specific, when, as expressed, it is general only. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside, and say who could be rightly detained, and who could be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." And consult carefully the cases cited, referring to the *Reese Case*, set out in Rose's Notes, at page 789. The other case, not referred to by any of the counsel, is the case of *Baldwin v. Franks*, 120 U. S., at pages 685-690, 32 L. ed. 768, 769, 7 Sup. Ct. Rep. 656, 763, to which we call critical attention. The court says: "In *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601, it was decided that this section was unconstitutional, as a provision for the punishment of conspiracies of the character therein mention within a state. It is now said, however, that in that case the conspiracy charged was by persons in a state, against a citizen of the United States and of the state, to deprive him of the protection he was en-

titled to under the laws of that state, no special rights or privileges arising under the Constitution, laws, or treaties of the United States being involved; and it is argued that, although the section be valid so far as such an offense is concerned, it is good for the punishment of those who conspire to deprive aliens of the rights guaranteed to them in a state by the treaties of the United States. In support of this argument, reliance is had on the well-settled rule that a statute may be in part constitutional, and in part unconstitutional, and that, under some circumstances, the part which is constitutional will be enforced, and only that which is unconstitutional rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation, so that each may be read by itself. This statute, considered as a statute punishing conspiracies in a state, is not of that character; for in that connection it has no parts, within the meaning of the rule. Whether it is separable, so that it can be enforced in a territory, though not in a state, is quite another question, and one that we are not now called on to decide. It provides, in general terms, for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision [like the two words in this statute], which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens,—those who conspire to deprive one of his rights under the laws of a state, and those who conspire to deprive him of his rights under the Constitution, laws, or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

This language is decisive of the unsoundness of the view taken by the supreme courts of Iowa, Kansas, Arkansas, and Ohio, cited above. But, it may be said, were not all these cases affirmed by the Supreme Court of the United States? Certainly. But why? That is made extremely plain by the Supreme Court of the United States, in *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 353, 44 L. ed. at page 194, 20 Sup. Ct. Rep. 136, and *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518. Chief Justice Fuller in the former says the Supreme Court of the United States accepted the construction of the Arkansas supreme court, "because that court had so decided," and also distinctly says that the decision of the supreme court of Indiana, in *Pittsburgh*,

C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 49 N. E. 582, was affirmed because the Supreme Court of the United States was bound to accept the construction put upon an Indiana statute by the supreme court of Indiana. The very point expressly argued in the *Tullis Case* was that the Supreme Court of the United States should hold the Indiana statute unconstitutional, notwithstanding the decision on the Kansas, Iowa, and Ohio statutes, because of the particular phraseology of the Indiana statute; but Chief Justice Fuller said that that view asked the United States Supreme Court "to disregard the interpretation given to a state statute by the court of last resort of the state, and, by an adverse construction, to decide that the state law is repugnant to the Constitution of the United States. 'But,'" said the chief justice, "the elementary rule is that this court accepts the interpretation of a statute of a state affixed to it by the court of last resort thereof." And so, in *Waters-Pierce Oil Co. v. Texas* the same court was asked to apply the doctrine of the *Reese*, *Harris*, and *Franks Cases* to the Texas statute, and hold it violative of the 14th Amendment. This statute provided: "Every foreign corporation violating any of the provisions of this act," etc., just as the Kansas and other statutes had said "railroad corporations" should be liable to all their employees, without reference to whether engaged in its operative service or not. The Texas court of civil appeals held that they could separate this language, "any of the provisions of this act," into such provisions as related to local commerce, and such as related to interstate commerce, and so upheld their act. [19 Tex. Civ. App. 1, 44 S. W. 936]. Clearly this was no severance of the act. It was putting into the act words not there. It was determining by the evidence in each case, whether the commerce was local or interstate. And hence, the earnest insistence for the application of the doctrine of the *Reese* and other cases cited above. But what was the reply of the United States Supreme Court? That in those cases the interpretation of certain statutes of the United States was involved, and that the Supreme Court of the United States, interpreting them and expressing its own opinion originally as to whether this sort of so-called severance could be indulged in, distinctly held that it could not; but that, if the Texas court of civil appeals chose to put that sort of construction on its statute, the United States Supreme Court was bound to accept that construction, and had no power to do any more than to determine whether the statute, so construed, violated the 14th Amendment. Says Justice McKenna, speaking for the court: 62 L. R. A.

"The courts of Texas have like power of interpretation of the statutes of Texas. What they say the statutes of that state mean, we must accept them to mean, whether it is declared by limiting the objects of their general language, or by separating their provisions into valid and invalid parts,"—citing the very cases we have just referred to, the *Tullis Case* and the *Paul Case*.

It is perfectly obvious to our minds, from the *Reese Case* and *Harris Case* and the *Franks Case*, on the penal and criminal side of the law, as well as from *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377, and the many cases referred to in Judge Rose's Notes in the appendix to that volume, citing the *Keokuk Case*, on the civil side of the law, that the Supreme Court of the United States distinctly holds, as its own view, that the sort of severance, or the sort of so-called limitation by judicial construction, where the court determines, by the evidence in each case, is not allowable. The distinction is put, as we have stated, in the clearest possible form in the *Franks Case*, 120 U. S. 685-690, 32 L. ed. 768, 769, 7 Sup. Ct. Rep. 656, 763, and *Reese Case*, 92 U. S. 221, 23 L. ed. 566. Counsel relies on this *Keokuk Case*, strongly, to show that there is a difference, as to the application of the principle we are discussing, between penal or criminal statutes and civil statutes. The language of Justice Strong at the conclusion of the opinion is very broad; but it is perfectly plain, when the facts are looked to, that severance could be had between two provisions in the statute. One provided that all water craft landing at an improved wharf should pay certain wharfage fees. Another independent section provided that all water craft landing at any part of Water Street, for a distance of 6½ miles, should pay wharfage fees, whether there was any wharf there or not. The court held that it was constitutional to require fees for landing at an improved wharf, but not to require fees of a boat landing on the banks of the river; and, as both sections were on the face of the statute, the court simply severed between them, and struck out the unconstitutional section. That was a perfectly proper application of the doctrine of severance between the provisions of the statute. And so, in the case of *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 24 L. R. A. 141, 4 Inters. Com. Rep. 683, 37 N. E. 247, *et seq.*, counsel will clearly see that the statute had two sets of provisions. One related to unjust discrimination in transportation charges: the other, to extortionate charges. The supreme court of Illinois accordingly severed the unjust-discrimination sections from the sections as to extortion, striking from the statute the unjust-discrimination sections which had been held

unconstitutional. Here again, both sets of provisions appeared on the face of the statute, and it was a proper case for severance. In a word, learned counsel will not fail to see, upon a critical examination of all the cases upon the subject, that there never can be any room for the application of the doctrine as to severing a statute, except in those cases where the constitutional provisions, as well as the unconstitutional provisions, both appear on the face of the statute, and that, wherever a court, in order to make a severance, has to insert in a statute words or provisions not put there by the legislature, it is guilty, simply, of judicial legislation.

We wish to call special attention to the further fact that we are not alone in the criticisms we have indulged in, as to certain courts above. Mr. Freeman, perhaps the profoundest law analyst living, in a most able note to *St. Louis, I. M. & S. R. Co. v. Paul* (Ark.) 62 Am. St. Rep., at top of page 181, distinctly states it as his view that the *Leep Case*, 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75, and other like cases, cannot be upheld. His criticism seems to be rather of the Supreme Court of the United States for affirming those decisions; but, as said in the first part of this opinion, his criticism should not have been of that court, but of the state supreme courts, for the construction placed by them upon the statutes of their respective states. As pointed out in the *Tullis Case*, 175 U. S. 353, 44 L. ed. 194, 20 Sup. Ct. Rep. 136, and the *Waters-Pierce Oil Co. Case*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518, the United States Supreme Court was helpless, being bound by the construction adopted by the said state supreme courts, and, as we have pointed out, took special pains to say that it affirmed the cases simply because it was so bound. It is said, and correctly, that if we were to place upon this statute the construction that the legislature only meant such corporations as had a business inherently dangerous, the Supreme Court of the United States would be bound to accept that construction, and, accepting it, would undoubtedly affirm our judgment. But we must carefully ascertain, and fearlessly uphold, in every case, the conclusion which, on our consciences, we think clearly right, without reference to results in a higher tribunal. This court neither seeks affirmance, nor fears reversal, at the hands of the United States Supreme Court. It is concerned alone to find the right, and to maintain it. Of course, if the cases invoked by the very able counsel for appellant from the United States Supreme Court maintained the doctrine that a statute like this, using the words "any corporation," could be either severed, or limited, by the so-called judicial construction, restrain-

ing its general terms by the evidence in each case, so as to exclude, or include, according to the testimony of each varying case,—that is to say, if that court had meant and declared that doctrine as the original view of that court,—we would be bound to accept that view, since that court is an appellate court from this, where Federal questions are involved. But it is made by the United States Supreme Court perfectly plain that the original view of that court, on this subject of severance and limitation by judicial construction, is utterly at war with the view of the courts we have quoted from, as explicitly declared in the *Franks, Harris, and Reese Cases*, *supra*, and that all those cases were affirmed by the Supreme Court of the United States because, and only because, it was compelled to accept the construction placed by the respective state supreme courts upon the statutes of their states, and had no power, such construction being accepted, to decide anything else, except the question whether those various statutes, so construed, violated the 14th Amendment.

But fourth, it is objected that in the *Mac-key Case* the Supreme Court of the United States distinctly held that it was exclusively within legislative discretion whether these liabilities "should be applied to common carriers by canal and stagecoach, and to persons and corporations using steam in manufacturing;" and it is said that there is nothing inherently dangerous in the business of a canal carrier, or of a stagecoach. Whether this is true as applied to canals is not so clear. It does seem difficult to find any inherent danger in the business of stagecoaching; but, as we have heretofore remarked, we do not understand the dangerousness of a business to be the only distinctive difference on which such statutes may be upheld. On the contrary, we understand the United States Supreme Court to hold that such statutes may be upheld, if they are based in their classification upon any substantial and essential differences between the natures of the businesses of the favored corporations or individual employers and the natures of the businesses of all other corporations or individual employers. It may be further said, very properly, that what the Supreme Court said about canals and stagecoaches was quoted from the Iowa supreme court, and was clearly *obiter dicta*.

Fifth, it is objected that the United States Supreme Court decisions would uphold this statute upon the ground that it is perfectly competent to confer upon the employees of all corporations these remedies and rights, whilst denying them to natural persons, because, and only because, of the fact that they are corporations, the creatures of the state, existing and drawing all

their vast privileges from the state. It is said that these considerations constitute such a great difference between the natural person and the corporation as to uphold such legislation. And the *Ellis Case*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, is cited; the court saying there that it was a sufficient answer, in that case, to the argument that the act would be valid if it extended the penalties to all corporations, and that as a matter of fact that statute did not so extend the penalties to all corporations. But this is far from decision to that effect. It is a mere comment *arguendo*.

Again, it is said that in *Pacific Exp. Co. v. Seibert*, 142 U. S. 352, 35 L. ed. 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250, it was held that "the Constitution is not violated by special legislation, applied equally to artificial bodies;" and numerous cases are cited from Judge Rose's notes on this case to sustain this proposition. But the perfect answer to this is that all these are cases as to the power of taxation, a subject wholly different from that under investigation here. And this distinction is clearly pointed out in *Connolly v. Union Sewer Pipe Co.* 184 U. S. 562, 46 L. ed. 691, 22 Sup. Ct. Rep. 440, where the court says: "It is sufficient to say that those cases had reference to the taxing power of the state, and involved considerations that could not, in the nature of things, apply to a state enactment like the one involved in the present case."

. . . A state may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States so long as the classification does not invade the rights secured by the Constitution of the United States. But different considerations control when the state by legislation seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade."

Finally, in aid of our view, we refer to the fact that chapter 65, p. 82, of the Acts of 1898, which consolidated the rights of action given by § 663 of the Code of 1892, expressly uses, as it ought to have done, the words "person or corporation." It provides: "Whenever the death of any person shall be caused by any wrongful or negligent act or omission, or by such unsafe character, ways, or appliances, as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof, and such deceased person shall have left a widow or children, or both, or husband, or father, or mother, or sister, or brother, the person or corporation," etc.

Our conclusion, after the most careful and protracted consideration, is that § 1 of the 62 L. R. A.

act of 1898 (Acts 1898, chap. 66, p. 85) violates the 14th Amendment of the Constitution of the United States, in that it imposes restrictions upon all corporations, without reference to any difference arising out of the natures of their businesses, which are not imposed upon natural persons, and thus denies to corporations the equal protection of the law. We are, therefore constrained to declare the said act unconstitutional. The legislature, soon to meet, can readily frame an appropriate act not open to these objections.

The arguments in this case, on both sides, are so exceptionally able that the reporter is directed to report them in full.

Affirmed.

B. J. BARRIER, Jr., *Appt.*,

v.

I. M. KELLY *et al.*

(.....Miss.....)

1. The doctrine of equitable election is founded upon the principle that he who seeks equity must do equity.
2. One who takes the benefit of a deed in his favor, which was made part of a transaction by which some of his property was deeded to a third person by the common grantor under the mistaken belief that it belonged to the grantor, cannot, after the lapse of several years, during which he knows that the other grantee is receiving the rents and profits of the property, repudiate the election and assert his title thereto.
3. One seeking, after a lapse of several years, to set aside a settlement under a transaction by which his ancestor, in making a division of his property, deeded land belonging to complainant to a third person under the mistaken belief that it belonged to the ancestor, and at the same time deeded certain property to complainant, who makes no offer to restore the property deeded to him, must, in order to succeed, show that such property was of no value.

(March 24, 1903.)

A PPEAL by complainant from a decree of the Chancery Court for Yazoo County sustaining a demurrer to a bill filed to establish title to certain real estate. *Affirmed.*

The deeds which were the basis of this controversy were as follows:

This indenture made and entered into this 4th day of June, 1890, between Mary Ann Ray, of Madison county, Mississippi, of the first part, and I. M. Kelly, of Yazoo

NOTE.—As to estoppel of landowner by allowing record title to remain in another, see note to *Breeze v. Brooks* (Cal.) 22 L. R. A. 256.

county, Miss., of the second part, witnesseth: That the party of the first part, in consideration of the love and affection which she bears to her beloved son, Jackson Harvell Ray, now a minor, and for other and divers good and lawful considerations thereunto moving the said party of the first part, not herein expressed, she hereby gives, grants, bargains, sells, and conveys to the party of the second part the following real estate, to wit: An undivided half interest in the east half of the southwest quarter, section seven; the east half and southwest quarter, and east half of northwest quarter, section eighteen, T. 10, R. 2 west, situated in Yazoo county, Mississippi. Also the following tract or parcel of land known and described as follows: north half of section three, township 8, range 3 west; east half of lot 7, section 18, township 8, range 4 east, situated in Madison county, Mississippi. Also the following personal property: A one-half undivided interest in all the cattle and household effects (except one bedroom set and clock, conveyed in deed of this date to the party of the second part for B. J. Barrier), and one horse and buggy being now owned by the party of the first part, and on the place on which she now lives in Madison county, Mississippi, now on my home in Madison county, Mississippi. To have and to hold the same until the said I. M. Kelly and his successors in the trust as hereafter set forth in succession, and subject to the limitations, terms, conditions, uses, and purposes hereinafter specified. But this conveyance is in trust and on the following terms and conditions, and for the following uses and purposes, and subject to the conditions, limitations, powers, and provisions following: Said party of the second part is to take charge of, control, manage, and direct the property herein conveyed to him as he may see proper, in the interest of said minor, until he shall become of age, when the said property herein conveyed, and still remaining in the hands of said trustee, shall be delivered to him; and said trustee is hereby directed to make a deed, in fee simple, to said lands, to said Jackson Harvell Ray, who shall thereafter hold the same absolutely. The said trustee is hereby authorized to make any improvements on said property he may see proper, rent out and control the same, and to invest any surplus money he may have, belonging to said minor, in property, which shall in all things follow the trust. Said trustee may resign his trust and appoint a successor in writing, duly acknowledged and recorded, or by last will and testament, and, should he die or resign without appointing a successor, the chancellor of the district may, on the application of said minor, or anyone in his behalf, appoint

a successor, but said minor may have the right to designate such successor, subject to the approval of the said trustee, and such successor shall have all the rights herein conferred on said Kelly, and be subject to all the requirements and conditions of this instrument. Said trustee shall render to the court, which has jurisdiction of the matters of guardianship an annual account, showing the condition of his trusteeship, but will not be required to show receipt for expenditures, but his account book shall be sufficient evidence of all receipts and expenditures. Said trustee may lease said land in Madison county to the father of said minor on such terms as he might see proper, and make lower prices to him on account of his relationship, if he sees proper to do so. Should said minor die during his minority without a wife living, or issue of the body, or descendants of the same, the property herein conveyed shall go to his half-brother, B. J. Barrier, or his children, or descendants of the same, should he have any. Said trustee is hereby directed to make the necessary conveyances at the proper time to vest the title according to the terms of this instrument. Said trustee is to use sufficient of the proceeds of the said personal property, which he may sell at public or private sale, on such terms as he may think best, and of the rents and profits of said land, in suitably maintaining, educating, and taking care of said minor; and if there should not be a sufficient sum of money realized by said trustee out of the cash, notes, choses in action, delivered to him in accordance with an instrument of even date herewith, executed by me for the benefit of my son, B. J. Barrier, to pay what said trustee is required to pay by said instrument, he may pay such deficit out of the said proceeds of said personal property, or rents and profits of said land. It is intended that said trustee shall pay all taxes and other necessary expenditures on said land, and to have such reasonable compensation for his services as the court to which he accounts may allow him. He shall also be allowed such reasonable attorneys' fees and other expenses as he may have to incur in and about his trusteeship.

Witness my signature this the day and year first above mentioned.

[Signed]

Mary Ann Ray.

This indenture made and entered into this the 4th day of June, 1890, between Mary Ann Ray, party of the first part, of Madison county, Mississippi, and I. M. Kelly, party of the second part, of Yazoo county, Mississippi, witnesseth: That the party of the first part, for and in consideration of the love and affection which she bears her beloved son B. J. Barrier, now a minor, and

for other divers good and lawful considerations thereunto moving the said party of the first part, not herein expressed, she hereby gives, grants, assigns, and delivers to said party of the second part all of the cash money, notes, choses in action or other evidence of indebtedness now belonging to her; also the following personal property: A one-half undivided interest in all the cattle on the home place in Madison county, Mississippi; also the only bedroom set being on the said place, and an undivided half interest in the bedding and household effects of every kind; also one clock; all being on said place in said county, and property being claimed by party of the first part, and said place referred to being the one on which the party of the first part now resides; and, for consideration aforesaid, the party of the first part, gives, grants, bargains, sells, and conveys to the party of the second part whatever interests she may have in the lands of her former husband, B. J. Barrier, Sr., situated in Yazoo, Madison, and Neshoba counties, in the state of Mississippi, owned by B. J. Barrier, Sr., at his death. To have and to hold the same unto the said party of the second part and his successors in the trust as hereinafter set forth in succession, and subject to the terms, conditions, uses, and purposes hereinafter specified. But this conveyance is in trust, and on the following terms and conditions, and for the following purposes, and subject to the limitations, powers, and provisions following: The said trustee shall, out of any money, or collections from any notes, choses in action or other evidence of indebtedness, as heretofore mentioned, pay all of the family expenses of or other demands made on him by the party of the first part, or such expenditures as he may think necessary, whether required by the party of the first part, during her life; hereby giving him full and discretionary power during the life of the party of the first part, except so far as she may direct; she reserving the right to direct any expenditure of such property, while she lives, that she may see proper. At the death of the party of the first part, said party of the second part is hereby directed to pay all debts that she may owe, including burial expenses, without probate and registry, as speedily as he can, out of said money, notes, etc., then erect such monument as he may see proper over the grave of the party of the first part and her deceased children, and pay expenses of removing the remains of the latter to the graveyard at Concord Church, in Yazoo county, Mississippi, where the party of the first part directs the said party of the second part to bury her remains. He is next to pay over the sum of one hundred dollars to Miss Eva Barrier, niece of the party of 62 L. R. A.

the first part, in consideration for the kindness she has shown and the services she has rendered to the party of the first part. He shall next pay to her husband, J. H. Ray, the sum of — dollars; all of which sum, etc., shall be paid out of said money, notes, etc.; and should there be any balance left, the said trustee is to use the same for the benefit of said B. J. Barrier, as he may require. The party of the first part hereby conferring on the said trustee full power and discretion. The said trustee may sell or dispose of said other personal property as he may think best, either by private or public sale, and on such terms as he may see proper, or retain such portion thereof for the use of the said minor as in his judgment the interest of the said minor may require. Said trustee is also authorized to use any of the said funds for the education, support, and maintenance of said minor, or may lend out or invest any surplus money he may have for the benefit of said minor. And he shall report to the proper court, in his guardianship of said minor, should he act as such, under the last will and testament of said party of the first part, appointing him, or he may report as trustee and separate from any matters of guardianship, his acts and doings hereunder, but his books of account shall be deemed sufficient evidence of his receipts and disbursements in his accounting hereunder, and he shall be allowed a reasonable compensation for his services in this trust and all reasonable attorneys' fees and other necessary expenses which he may incur. When said minor arrives at the age of twenty-one, then said trustee shall deliver to him whatever of the estate herein conveyed to him which he has on hand undisposed of, or convey to him any real estate he may have purchased for him, if not already conveyed to him, or the interest in the lands aforesaid of his father. The party of the first part has not conveyed to said trustee for the benefit of said minor any real estate except whatever interest she may have in his father's lands, because said minor has inherited from his father and his deceased brothers sufficient real estate to make him own about an equal amount in value to that owned by party of the first part, and this day conveyed by her to the said party of the second part, as trustee for her son, J. Harvell Ray. Said trustee may, in writing, duly signed and executed and recorded, resign his trusteeship hereunder, and appoint a successor, or may appoint one by his last will and testament; and such successor shall have all the rights, powers, and privileges herein given the party of the second part. Witness my signature this day and year first above mentioned, after the interlineation on the third page, "or the inter-

est in the lands aforesaid of his father," and "except whatever interest she may have in his father's lands."

[Signed] Mary Ann Ray.

Messrs. C. H. Williams and W. W. Lockhard for appellant.

Messrs. Barnett & Perrin for appellees.

Whitfield, Ch. J., delivered the opinion of the court:

At the time of the death of Mrs. Ray, B. J. Barrier, Jr., became the legal owner of the entire Taylor tract of land. His mother had first been married to Mr. Barrier. The only issue surviving from this marriage was B. J. Barrier, Jr., the appellant. After the death of Mr. Barrier, the widow intermarried with Mr. Ray, and by him had one son, the appellee. The appellant and appellee were therefore half-brothers. Mr. Barrier and Mr. Ray had bought, each, an undivided half interest in the Taylor tract of land. These transactions occurred before the Code of 1880 abolished dower. Mrs. Barrier, upon her husband's death, was entitled to dower in that half of the Taylor land bought by her husband Barrier, which dower was never assigned. Upon her death, the dower interest expiring, B. J. Barrier, Jr., became sole owner of that undivided half interest. After the marriage of the widow Barrier to Mr. Ray, and before the birth of their son, the appellee, Mr. Ray conveyed his undivided half interest to Mrs. Ray, then his wife, for her life, remainder to two Barrier sons then living, of whom B. J. Barrier, Jr., was one. The other Barrier son died, and B. J. Barrier, Jr., inherited this interest. Of course, upon the death of Mrs. Ray, her life estate in this land expired, and appellant became the sole owner of that half interest, also, in the Taylor land. So that, as stated, on the death of Mrs. Ray the appellant became the sole owner of the legal title of the entire Taylor land. On the 4th of June, 1890, Mary Ann Ray made two deeds, by one of which she conveyed to I. M. Kelly, as trustee for J. H. Ray, Jr., an undivided half interest in certain chattels and household effects, and a buggy and a horse, and attempted to convey an undivided half interest in the said Taylor land to I. M. Kelly, trustee, to be by him conveyed to J. H. Ray, Jr., upon his arrival at majority. By the other deed she conveyed to I. M. Kelly, trustee, for the benefit of B. J. Barrier, Jr., "all of the cash money, notes, choses in action and other evidences of indebtedness" belonging to her at the date of the deed; also one undivided half interest in the cattle on the home place; also the only bedroom set of furniture, and also an undivided half interest in the bedding and the household effects of every

kind; also one clock, and whatever interest she might have in the lands of her husband B. J. Barrier, Sr., situated in Yazoo, Madison and Neshoba counties, in this state, and owned by her husband B. J. Barrier, Sr., at his death. She, however, reserved the right during her life to make any expenditure out of the notes, cash, etc., she might see proper; and she further charged the cash, notes, etc., with the family expenses, her debts, burial expenses, the cost of erecting a monument over herself, and of removing the remains of her deceased children to the graveyard at Concord Church, and with the payment of a legacy of \$100 to Miss Eva Barrier, her niece; and the balance, if any, was to be used by the said trustee for the benefit of B. J. Barrier, Jr., as he might require. In this last deed the grantor says: "The party of the first part [the mother] has not conveyed to said trustee for the benefit of said B. J. Barrier, Jr., any real estate, except whatever interest she might have in his father's lands, because said minor has inherited from his father and his deceased brothers sufficient real estate to make him own about an equal amount, in value, to that owned by the party of the first part, and this day conveyed by her to said party of the second part [Kelly] as trustee for her son J. Harvell Ray." These deeds were made on the same day, mutually referred to each other, not for description of the property, merely, and are plainly parts of one transaction, and to be construed as one instrument. The mother, having executed these deeds on the 4th of June, 1890, died June 10, 1890.

We think it perfectly clear that Mrs. Ray believed herself to be owner of the undivided half interest in the Taylor land which she attempted to convey to her son J. H. Ray, Jr., and in which her husband had conveyed to her a life interest only; and, second, that she believed her Barrier son, the appellant, owned the other undivided interest in that same land, which came through his father, subject to her dower interest. She also thought she had some interest in certain lands in Madison and Neshoba counties, which she conveyed to her son B. J. Barrier, Jr.

In July, 1890, Kelly qualified as guardian to B. J. Barrier, Jr., in Madison county. On the 16th of November, 1897, B. J. Barrier, Jr., became twenty-one years of age; and in March, 1898, Kelly made his final report as trustee and guardian of Barrier, reporting a settlement between him as trustee and guardian, according to the terms of the deed of Mary Ann Ray to Kelly for Barrier's benefit, and was discharged by the court. Some four years thereafter, to wit, on December 30, 1901, appellant filed this bill against his late guardian, Kelly, and his half-brother,

the appellee, claiming that he was owner in fee simple of the entire Taylor tract of land, one undivided half interest in which his mother had attempted, as shown, to convey to his half-brother, J. H. Ray, Jr. He prayed that this deed should be canceled as a cloud upon his title; and, second, that the court should decree him possession of, and ownership in fee simple of, the entire Taylor tract of land; third, that Kelly, trustee, should be required to account and pay over to him the other half of the rents and profits from said land, which he had collected since and including the year 1890, together with the interest at legal rate thereon; and, fourth, that in case Kelly had paid these rents to J. H. Ray, Jr., he, the said Ray, should be required to account and pay over same to him. The appellee at the May term, 1902, demurred to this bill upon the ground that it showed no cause of action, and that the appellant did not offer to do equity. This demurrer was sustained by the court, and sixty days allowed complainant in which to amend his bill, or file an amended bill in the case. The complainant declined to amend his bill in the sixty days allowed him, whereupon the court below dismissed the bill, and from that order this appeal is prosecuted.

It will be observed that the bill was dismissed under the principle of equitable election; the court holding that the appellant had made his election in accordance with the instrument, and not against it, and that he could not now repudiate that election. It will be specially noted that in this case it is clear, first, that the mother believed herself to be the owner of the land she attempted to convey to the appellee, and hence could not have intended to convey that land as being the appellant's property; and, second, that nevertheless she did in fact attempt to convey what was not hers, but plaintiff's property. It is clear, therefore, on the face of the instrument, that she did convey, or attempted to convey, an undivided half interest which was not her property, but wholly the property of appellant, and by the same instrument did convey to him, first, the surplus left from the profits of cash, notes, etc.; second, certain specific household effects; third, an undivided half interest in the cattle on the place; and, fourth, whatever interest she had in certain lands in the three counties named.

One of the fundamental differences between the doctrine of equitable election, as we administer it, and as it was administered under the Roman civil law, from which it was borrowed, is that with us the doctrine of equitable election applies, whether the donor was or was not aware that he was dealing with property not his own. 1 Pom. 62 L. R. A.

Eq. Jur. § 463; 1 White & T. Lead. Cas. in Eq. p. 546; note to *Streetfield v. Streetfield*; and 2 Am. & Eng. Enc. Law, 2d ed., p. 68 (2). Another difference between the two systems is that under the civil law the doctrine of equitable election was confined to wills. See Mr. Swanston's notes to *Dillon v. Parker*, 1 Swanst. 359, and note, above referred to, in 1 White & T. Lead. Cas. in Eq., pt. 1, pp. 513-541. With us the doctrine applies to deeds, wills, and all other instruments whatsoever. One of the differences between the application of the principle to a will and to a deed is that "in the case of deeds, such as settlements, a person may be compelled to elect, although there is not a clear intention on the part of the settlor to dispose of property which is not his own; and this on the ground that a person cannot accept and reject the same instrument." See 2 Am. & Eng. Enc. Law, 2d ed. p. 69 (5), and note 2. Lord Redesdale said of this in *Birmingham v. Kirwan*, 2 Sch. & Lef. 444, cited in said note, that this difference arose "because deeds being generally matter of contract, the contract is not to be interpreted otherwise than as the consideration, which is expressed, requires." We note this distinction, though it is immaterial in this case, since it is perfectly manifest here that Mrs. Ray did intend to convey the property she attempted to convey to Kelly for her son Ray. There is no doubt about her clear intention so to convey, and no doubt that that clear intention appears on the face of the instrument; and just as little doubt that she meant to convey it as her own, the fact being that it was complainant's property. The doctrine of equitable election itself is, in our judgment, not founded on intention, as held by so many cases, but is, as stated by Mr. Pomeroy, "a positive rule of the law, covering the devolution and transmission of property by instruments of donation, and is invoked wholly irrespective of the intention of the donor, although in the vast majority of cases it undoubtedly does carry into effect the donor's real purpose and desire." The doctrine rests, as we think, upon the equitable principle that he who seeks equity must do equity. We approve and adopt the statement of the doctrine by the United States Supreme Court in *Peters v. Bain*, 133 U. S. 695, 33 L. ed. 706, 10 Sup. Ct. Rep. 354, as follows: "The doctrine of election rests upon the principle that he who seeks equity must do it, and means, as the term is ordinarily used, that, where two inconsistent or alternative rights or claims are presented to the choice of a party by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other, and so, in other words, that one cannot take a benefit under an in-

strument, and then repudiate it." In *Cooper v. Cooper*, L. R. 7 H. L. 67, Lord Chancellor Cairns, in explaining that the doctrine is applied without reference to whether the donor knew that the property of which he attempted to dispose belonged to another, said: "The rule . . . does not proceed either upon an expressed intention, or upon a conjecture of a presumed intention, but it proceeds on a rule of equity, founded upon the highest principles of equity, and as to which the court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the will." Mr. Pomeroy makes the matter exceedingly clear in § 464: "A disposition calling for an application of the doctrine of election may be made under two following different states of circumstances: Either the donor may know that the property which he assumes to deal with is not his own, but belongs to another, and notwithstanding such knowledge he may assume to give it away, or he may give it away, not knowing that it belongs to another, but erroneously and in good faith supposing that it is his own. In the first of these two cases the presumption of an intention on the part of the donor to annex a condition to the gift calling for an election by the beneficiary plainly agrees with the actual fact. At all events, it violates no probabilities. When a testator devises an estate belonging to A to some third person, and at the same time bestows a portion of his own property upon A, he undoubtedly must rely upon the benefits thus conferred upon A, as an inducement to a ratification by A of the whole disposition. To give A the property which the testator was able to dispose of, and at the same time to allow him to claim his own estate, which had been devised to the third person, by his own paramount title, would be to frustrate the evident intention of the testator. In the second case, where the testator or other donor erroneously supposes that the property which he undertakes to give away is in fact his own, the doctrine of election applies with the same force and to the same extent as in the former. Here it is, in the nature of things, simply impossible that the donor could actually have had the intention which the theory imputes to him, since he really believes himself to have a disposing power over the property, or to be dealing with property which is his own."

This case falls squarely within the second category stated by Mr. Pomeroy, and it is simply impossible that the grantor, Mrs. Ray, could have had the intention imputed to her by the theory, since she believed herself to be disposing of her own property. We prefer, therefore, the broader view of the Supreme Court of the United States, of Mr. 62 L. R. A.

Pomeroy, and of Lord Chancellor Cairns, that the rational basis of the doctrine is not to be found in the supposed intention of the donor, but in the equitable principle that he who seeks equity must do equity. We think this doctrine applies in full force to this case. Appellant has made his election. He has been receiving since 1890 whatever surplus has been yielded from the cash, notes, etc. He has retained the specific personal gifts, and for four years after his arrival at age, and after a full settlement with his guardian has been made, has made no objection; all the while knowing, as is clear from the pleadings, that his half-brother was in reception of the rents and profits of the lands attempted to be conveyed to him by his mother. Equity will not permit him now to rip up the whole transaction, alter the entire situation, and repudiate his election once definitely made. It is true that the equitable doctrine of election is administered upon the principle of compensation, and not of forfeiture, though, as said by Gibson, Ch. J., in *Lewis v. Lewis*, 13 Pa. 79, 53 Am. Dec. 443, there may be some few cases in which the principle of forfeiture alone can be applied. In 2 Am. & Eng. Enc. Law, 2d ed. p. 115 (3), the rule is thus expressed: According to the great weight of authority, as now conclusively established, the refractory donee does not, in such event, forfeit the benefit or estate conferred upon him, but is bound only to make compensation out of it to the disappointed donee to the extent of the value of the property of such refractory donee which the donor has attempted to bestow upon such disappointed donee. In such case a court of equity treats the refractory donee as a trustee, and will sequester the benefit intended for him, in order to secure compensation to the disappointed donee. But the excess does not go to the personal representative of the testator, as if undisposed of, but is to be given to the refractory donee; the purpose being satisfied, for which alone the court controlled the legal right. See also 1 Pom. Eq. Jur. § 468, and note 1 on page 636, and 1 White & T. Lead. Cas. in Eq., note, *supra*, pt. 1, p. 543. And it follows from this principle of compensation that, since appellant in this case had his election to claim against the instrument and retain his own property, he might, in case the surplus arising from the cash, notes, etc., and proceeds of other personal property given him, had exceeded in value his property conveyed to his brother, have retained, in addition to his own property, the difference between the value of that property and such surplus; and it is earnestly urged that the bill does not show anything but the mere settlement between him and his guardian, or that he had received a dollar therefrom, and

that the bill further does not show that there was any surplus left from said cash, notes, etc. But the perfect reply to this is that all this lay peculiarly within the knowledge of complainant, and, under the rule that the pleadings must be taken most strongly against the pleader, it must be presumed that if the fact had been that there was no such surplus from such cash, notes, etc., he would certainly have averred it. The bill avers the rents of the entire Taylor tract of land to be only \$300, and it may be that appellant has derived from cash, notes, etc., and other personal property, more, in value, than the undivided half interest in said land attempted to be conveyed by his mother to appellee was worth. At all events, it was the duty of complainant to fully and particularly disclose the truth as to this,—most especially so when he comes into a court of conscience, pressing his legal rights to their utmost limit, without offering to return anything he may have received. It is true, he

was an infant up to his arrival at age in November, 1897. But he waited, under the peculiar circumstances we have set out, four years thereafter, to file this bill. We are clearly of the opinion that the learned court below was entirely right in applying to him the principle of equitable election.

Not only did the court below give him sixty days in which to amend this bill, but said time was given, if he chose so to use it, in which to file an amended bill; and the inference from his failure to avail himself of leave to do either is irresistible that he had stated his case as strongly as it was possible to state it, and that, had he made the full disclosure equity required at his hands in the situation, it would appear that he had elected to keep what his mother gave him, because it was worth more than the land belonging to him, which she had conveyed to Kelly for his brother's benefit.

Affirmed.

MISSOURI SUPREME COURT.

Elizabeth J. BURNSIDE, *Respt.*,

v.

Thomas WAND, *Appt.*

(170 Mo. 531.)

1. A mistake in entry of judgment on a bond securing payment of instalments of alimony, to the effect that the debt shall be discharged upon payment of

the damages due, which can be corrected *nunc pro tunc* so as to provide for execution for the amount due and for the judgment to remain as security for further breaches, is not shown by a record indicating that the bond was treated as a penal bond for the payment of money with a condition of defeasance "by which the same became void on the payment of a less sum," that the petition prayed for judgment for the penalty of the bond and for execution for the sum

NOTE.—Form of judgment on penal bonds.

I. Introduction (comprising English statutes and decisions).

- a. The necessity for § 4 & 5 Anne, chap. 16, 427.
- b. Annuity and instalment bonds, 428.
- c. Exceptions to the scope of 8 & 9 Wm. III., 431.
- d. Form of judgment under the statute 8 & 9 Wm. III., 431.
- e. Summary, 432.

II. Proper form of judgment (under statutes and decisions in the United States).

- a. In general, 433.
- b. When the condition is for the payment of a sum certain at a day certain, 433.
- c. When the condition is for the performance of covenants or collateral agreements.
 1. In general, 435.
 2. Annuity and instalment bonds, 439.
 3. Appeal bonds, 442.
 4. Attachment bonds, 442.
 5. Bail bonds, 443.
 6. Bastardy bonds, 444.
 7. Certiorari bonds, 446.
 8. Injunction bonds, 446.
 9. Indemnity bonds, 446.

II. c.—(continued).

10. Official bonds, 448.
11. Post-obit bonds, 453.
12. Replevin bonds, 453.
13. Title bonds, 454.

III. Effect of improper form, 455.

IV. Summary, 457.

I. Introduction (comprising English statutes and decisions).

- a. The necessity for § 4 & 5 Anne, chap. 16.

Shakespeare, in his "Merchant of Venice," portrays, according to the practice of those times, the effect of the breach of a penal bond,—that the whole penalty became forfeited and recoverable.

The reason for this apparently unreasonable practice is most satisfactorily explained by Blackstone (vol. 3, Com. 434) to be that the penalty of a bond was originally contrived to evade the "monkish constitutions," which prohibited taking interest for money, and was, therefore, considered as the real debt in courts of law when the debtor neglected to return the loan with interest, because, as the law then stood, the judge could not give judgment that the interest be specifically paid. But, later, after the taking of interest was made legal and especially after the statute of 37 Hen. VIII.

due, and that judgment was ordered for plaintiff.

2. A bond securing payment of monthly instalments of alimony is not within the terms of a statute providing that, in cases of actions upon bonds "for the breach of any condition other than the payment of money," or for "any penal sum for the nonperformance of any covenant or written agreement," the judgment shall be for the whole amount of the bond, which shall remain as security for future defaults, and the execution shall be for the damages accrued.

(December 10, 1902.)

A PPEAL by defendant from an order of the Circuit Court for the City of St. Louis in favor of plaintiff correcting a judg-

chap. 9, declaring that the debt or loan should be considered the "just and true intent" for which the obligation was given, when the courts of law still adhered "wilfully and technically" to the letter of the ancient precedents and refused to consider the payment of principal, interest, and costs, as a full satisfaction of the bond, it became the practice to resort to the "more liberal men who sate in the courts of equity," and who construed the penalty of such instruments according to their just and true intent as merely a security for the loan. For instances of this early practice of resorting to equity for a stay of proceedings in actions of debt upon bonds, upon payment of the principal, interest, and costs, see Anonymous, 6 Mod. 11; Butler v. Rolfe, 6 Mod. 25; BurrIDGE v. Fortescue, 6 Mod. 60; Ireland Case, 6 Mod. 101; Stern v. Vanburgh, 2 Keble, 553, 555. In order to avoid the inconvenience and injustice of thus putting different constructions, in the different courts, upon the same transactions, the stat. 4 & 5 Anne, chap. 16, was passed in 1705, providing that, in an action of debt on a bond with a penalty, having a condition of defeasance to make void the same upon payment of a lesser sum at a day certain, if "the defendant shall bring into the court where the action shall be depending all the principal money and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity, upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the court shall and may give judgment to discharge every such defendant of and from the same;" thus making what had long been the practice in courts of equity the rule in courts of law as well.

Lord Mansfield, in Bonafous v. Rybot, 3 Burr. 1870, uses the following pertinent language in discussing the need for and intent of the statute of Anne: "It is surprising that, after the statute of usury, 37 Hen. VIII., which excepts obligations with condition, made upon a just and true intent, the courts of law did not consider the just intent of a bond to be principal, interest, and costs, secured by a penalty; and suffer the party, at any time, to save the forfeiture by performing the intent. It is more extraordinary that, after this was settled in a court of equity 'to be the nature of a bond,' and therefore every party to a bond understood it in this sense, the courts of law did not follow equity, but still continued to do injustice as

ment which had been entered in a suit on a bond to secure the payment of alimony. *Reversed.*

The facts are stated in the opinions.

Mr. T. J. Rowe for appellant.

Messrs. Gilliam & Smith, for respondent;

The judgment is wrong in the second clause in the use of the words "to be satisfied upon the payment of the sum of," which is a departure from the pleadings, the evidence, and the minutes of proceedings, and contrary to the statute in such case made and provided, and is not the proper judgment in the case.

Mo. Rev. Stat. §§ 869-871, 2113-2117, 2235; *Waldo v. Fobes*, 1 Mass. 10; *Young*

of course, and put the parties to the delay and expense of setting it right elsewhere, as of course. The act of Parliament meant that, in cases of penalties by way of security, the clear, final justice of the case should be attained in courts of law (much to the benefit of both parties)."

b. Annuity and instalment bonds.

Thus, the procedure in actions upon penal bonds specifically conditioned to become void upon the payment of a lesser sum at a day certain seems to have been settled, but some difficulty arose in deciding whether any other classes of bonds might be considered included within the scope of this statute.

In *Ex parte Winchester*, cited in *Ex parte Groome*, 1 Atk. 118, the question came up whether a bond conditioned to pay the principal sum after the death of the obligor and wife, and interest at 4 per cent by half-yearly payments in the meantime, was within the statute. But it was held that, not being a bond with a defeasance for the payment of a lesser sum at a day certain, it was not, and that the act of Parliament did not intend to comprehend bonds of that nature; "for," the court said, "suppose a bond payable at instalments, the obligee gets judgment on the whole penalty, upon a breach of payment at the first instalment; why, even a court of law would in such case act equitably, for, upon the obligor's applying to the court there, and offering to pay the money due at the instalment, and agreeing to let the judgment stand as a security for the rest, they will relieve the party on payment of the money then due and costs."

And likewise, in *Land v. Harris*, 1 Strange, 515, in an action upon a bond conditioned for the payment of a certain sum by annual instalments, the proceedings were not stayed upon the payment of the instalment due and costs, in conformity with the statute; the court stating that the obligee must not be put to the necessity of so many several actions as one a year.

But Tidd in vol. 1, page 543, of his Practice, says that later, upon the "equity of the statute" in suits upon annuity and instalment bonds, the courts stayed proceedings upon payment of the arrears and costs, and allowed judgment as security for future payments, with a stay of execution until they became due; citing *Bridges v. Williamson*, 2 Strange, 814,

v. *Reynolds*, 4 Md. 375; *Hardy v. Bern*, 5 T. R. 636; *Tidd*, Pr. 4th Am. ed. 879, 543; *Battey v. Holbrook*, 11 Gray, 212; *Meinert v. Bottcher*, 60 Minn. 204, 62 N. W. 276; *Ramsey County Bldg. Soc. v. Lawton*, 49 Minn. 362, 51 N. W. 1163; *Orendorff v. Utz*, 48 Md. 298; *Ridgely v. Lee*, 3 Harr. & M'H. 94.

The judgment having been inadvertently satisfied without consideration, the entry of satisfaction was properly corrected to cover the damages, interest, and costs actually paid.

Willard v. A. Siegel Gas-Fixture Co. 47 Mo. App. 1; *Vanderline v. Smith*, 18 Mo. App. 55; *Weeks, Attorneys at Law*, §§ 219-232; *Inman v. Griswold*, 1 Cow. 199; *Seymour v. Minturn*, 17 Johns. 169, 8 Am.

Dec. 380; *Laughlin v. Fairbanks*, 8 Mo. 367; *Cohen v. Camp*, 46 Mo. 179; *McRoberts v. Lyon*, 79 Mich. 25, 44 N. W. 160; *Arnold v. Fuller*, 1 Ohio, 458; *Johnson v. Provincial Ins. Co.* 12 Mich. 216, 86 Am. Dec. 49.

The judgment of March 22, 1899, is the only judgment authorized by the statute which covers the case.

Mo. Rev. Stat. 1889, §§ 869-871; *State ex rel. Ozark County v. Tate*, 109 Mo. 265, 18 S. W. 1088; *Belkin v. Rhodes*, 76 Mo. 643; *Ross v. Ross*, 83 Mo. 100; *Evans v. Fisher*, 26 Mo. App. 547; *Woodbridge v. Quinn*, 70 Mo. 370; *State v. Jeffers*, 64 Mo. 376; *Conlin v. Lamont Iron Co.* 116 Mich. 627, 74 N. W. 1004; *Birmingham v. Leonhardt*, 2 Kan. App. 513, 43 Pac. 996; *Wilson Sewing Mach. Co. v. Lewis*, 10 Ill. App. 191; *People v.*

where the defendant was given leave to bring in only the arrears under the statute. Proceedings were stayed, also, in *Moss v. Hardy, Barnes*, N. C. 288, upon payment of the instalment due; it does not appear, however, in what form the judgments were rendered in those cases.

But in *Darby v. Wilkins*, 2 Strange, 957, an action upon a bond conditioned for the payment of money by instalments, also cited by *Tidd*, the court says, in reference to the statute of Anne, that it related to a case of bringing in all the money reserved by the condition because it provided that the bond should be absolutely discharged, but that "within the equity of the statute it has been allowed to bring in the money due on the instalments;" and the plaintiff was allowed to have judgment for the whole, but not to take out execution until the payments became due. However just and equitable this decision may be, it certainly is unwarranted by the statute of Anne, and putting it there by the phrase "equity of the statute" is most unsatisfactory.

In *Bonafous v. Rybot*, 3 Burr. 1370, the bond was conditioned for the payment of a gross sum of money absolutely at a day certain, but subsequently it was agreed that the money should be paid in four instalments, upon default in any of which the defeasance to be void. In debt upon the bond upon a lapse in the payments, it was argued, in opposition to a rule to stay proceedings upon payment of the amount due, that the case of a bond conditioned for the payment of money by instalments was not within the statute of Anne, which was confined to common and ordinary bonds conditioned for the payment of a lesser sum at a day certain, and did not extend to bonds conditioned for the payment of money by instalments,—at least until all the days of payment were past. Lord Mansfield, however, thought that the statute, being remedial, ought to have a most liberal construction, and, for the advancement of justice, be extended to cases not mentioned in the act, and stated that he could see no doubt as to bonds conditioned for the payment of money by instalments being included within the act. But in this particular instance, the bond having been conditioned for the payment of a gross sum at a fixed time, the failure to perform the subsequent agreement to pay by instalments rendered the gross sum due, and so, unless the plaintiff

paid the principal sum, he could not be relieved from the penalty; and the rule was, therefore, discharged.

A bond for the payment of a sum certain upon a given day, and of interest in the meantime on specified days anterior to the day fixed for payment of the principal, upon which both principal and interest were due, was, because the entire sum was due and ascertainable by computation, held to be within the statute of Anne. *Smith v. Bond*, 3 Maule & S. 528, 10 King. 125, 2 L. J. C. P. N. S. 269.

In a number of cases of annuity or instalment bonds, the decisions are not made in reference to any statute, but are apparently influenced largely by the act of 8 & 9 Wm. III., passed in 1697, some years prior to the passage of the statute of Anne, to provide for the procedure in actions upon bonds conditioned for the performance of covenants or agreements. In regard to the reason and necessity for this statute, it was said, in *Betts v. Burch*, 4 Hurst. & N. 506, 1 Post. & F. 485, 28 L. J. Exch. N. S. 267, 7 Week. Rep. 546, that originally a plaintiff recovered the debt at law, then that courts of equity thought that they could do substantial justice by setting aside the agreement and awarding damages, and finally the legislature interfered, and, by the statute, provided that no more than the actual damages sustained by the breach should be recoverable at law.

Briefly, the provisions of the statute of William are as follows: That in all actions commenced "upon any bond or bonds, or on any personal sum, for nonperformance of any covenants or agreements in any indenture, deed, or writing contained" the plaintiff may assign breaches, and the jury may assess, "not only such damages and costs of suit as hath heretofore been usually done in such cases" (nominal damages for the detention of the debt, and costs), but also damages for such of the breaches as are proved, and "the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions;" and, upon payment of the damages so assessed with costs, and all reasonable costs and charges of execution, a discharge is to be entered of record; "but, notwithstanding, in each case such judgment shall remain, continue, and be as a further security to answer to the plaintiff . . . such damages as shall, or may, be sustained for further breach" of the bond, which plaintiff

Compher, 14 Ill. 447; *Dent v. Davison*, 52 Ill. 109; *McDole v. McDole*, 106 Ill. 452.

The judgment appearing of record is subject to be corrected on motion for irregularity within three years after the term at which such judgment was rendered.

Mo. Rev. Stat. § 2235; *Gille v. Emmons*, 58 Kan. 118, 48 Pac. 569; *Corn Exch. Bank v. Blye*, 119 N. Y. 414, 23 N. E. 805; *Rousset v. Boyle*, 45 Cal. 64; *Dreyfuss v. Tompkins*, 67 Cal. 339, 7 Pac. 732; *Cauthorn v. Berry*, 69 Mo. App. 404; *Fletcher v. Coombs*, 58 Mo. 430; *Jillett v. Union Nat. Bank*, 56 Mo. 304; *Harlan v. Moore*, 132 Mo. 483, 34 S. W. 70; *State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317; *Cullum v. Batre*, 2 Ala. 415; *Maxon v. Chicago, M. & St. P. R. Co.* 67 Iowa, 226, 25 N. W. 144; *Mahaffy v. Ma-*

haffy, 63 Iowa, 55, 18 N. W. 685; *Boyle v. Connelly*, 2 Bibb, 7; *Doty v. Rigour*, 9 Ohio St. 519; *Payne v. Ulmer*, 1 Walk. (Pa.) 516; *Chestnutt v. Pollard*, 77 Tex. 86, 13 S. W. 852; *Hurlbut v. Lang*, 10 Tex. Civ. App. 168, 29 S. W. 1109; *Birmingham Nat. Bank v. Mayer*, 104 Ala. 634, 16 So. 520; *Doe ex dem. Brown v. Owen*, 2 Blackf. 452; *Smith v. Todd*, 3 J. J. Marsh. 298; *Hood v. Spaeth*, 51 N. J. L. 129, 16 Atl. 163.

The judgment was properly corrected.

Kiehl v. Com. 18 W. N. C. 505, 6 Atl. 389; *Thatcher v. Taylor*, 3 Munf. 249; *Exchange Nat. Bank v. Allen*, 68 Mo. 474; *Downing v. Still*, 43 Mo. 309; *DeKalb County v. Hixon*, 44 Mo. 341; *Jones v. St. Joseph F. & M. Ins. Co.* 55 Mo. 342; *Phillips v. Evans*, 64 Mo. 17; *Pockman v. Meatt*, 49

may suggest by scire facias, and obtain an assessment of his damage by a jury upon a writ of inquiry, and execution awarded, as above, and so on, *totties quoties*.

Thus, in *Tighe v. Crafter*, 2 Taunt. 387, the court held that they could not stay the proceedings upon payment of the amount due and costs, as the bond was forfeited; but that they would see what could be done to restrain the execution, if the plaintiff should levy more than was fit. The court, in *Smith v. Bond*, 3 Maule & S. 528, 10 Bing. 125, 2 L. J. C. P. N. S. 269, remarks that this case falls within the statute of William as to the judgment standing as security for the future.

Later, in *Masfon v. Touchet*, 2 W. Bl. 706, upon a motion to stay proceedings upon payment of the interest due, which was payable in half-yearly instalments, the court merely ordered judgment for the whole to be rendered with stay of proceedings upon payment of the interest due.

Plaintiff was held entitled to a judgment for the whole penalty to stand as security, in *Van Sandau v. —*, 1 Barn. & Ald. 214, 18 Revised Rep. 473, an action brought upon a default in the payment of interest on a bond in a penal sum conditioned for the payment of a lesser sum at a certain date with interest in the meantime payable in half-yearly instalments. The decision is not made in reference to any statute, although one of the counsel cited the statute of William.

A judgment entered upon an annuity bond upon a lapse in payments was ordered, in *Howel v. Hanforth*, 2 W. Bl. 843, to stand as security for future arrears, with liberty to apply to the court from time to time to sue out fresh executions thereon.

Judgment was entered for the penalty in an annuity bond and execution issued for that amount beside fees, in *Ogilvie v. Foley*, 2 W. Bl. 1111; but the court ordered the overplus beyond what would satisfy the arrears of the annuity refunded, and that the judgment should stand as a security, with liberty to take out execution as future arrears should arise.

A case standing on its own merits is *Gowlett v. Hanforth*, 2 W. Bl. 958,—an action on a bond conditioned to pay a certain sum by instalments; and, if default were made in the payment of any one or more of the instalments, then the bond to stand in force for the whole principal and interest remaining due and unpaid. 62 L. R. A.

paid. It was held that, on account of this special condition, the defendant was not entitled to have proceedings stayed upon payment of the instalments due with costs, under either the statute of Anne, or William.

And so, in *James v. Thomas*, 5 Barn. & Ad. 40, 2 Nev. & M. 663, 2 L. J. K. B. N. S. 207, an action on a bond with a penalty conditioned for the payment of money at a certain day and interest in the meantime, with an agreement that the principal should become demandable upon any default in the payment of interest, it was held that judgment should be rendered for the whole principal sum, and execution awarded therefor, and not merely for the arrears of interest.

Then, there are a number of strong and oft-cited cases expressly to the effect that annuity and instalment bonds are within and governed by the statute of William, as in *Collins v. Collins*, 2 Burr. 820, 2 Kenyon, 530, an action of debt upon a bond for the payment of an annuity during the life of a parent, and also for maintaining him in food and lodging, where it was concluded that, while the action was within a statute allowing set-off to actions in debt on bonds, and prescribing that judgment should then be entered for no more than appeared to be justly and truly due the plaintiff, and not for the penalty for the bond, nevertheless, in order to prevent the matter becoming *rem judicatum*, so that plaintiff could not recover for any future payments to become due upon the bond, since it appeared that the whole debt was not paid, the judgment must also direct that the penalty remain as security for future breaches, according to 8 & 9 Wm. III., execution to be stayed, however, upon payment of the sum really due.

And in *Walcot v. Goulding*, 8 T. R. 126, the court held it to be established that a bond conditioned for the payment of an annuity was within the statute of William.

So, in *Willoughby v. Swinton*, 6 East, 550, 2 Smith, 663, a bond conditioned for the payment of a certain sum by instalments was held within the statute, in analogy to the rule in annuity bonds.

It is stated, *arguendo*, in *Smith v. Bond*, 3 Maule & S. 528, 10 Bing. 125, 2 L. J. C. P. N. S. 269, that annuity bonds, and bonds for money payable by instalments, are within the statute of William. Other authorities to the same effect are 2 Archbold, Pr. 522; 7 Bacon,

Mo. 345; *Smith v. Best*, 42 Mo. 185; *State ex rel. Abrahams v. Cross*, 6 Ind. 387; *Loring v. Groomer*, 110 Mo. 632, 19 S. W. 950; *Freeman*, Judgm. 4th ed. § 38; *Black*, Judgm. §§ 106, 162; *State ex rel. Brown v. White*, 75 Mo. App. 261; *Gwin v. Waggoner*, 116 Mo. 143, 22 S. W. 710; *Cameron v. Boyle*, 2 G. Greene, 154; *Boucne v. Hallet*, 1 Caines, 517.

The satisfaction was properly reversed, corrected, and amended.

State use of State Bank v. Martin, 20 Ark. 629; *Martin v. Bank of the State*, 20 Ark. 636; *Winter v. Kansas City Cable R. Co.* Mo. 159, 61 S. W. 606; *Stewart v. Armel*, 62 Ind. 593; *Kirk's Appeal*, 87 Pa. 243, 30 Am. Rep. 357; *Roberts v. Nelson*, 22 Mo. App. 28; *Faughman v. Elizabeth*,

58 N. J. L. 309, 33 Atl. 212; *McNeal v. Hunt*, 6 Kan. App. 670, 50 Pac. 63; *Bogle v. Bloom*, 36 Kan. 512, 13 Pac. 793; *Deland v. Hiatt*, 27 Cal. 611, 87 Am. Dec. 102; *Cumber v. Wane*, 1 Strange, 426, 1 Smith Lead. Cas. 147; *Beers v. Hendrickson*, 6 Robt. 53; *Wilson v. Stilwell*, 14 Ohio St. 464; *Haggin v. Clark*, 61 Cal. 1; *Shannon v. Woolard*, 12 Lea, 663; *Ryan v. Ward*, 48 N. Y. 204, 8 Am. Rep. 539; *Heintz v. Pratt*, 54 Ill. App. 616; *Fuller v. Baker*, 48 Cal. 632; *Freeman*, Executions, 3d ed. §§ 53, 54; *Dundee Nat. Bank v. Wood*, 30 N. Y. S. R. 607, 9 N. Y. Supp. 351; *Murphy v. Flood*, 2 Grant Cas. 411; *Mechanics' Bank v. Minthorne*, 19 Johns. 244.

The statute was read into the bond at its execution, became a part of the judgment,

Abr. 270; *Gainsford v. Griffith*, 1 Wms.' Saund. 58, note a; *Roberts v. Mariett*, 3 Wms.' Saund. 187, note 2.

Thus, it is apparent that a decided conflict exists on this point, with the weight of authority, however, in favor of the latter proposition, the true solution to which would seem to be as expressed in the opinions in *BURNSIDE V. WAND*, that annuity and instalment bonds are not strictly within either statute, as one provides for bonds with a condition of defeasance to make void the "same upon payment of a lesser sum at a day" certain, and the other for all bonds conditioned for the performance of covenants or agreements, and was made to include bonds conditioned for the payment of money only by the construction put upon it by the courts.

e. Exceptions to the scope of 8 & 9 Wm. III.

The statute of William has been construed not to apply to bail bonds, upon which final judgment was allowed to be entered up in *Moody v. Pheasant*, 2 Bos. & P. 446, without executing a writ of inquiry. *Selby v. Serres*, E. 41 Geo. III. K. B., is cited to the same proposition in 1 Tidd, 584.

Nor to replevin bonds in an action upon which it was held, in *Middleton v. Bryan*, 3 Maule & S. 155, that the plaintiff might tax the costs and issue execution for the costs and the amount of the goods distrained as indorsed on the replevin bond without executing a writ of inquiry.

Nor to petitioning creditor's bond in bankruptcy proceedings (*Smith v. Broomhead*, 7 T. R. 301, and *Smithey v. Edmonson*, 3 East, 22), because the chancellor is expressly empowered by 5 Geo. II. chap. 30, § 23, to assess the damages in such cases.

Nor to post-obit bonds (*Murray v. Stair*, 2 Barn. & C. 82, 3 Dowl. & R. 278, 26 Revised Rep. 283), as the whole sum that the defendant could ever be entitled to becomes due at one time, and there is, therefore, no occasion for an assessment of damages which are the subject of computation only. It seems to have been held that such bonds are within the statute of Anne.

A suggestion in *Wardell v. Fermor*, 2 Campb. 285, that the post-obit bond in suit was within the statute of William is said by the reporter to have been considered quite superfluous.

Citing the last case, and holding to the same 62 L. R. A.

effect, is *Cardozo v. Hardy*, 2 J. B. Moore, 220.

Nor to a bond for the replacement of stock. *Saville v. Jackson*, 13 Price, 715, where nothing remained to be done after the judgment, and the obligation was wholly at an end and intended to be satisfied thereby.

Nor to any bond where the damages to be assessed by the jury would be calculated to meet and satisfy the entire condition of the bond. *Smith v. Bond*, 10 Bing. 125, 3 Maule & S. 528, 2 L. J. C. P. N. S. 269. It is said, *obiter*, in this decision that the great object of the statute of William was to take away the necessity of applying for relief to a court of equity, and that, on this principle, replevin and bail bonds are held not to be within the act, because the court can in those cases relieve the defendant without his being obliged to file a bill in equity.

Further authorities specifying and discussing generally the above exceptions to the statute, are 2 Archbold, Pr. 522; *Gainsford v. Griffith*, 1 Wms.' Saund. 58, note a; and 1 Tidd, Pr. 584.

d. Form of judgment under statute 8 & 9 Wm. III.

An authority of general value in regard to the statute is the note attached to *Gainsford v. Griffith*, 1 Wms.' Saund. 51, an action of debt on a bond conditioned for the performance of covenants, in which judgment was rendered for the plaintiff for the debt and also for damages sustained on account of the detention, with costs. In the note, the reporter states that at the time of the decision in this case plaintiff not only had judgment to recover the penalty of the bond together with his costs, but was also entitled to take out execution for the whole without any regard to the damages which he had actually sustained by the breach; and that it was so until the statute 8 & 9 Wm. III.; that this statute was meant to meet the case of nonperformance of covenants and agreements secured by bonds, when the covenants were to be performed at different times, or the money paid by instalments. The reporter also states that the statute applies only to actions of debt,—that, if plaintiff sue either in covenant or assumpsit, according to whether the instrument is under seal or not, the judgment is for the damages found by the jury and no more, and cannot possibly stand as security for further breaches.

and the action of the clerk in interpolating the provision for satisfaction in the last clause of the judgment was mischievous, unauthorized, and void, and was properly set aside.

Snowden v. State, 8 Mo. 484; *Houck v. Cross*, 67 Mo. 151; *Kerr v. Galloway*, 94 Tex. 641, 64 S. W. 858; *Bronson v. Kinzie*, 1 How. 319, 11 L. ed. 143; *McCracken v. Haycard*, 2 How. 612, 11 L. ed. 399; *Hicks v. Scofield*, 121 Mo. 388, 25 S. W. 755; *Hill v. St. Louis*, 159 Mo. 168, 60 S. W. 116; *Ex parte Cohen*, 159 Mo. 662, 60 S. W. 1081; *State ex rel. Grimm v. Manhattan Rubber Mfg. Co.* 149 Mo. 212, 50 S. W. 321; *State v. Gilmore*, 141 Mo. 512, 42 S. W. 817; *State ex rel. St. Louis v. Laclede Gas-light Co.* 102 Mo. 485, 14 S. W. 974, 15 S.

W. 383; *State v. Grant*, 79 Mo. 122, 49 Am. Rep. 218; *Collins v. German American Mut. Life Assn.* 85 Mo. App. 245; *St. Louis use of Duff v. Karr*, 85 Mo. App. 608; *Stephenson v. Jones*, 84 Mo. App. 254; *Ruschenberg v. Southern Electric R. Co.* 161 Mo. 70, 61 S. W. 626.

This court, when this state adopts a statute, or the controlling words of a statute, from a foreign country or another state, adopts the construction there put upon it.

Skouten v. Wood, 57 Mo. 380; *Skrainka v. Allen*, 76 Mo. 384; *St. Louis Nat. Bank v. Hoffman*, 74 Mo. App. 203; *State v. Chandler*, 132 Mo. 155, 33 S. W. 797.

Our statute on penal bonds being substantially copied from 8 and 9 Wm. III. chap. 11, § 8, and 4 Anne, chap. 16, the English

In regard to the specific question as to the form of judgment, the reporter states that, under the statute, it is to be entered as before,—that is, to recover the debt and damages for its detention, with costs; whereupon execution is sued out to levy the debt and costs recovered by the judgment, but indorsed to levy only the damages assessed for the breaches, with all reasonable costs and charges; that no special judgment for the damages assessed seems to be required by the statute; that there can be only the one judgment, *vis.*, the old one for the debt with damages for its detention and costs.

An objection was made to the form of the judgment, in *Goodwin v. Crowle*, 1 Cowp. 357, an action in debt to recover for the nonperformance of the covenant of a bond. It was insisted that the judgment which was entered for the whole penalty should have been entered only as security, but the court held that the statute did not operate to change the form of entry of the judgment in any way, which, as before, was properly entered for the full penalty of the bond, although it in fact stood only as security for the damage sustained, and execution could be taken out only for the damage really suffered, found by the assessment thereof upon breaches assigned after judgment.

In *Hankin v. Broomhead*, 3 Bos. & P. 607, an action on a bond with a penalty conditioned for the performance of covenants, after judgment by default was entered for the debt and damages for its detention, with costs, a further judgment was entered for the damages assessed upon a writ of inquiry as to the breaches assigned, without any statement that it was in lieu of the first judgment, but only entering a remittitur as to the costs. As a preliminary to his decision, the judge writing the opinion said: "I am sorry to find that none of the courts have ever been moved as to the proper mode of entering up judgments under the statute of William in cases of this kind. At common law, no doubt the party was entitled to take his judgment for the penalty in the bond, and the defendant could only obtain relief through the interposition of a court of equity, which would direct an issue of *quantum damnificatus*, and prevent any execution being enforced for more than the damages actually sustained. To avoid so circuitous a mode of relief, and to afford to parties the benefit of the above equitable execution, the statute of William was passed." The decision arrived at was 62 L. R. A.

that the second judgment with the remittitur of costs should be reversed and that the first judgment stand unimpeached.

e. Summary.

Briefly, the following is the situation according to the English cases and statutes:

In all actions in debt upon bonds in a penal sum conditioned for the payment of a lesser sum at a day certain, the court gives judgment to discharge the bond according to 4 & 5 Anne, chap. 10, upon payment of the principal and interest due with costs.

In all actions in debt upon bonds conditioned for the performance of covenants or agreements, provided for by 8 & 9 Wm. III., judgment is rendered for the penalty, nominal damages for its detention with costs, and execution issued for the same, but indorsed to be discharged upon payment of the real damage suffered as assessed by the jury upon the breaches assigned; the judgment to stand as security for further breaches *toties quoties*.

Included within the scope of the latter statute by construction are annuity and instalment bonds.

Excluded, are bail bonds, replevin bonds, post-obit bonds, petitioning creditor's bonds in bankruptcy proceedings, and, theoretically, all other bonds where the damages to be assessed would be calculated to meet and satisfy the entire condition of the bond.

The main distinction as to the form of judgment under these statutes seems to be that only in those cases where the bond was within the scope of the statute of William was provision made that the judgment remain as security for future breaches. There is little reason for supposing that at this time the judgment was not uniformly *pro forma* for the penalty, although in fact discharged in the one case by the payment of the principal, interest, and costs, and in the other execution was allowed to issue only for the damages assessed. Judgment had certainly always been rendered for the penalty, and the form was expressly left unchanged by the statute of William, so that it seems fair to assume that, had the statute of Anne, passed nearly ten years later, been intended to vary the rule, the intention would have been stated in explicit terms.

cases and authorities should have great weight in its interpretation.

Their uniform interpretation is that, on a bond for payment of an annuity, or for payment of money in instalments, judgment was given for the amount of the penalty, execution for amount due, and the judgment stood as security for further breaches.

19 Enc. Pl. & Pr. p. 290; *Gainsford v. Griffith*, 1 Wms., Saund. 58, note 1; 2 Bouvier, Law Dict. 961; *Young v. Reynolds*, 4 Md. 383; *Collins v. Collins*, 2 Burr. 826; *Lee v. Lester*, 18 L. J. C. P. N. S. 312; *Foster, Scire Facias*, 43, 44, *44; *Willoughby v. Swinton*, 6 East, 550; *Van Sandau v. —*, 1 Barn. & Ald. 214; *Batley v. Holbrook*, 11 Gray, 212; *Waldo v. Fobes*, 1 Mass. 10; *Boucne v. Hallet*, 1 Caines, 517;

Wood v. Wood, 3 Wend. 454; *Thatcher v. Taylor*, 3 Munn. 249.

A court of law by its judgment declares the conclusion of the law upon the facts proved, and leaves the party to the proper process to enforce it.

Kramer v. Rebman, 9 Iowa, 114; *Houck v. Cross*, 67 Mo. 151.

The clerk has no authority to enter judgment for any other sum than that the verdict and statute call for.

Robostelli v. New York, N. H. & H. R. Co. 34 Fed. 507.

If the clerk fails to enter the judgment, or enters an erroneous one, the court may, at a subsequent term, order the entry of the correct one *nunc pro tunc*.

Hyde v. Curling, 10 Mo. 359; *Turner v.*

II. Proper form of judgment (under statutes and decisions in United States).

a. In general.

The English statutes, substantially, are adopted in many of the states, or statutes modeled from them, and, therefore, the same questions as to the form of judgment arise here as in England; but also, along with the tendency to abolish all fictions and simplify procedure, a few cases have put forth the reasonable doctrine that, where there are no further breaches possible on the bond, and therefore no necessity that the judgment stand as security, it may be entered merely for the damages assessed or the amount really due. Decisions to this effect, however, are yet so few and scattering as to weigh but little against the great mass of authorities which follow the common-law form and direct in all actions in debt on penal bonds a judgment *pro forma* for the penalty.

But a tendency is also observable in quite a number of cases to treat a departure from the strict common-law form, with decided leniency, and, with the decisions above referred to, perhaps indicates the approach of the not undesired result of a judgment merely for the damage sustained or amount due upon a breach of a penal bond in those instances where there are no further breaches possible, and therefore no necessity of a judgment for the penalty to stand as security.

For convenience, it has been deemed desirable to treat the different classes of bonds under the various heads, although the same rules, with a few exceptions, govern all.

b. When the condition is for the payment of a sum certain at a day certain.

This is the class of bonds provision for which was made by the statute of Anne, referred to in *supra*, I. a.

In the very few decisions found in this country on bonds of this description judgment *pro forma* for the penalty seems to be the recognized rule with a few exceptions.

The court stated, in *Moore v. Fenwick, Gilmer* (Va.) 214, an action in debt upon a money bond, that judgment was to be rendered for the penalty, to be discharged by the payment of the principal money and the interest due thereon, and for that reason, among others, reversed the judgment which was rendered for the sum found due by the jury.

62 L. R. A.

Judgment by confession was held properly entered for the penalty of a bond conditioned for the payment of a lesser sum, in *Latrobe Bldg. & L. Asso. v. Fritz*, 152 Pa. 224, 25 Atl. 558, the burden being upon the obligor to show that she had paid the sum conditioned to be paid, and to have the judgment corrected.

At the foot of a bond in the penalty of a certain sum conditioned for the payment of a lesser sum was a writing signed by another, stating that he bound himself as security for the sum mentioned in the condition. This was held a joint obligation, but by a divided court, and judgment rendered for the penalty to be discharged by the payment of the sum mentioned in the condition, with interest. *Atwell v. Towles*, 1 Munn. 175.

In *Robbins v. Long*, 16 N. J. Eq. 59, the question is whether, in an action at law upon a bond for the payment of money only, recovery may be had beyond the penalty; but the following statement of the court, *arguendo*, is not uninteresting: "The English penal bond is, in form, an anomaly. The bond is not given for the actual debt, but for the penal sum, with condition that, if the real debt and interest are paid at maturity, the bond is satisfied. If not paid at maturity, the bond is unsatisfied, and the penal sum has become the real debt. So the courts of law held. Equity said, no; whatever may be the form in substance, the amount of the obligation is a mere penalty which the obligee shall not enforce. He is entitled only to the principal and interest of the real debt. After a long struggle, with the history of which we are all familiar, equity triumphed. What purports to be in form the real debt is but the penalty. The form is retained, the substance is changed."

In an action in debt on a bond conditioned for the payment of a certain sum on demand, judgment was rendered for the penalty, together with damages assessed, and costs, to be discharged by the payment of the sum named in the condition with interest, and the damages and costs. The damages assessed exceeded those laid in the writ. The judgment was held erroneous, because it gave damages exceeding those laid in the writ, and also because the principal sum conditioned to be paid, with the interest directed to be paid thereon, exceeded the penalty of the bond. The court stated that judgment ought to have been for the penalty and damages not exceeding those

Christy, 50 Mo. 145; *Priest v. McMaster*, 52 Mo. 60; *Brusie v. Peck*, 62 Hun, 248, 16 N. Y. Supp. 645; *Patrie v. Hamilton College*, 92 Hun, 81, 36 N. Y. Supp. 636; *Durning v. Burkhardt*, 34 Wis. 585; *Williams v. Hayes*, 68 Wis. 248, 32 N. W. 44; *Moses v. Eagle & P. Mfg. Co.* 68 Ga. 241; *Seely v. Pelton*, 63 Ill. 101; *Beam v. Bridgers*, 111 N. C. 269, 16 S. E. 391; *Tunstall v. Schoenpflug*, 4 Baxt. 43; *Stevens v. Lee*, 70 Tex. 279, 8 S. W. 40; *Seattle & M. R. Co. v. Johnson*, 7 Wash. 97, 34 Pac. 567; *Comway v. Day*, 79 Ind. 318; *Nell v. Dayton*, 47 Minn. 257, 49 N. W. 981; *Hill v. Hoover*, 5 Wis. 386, 68 Am. Dec. 70; *State ex rel. Taylor v. Delafield*, 69 Wis. 264, 34 N. W. 123; *Springfield Lighting Co. v. Hobart*, 98 Mo. App. 227, 68 S. W. 942; *Smith v. Myers*,

5 Blackf. 223; *Bacon v. Lincoln*, 2 Cush. 124; *Hunt v. Grant*, 19 Wend. 90; *Smith v. Hood*, 25 Pa. 218, 64 Am. Dec. 692; *Doty v. Rigour*, 9 Ohio St. 519; *Patton v. Massey*, 2 Hill L. 475; *De Hymel v. Scottish-American Mortg. Co.* 80 Tex. 493, 16 S. W. 311.

Marshall, J., delivered the opinion of the court:

This is an appeal from a judgment of the circuit court of St. Louis, amending, by a *nunc pro tunc* order, dated March 22, 1899, a judgment theretofore entered by that court on April 29, 1898.

It is said that the circuit court had power to enter the *nunc pro tunc* order upon either one of two grounds, to wit: First,

in the writ, and directed that the judgment be reversed unless the plaintiff would release the excess of damages beyond those laid in the writ, in which event judgment was directed to be entered for the debt in the declaration mentioned and the residue of said damages and costs. *Tennant v. Gray*, 5 Munt. 494.

In *Terrell v. Ladd*, 2 Wash. (Va.) 150, an action in debt on a bond, the penalty of which was in current money, with condition to pay sterling money, judgment was entered for the debt mentioned in the declaration, to be discharged by a specified sum in sterling money. The objection to the directions that the judgment be discharged by sterling money when the penalty of the bond was stated in current money was not sustained, the court remarking that it would settle the rate of exchange.

The court, *arguendo*, in *Gloucester City v. Eschbach*, 34 N. J. L. 150, 23 Atl. 360, states that, by statutory provisions substantially taken from the English statutes 8 & 9 Wm. III. and 5 Anne, the sum really and in equity due, on any bond containing a penalty to secure and enforce the payment of money only, is declared to be the debt due; but that, in actions upon such bonds, judgment is entered for the penalty to be discharged by the payment of the sum found to be really due, with costs; while, upon bonds with conditions other than for the payment of money, there may be assigned upon the record of any action the breaches of condition charged, and damages shall be assessed by verdict or inquiry for such breaches as are established, whereupon judgment is to be entered for the penalty to be satisfied upon the payment of such damages and costs.

It is assumed in *Syracuse City Bank v. Co-ville*, 19 How. Pr. 388, but without expressing an opinion, after a somewhat extended discussion of the question, that the form of judgment to be rendered in actions upon penal bonds was not changed by the adoption of the Code so as to be rendered for the sum actually due, instead of for the penalty.

But *Howard v. Farley*, 18 Abb. Pr. 260, an action on a bond providing for the payment of a lesser sum at a certain date with interest, is so decidedly an innovation, and illustrative of the tendency above referred to of simplifying the procedure, that it may not be out of place to quote from it somewhat at length. The court says: "In debt on bond under the former practice, the judgment was for the penalty, but 62 L. R. A.

execution could issue only for the sum due by the condition. I think the Code has changed the practice; and that the judgment should no longer be for the penalty, but for the condition. One of the ends aimed at and attained by the codifiers was the removal of all fiction from pleadings and proceedings in civil actions. Hence, it is required that the complaint shall state the facts constituting the cause of action; and in actions for the recovery of money the amount claimed must be stated. The penalty of a money bond never was recoverable. The judgment was in form merely, and the recovery could be for the condition only. In stating the facts, the condition and its breach must be alleged, with a statement of the amount due; and the amount due only can be demanded. Could a plaintiff verify a complaint, claiming the penalty to be due and demanding judgment therefor? . . . The design of the new system was to assimilate all actions, and to require the truth to be stated in pleadings, . . . and I can see no reason for continuing a useless form when the spirit of our present system is to arrive at the substance of things." *Western Bank v. Sherwood*, 29 Barb. 383 (*infra*, II. c. 2), holding that the former practice was not changed, was then criticised as mere *dictum*, no reason being assigned or authority furnished; "and it seems to me to be opposed to the entire scope and meaning of the present system of pleading, in conflict with its spirit, and as defeating the fundamental design of the law." Judgment was ordered entered for the plaintiff for the amount due by the condition of the bond, *viz.*, interest and costs.

Upon an appeal by the plaintiff as to a question of costs (20 How. Pr. 4), the court said, in regard to plaintiff's demand for judgment for the penalty, that it was made through an error of his counsel in supposing that the old action of debt on bond was not abolished by the Code.

The bond in *Mutual Ben. Ins. Co. v. Brown*, 30 Mo. App. 459, was conditioned to be void upon the payment of interest to accrue upon a certain debt, and all damages and waste done to or upon certain premises. Upon nonpayment of the interest suit was instituted upon the bond, and judgment was rendered for the sum really due with interest and costs, the petition failing to assign breaches, or to ask for judgment for the penalty of the bond. It was contended that the judgment so entered should

because the original judgment was a misprision of the clerk, and was not the judgment the court ordered to be entered, and that there was evidence furnished by the papers and files in the case, the record proper, or the clerk's minute book or the judge's docket, to show that this was true, and also to show what judgment the court did order to be entered; and, second, that, if the first ground aforesaid be not true, still the statutes of this state prescribe the character, nature, and form of the judgment that shall be entered in cases of the character of the case at bar. Of course, all lawyers will admit that the conclusions stated are correct, if the premises are true. The question therefore is, Are the premises true? Is it a fact that there is any evidence fur-

nished by the papers and files in the cause, or by the record, or by the clerk's minute book, or by the judge's docket, showing that the judgment of April 29, 1898, was a misprision of the clerk, and likewise showing that the judgment as amended by the *nunc pro tunc* order of March 22, 1899, was the judgment the court originally ordered to be entered?

A short review of the evidence furnished, as the rule above stated requires, will easily solve the first contention. On June 5, 1894, Mrs. Burnside obtained a decree of divorce from her husband, with an allowance of \$50 a month alimony. He did not keep up the payments, so, on March 29, 1895, the court ordered him to give bond "in the sum of \$6,000, within ten days, conditioned for the

be reversed, as not conforming to the statute providing for judgment for the penalty with execution for the damages in all actions upon bonds for the breach of any condition other than the payment of money; but the court held that the penal part of the bond, to pay all damages occasioned by waste, was not declared on,—that the action was for a breach of a condition to pay a sum of money, and that in such a case there need be no other allegation than that the money was not paid, and that there need not be a judgment rendered for the full penalty of the bond with execution for the damage assessed, as in such a case there is a direct promise to pay a certain sum of money, and therefore no necessity for an inquiry of damages; and that the statute in question provided for actions upon bonds for the breach of any condition other than the payment of money.

c. When the condition is for the performance of covenants or collateral agreements.

1. In general.

The strict intent of the statute of William seems to have been to provide for the procedure in all actions on bonds conditioned for the performance of covenants and agreements, other than the payment of money upon which successive breaches could occur, and for that purpose enacted that the judgment for the penalty might stand as security for future breaches. As has been seen (*supra*, I. b), annuity and instalment bonds, although for the payment of money, by analogy and construction came to be included within the scope of the statute, until now but rarely is any distinction whatever made in regard to bonds conditioned in any form for the payment of money, except, of course, those wherein a sum certain is payable at a day certain.

In this country, as will be seen from the following cases, where the bonds are conditioned for the performance of covenants on collateral agreements, the procedure of the statute of William is substantially followed.

In *Wilson Sewing Mach. Co. v. Lewis*, 10 Ill. App. 191, an action in debt upon a penal bond for the performance of covenants, it was held that judgment in debt should have been rendered for the penalty of the bond as well as the damages, the debt to stand as a security for future assessments of damages.

And it was declared in *People v. Harmon*, 15 62 L. R. A.

Ill. App. 189, in conformity with a state statute so providing, that the judgment in actions on penal bonds conditioned for the performance of covenants should be for the entire penalty of the bond, and thereafter stand as a security for such damages as might be assessed from time to time.

After the recovery of judgment for the amount of the penalty and nominal damages in an action of debt on a penal bond conditioned for the payment of all debts contracted by a firm, the plaintiff was thereafter allowed to file suggestions of further breaches which occurred after the recovery of judgment, and, upon proof of payments made by him upon the debts in question, it was held that he might properly recover therefor under the former judgment, which stood as security for any subsequent breaches which might occur by reason of the payment of any of the debts by the obligee. *Dent v. Davison*, 52 Ill. 109.

The rule is laid down in *Clark v. Goodwin*, 1 Blackf. 74, that, in penal bonds conditioned for the performance of covenants after the assessment of damages by the jury upon the assignment of breaches, judgment is then rendered for the penalty of the bond and the costs of the suit, the sum to be levied on execution being regulated by the assessment, and the judgment for the penalty remaining as security for further breaches.

It was held in *Whitney v. Slayton*, 40 Me. 224, an action upon the breach of a bond binding the obligor not to exercise a certain trade, that judgment must be rendered for the penal sum, with award of execution for the damages sustained up to the time of the trial.

The bond in *Waldo v. Fobes*, 1 Mass. 10, was conditioned for the payment of a promissory note and all debts due from a firm. Under an early statute providing that in such cases judgment was to be entered for the whole penalty, and execution awarded for so much of the debt or damage as was due or sustained at the time, it was held that all damages sustained up to the time of rendering judgment, not merely to the time of commencement of suit, might be included.

The judgment in *Goodrich v. Yale*, 97 Mass. 15, was regarded as irregular because for a specific sum assessed as damages, and not for the penal sum as provided by statute, with execution for so much only as was due in equity and good conscience, and recovery allowed for

payment of the monthly allowance of \$50 a month to plaintiff." In pursuance of this order he gave a bond, with the defendant herein, Thomas Wand, as surety, in the sum of \$6,000, conditioned as follows: "The condition of this bond is such, however, that if the said James Burnside shall well and truly pay unto the said Elizabeth J. Burnside the said monthly allowance of fifty dollars a month to plaintiff mentioned in said order of March 29, 1895, in accordance with the terms and provisions of the above-recited decree of June 5, 1894, then this bond to be null and void, otherwise to remain in full force and effect." Mr. Burnside failed to make the monthly payments, and on September 1, 1897, he was in arrears therefor in the sum of \$375. Mrs. Burnside then,

future breaches by *scire facias*. But it was held, however, that plaintiffs had no ground to complain of the irregularity, because the bond was conditioned for the abstinence from trespass to certain mill property which had been sold by them before the action on the bond was commenced.

Judgment was rendered for the penalty in conformity with the statute, in *Fisk v. Gray*, 100 Mass. 191, an action upon a penal bond to secure the performance of covenants. The opinion states that thereupon it became the duty of the court to determine for what part of the penal sum execution should issue, and that, if execution were awarded for but a part of the judgment in the first instance, plaintiff might have a *scire facias* for any future breach of covenants in the bond for which the judgment would stand as security.

The court points out in *Bishop v. Freeman*, 42 Mich. 533, 4 N. W. 290, that Michigan statutes, like the common law, treat the penalty of a bond given to secure anything but the payment of money as the debt to be sued for, allowing a recovery for that amount, but permitting execution only for the damages and costs, the judgment standing as security for the satisfaction of any further breaches, not to be sued for in separate actions, but to be recovered on *scire facias* alleging such breaches according to the facts.

Judgment was rendered for the whole penalty of a very large bond in *Bowne v. Hallet*, 1 Calnes, 517, on account of the breach of a condition for the payment of interest; but the execution was stayed upon payment of the interest and costs, the judgment, however, to stand as a security for the debt.

The bond in *Adams v. Bush*, 5 Watts, 289, was penal, conditioned for the performance of certain acts at five successive specified periods. It was agreed that, upon default, "judgment or judgments" should be entered by warrant of attorney. In accordance therewith, five different judgments were entered, execution thereon to be stayed until the agreed times when the acts specified were by the agreement to be performed. An order by the court, subsequently made at the instance of the plaintiff, to consolidate the five judgments into one for the penalty of the bond, was held null and void on appeal, because the consolidation could have been made only at the instance of the defendant, and then only if no injury would thereby be done 62 L. R. A.

on September 9, 1897, brought suit against Mr. Burnside and the surety, Wand, the defendant herein, on the bond. She recited these facts in the petition, and prayed for a judgment "for \$6,000, the penalty of said bond, and that execution issue for the sum of \$375, with interest, as damages aforesaid, and the costs." On the 20th of April, 1898, the court ordered a judgment for the plaintiff, the memorandum given to the clerk by the judge being: "*E. J. Burnside vs. Thomas Wand*. Judgment for plaintiff." The clerk then made this entry in his minute book: "1898, April 20. Judgment for plaintiff for \$6,000, penalty of bond; damages \$384.50." And the clerk on the same day entered a judgment "that the plaintiff recover of the defendant the sum

to the plaintiff. The five judgments were also, however, declared null and void, the court stating that judgment might have been, in the first instance, entered for the penalty of the bond, but that no execution could then have issued until by a *scire facias* and trial a jury had found the breach and the amount of damage on that account.

The bond in *Towner v. Wells*, 8 Ohio, 136, was for the performance of collateral conditions, and the judgment thereon was in conformity with the statute authorizing the court to give judgment for the penalty of the bond, and to award execution for the amount of damages assessed by a jury, or for the sum due in equity, with costs, the judgment for the penalty to stand as security for any further breaches.

It was contended in *Durkey v. Hammond*, 2 Mill, Const. 151, that a judgment and execution ought to be set aside for irregularity because the judgment was entered for a certain sum as damages assessed, instead of for the penalty. The court admitted that the judgment should have been entered for the penalty, not for the precise damages; but, on account of lack of official proof of the irregularities, according to the rules of the court, declared itself unable to take further notice of the objection.

In *Marvin v. Bell*, 41 Vt. 607, the bond was conditioned not to do certain acts, and in an action upon a breach thereof it was held that the court should render judgment for the full amount of the bond, and issue execution for so much, only, as should have been found in damages, leaving the remainder, if any, as security for any injury that might result from further breaches, to be made available by way of *scire facias*.

In *Trice v. Turrentine*, 35 N. C. (13 Ired. L.) 212, it was declared that, according to the state statute taken from the statute of William, the proper judgment in an action on a penal bond was that the plaintiff recover of the defendant the penal sum, with costs, and that the damages assessed form no part of the judgment, but should be entered at the foot of the record, and indorsed on the execution for the guidance of the sheriff.

It was insisted that judgment should have been rendered merely for the balance found due, in *Alendorf v. Stickie*, 2 Cow. 412, under the statute in regard to set-offs; but, it appearing that the bond in question was not only

of six thousand (\$6,000) dollars, the penalty of the bond sued on, to be satisfied upon the payment of the sum of three hundred and eighty-four and fifty one-hundredths (\$384.50) dollars damages, together with her costs and charges in this behalf expended, and that execution issue therefor." This judgment was set aside, and entered again on April 29, 1898, and this is the judgment the court amended at a subsequent term by a *nunc pro tunc* order on March 22, 1899.

The defendant appealed from the original judgment to the St. Louis court of appeals, where the judgment was affirmed (77 Mo. App. 382), and the defendant paid the judgment, and the plaintiff entered satisfaction thereof. The plaintiff, then, on February

27, 1899, filed a motion to have the judgment amended *nunc pro tunc*, "so that it shall not express the debt to be discharged upon the payment of the damages, but shall express the amount of damages awarded, with provision for execution therefor, and a further provision that the penalty of the bond, \$6,000, shall stand as security for further breaches of said bond, in conformity with chap. 22, art. 1, of Revised Statutes of Missouri of 1889, and particularly with §§ 869 and 871 of said article." The court amended the judgment *nunc pro tunc* as requested, and entered a judgment finding "for the plaintiff the sum of six thousand (\$6,000) dollars, the penalty of the bond sued on, and that the plaintiff hath sustained damages by reason of the breaches of

for the payment of money, but for the performance of other acts, it was held that judgment must be in form for the penalty to stand as security for further breaches, and that it would have been otherwise had it been merely for the payment of money.

A tendency to blindly apply the procedure in the statute of William to cases which it was never intended to include, as where the bond is not liable to successive breaches, but the whole damage accrues upon one violation, or the breach complained of is the last that can happen, is illustrated in Garnett v. Yoe, 17 Ala. 74, an action upon a penal bond with a collateral condition. Judgment was rendered for the amount of the verdict, instead of for the penalty. The court declared that it should have been for the amount of the penalty, with nominal damages and costs, the judgment to stand as security for future breaches, upon a *sci. fa.*, according to the common-law practice, which had not been altered by statute. But in the case at bar there could be no further breaches, and the court said, in view of that fact, it might not reverse the judgment for its erroneous form, were that the only reason,—especially since the defendant could not be injured by it; however, it was stated to be safest and best to adhere to the established modes of proceeding, and that departures from them were not to be encouraged; and the judgment was, for other reasons, also, reversed.

The statute 8 & 9 Wm. III. chap. 11, was stated in Philbrook v. Burgess, 52 Me. 271, never to have been adopted in New England, but that the prov. act of 8 Geo. II. incorporated into the Maine laws, which was substantially the same, provided that judgment be entered for the penal sum, the jury to assess the damages, and execution to issue for that amount only. This statute, however, was held not applicable to suits upon bonds with merely a condition of defeasance,—that, as to such bonds, "it appears to have been the common law of New England, recognized in the early statutes, that the court, without any process in equity therefor, should assess the damages justly due, not exceeding the penal sum and interest, and render judgment and issue execution therefor." The bond in the case at bar was for the maintenance of a husband and wife during their lives. The court says: "But, if the bond is not one for the performance of an agreement or covenant, but is only to be void upon conditions therein speci-

fied, there can be but one breach of it, for which there can be but one suit, and one assessment of damages, for which judgment is rendered, and execution issued, as in other cases." In regard to this statement, it is said in White v. Blake, 74 Me. 492, that it is to be applied only to cases where all the damages accrue upon the first breach, or where, as in that case, there is a basis upon which prospective damages may be equitably and understandingly assessed by the court.

But Philbrook v. Burgess was expressly overruled in Corson v. Dunlap, 83 Me. 32, 12 L. R. A. 90, 21 Atl. 173, *infra*, II. c. 8, so far as it is inconsistent with the latter decision.

In many instances where the bond is conditioned for the performance of a single collateral act, or where there is no necessity that it stand as security, the judgments are rendered *pro forma* for the penalty to be discharged by the payment of the amount assessed as damages, with costs.

As, in Toles v. Cole, 11 Ill. 562, it was held in an action in debt on a bond conditioned for the payment of whatever judgment might be recovered in a specified suit, that the jury should have found the amount of the penalty of the bond as the debt, and the amount of recovery in the action referred to as the damages, and that the proper judgment thereon would have been the amount of the debt to be discharged on the payment of the damages and costs.

In Freeland v. Jasper County, 27 Ill. 303, an action on a bond conditioned for the payment of a debt and costs, the judgment was entered for the penalty and for the damages, with no provision that the whole judgment should be satisfied upon payment of the damages. This was held erroneous, as there was nothing to prevent the plaintiff from collecting the full amount of damages sustained by the breach, as well as the penalty.

It was declared in Odell v. Hole, 25 Ill. 208, to be the uniform rule of the court, in actions of debt upon penal bonds with conditions annexed, that the jury should find the amount of both the debt and damages and upon such a verdict the court should render judgment for the debt thus found, and award execution for that sum with the direction, 'advised thereon, that the amount of the damages alone should be collected.

The rule was again, held in Mitchell v. Por-

said bond in the petition set forth in the sum of three hundred eighty-four and fifty-hundredths (\$384.50) dollars. It is therefore considered by the court that the plaintiff recover of the defendant the sum of six thousand (\$6,000) dollars, the penalty of the bond sued on, which judgment shall stand for the damages assessed, and shall remain as a security for any damages that may be thereafter sustained by the further breach of any condition of such bond, together with the costs by plaintiff in this behalf expended; and it is further ordered and adjudged that the plaintiff have execution for the sum of three hundred eighty-four and fifty-hundredths (\$384.50) dollars, the damages by the court assessed as aforesaid, together with costs."

ter, 8 Blackf. 499, to be that, in an action in debt on a penal bond, the judgment may be for the penalty and costs of the suit with execution following the judgment, but bearing an indorsement to levy the amount of the damages assessed by the jury on account of the breaches assigned, together with the costs of the suit.

These last two decisions are strictly in accord with the form prescribed at common law.

In *Gardner v. Niles*, 16 Me. 279, a suit upon a penal bond for the performance of a condition, the opinion states that, under the statute, the court is to enter up judgment for the penalty, and to award execution for so much of the debt or damage as is due or sustained at that time; which the court construed to mean the time of the rendition of judgment, and not of the commencement of action.

Judgment was rendered for the damages assessed by the jury, in *Webb v. Fish*, 4 N. J. L. 371, an action upon the breach of a bond for the performance of a special condition. The judge writing the opinion stated that the judgment was erroneous as it should have been entered for the whole penalty, but, were that the only error, he would have been disposed to suspend the judgment until the amendment could be made by the court to which the writ of error was directed; other errors appearing, however, the judgment was reversed.

In an action on a bond securing contracts given for the paving of streets, the court held that the judgment ought to be that the plaintiff recover the debt,—that is, the penalty, with damages for its detention,—and have execution for the damages arising from the breach. On one contract, it appearing that the damages sustained exceeded the penal sum, it was held that judgment should be for the recovery of the penal sum and interest, with execution for the same amount. Upon another contract, it appearing that the damages did not exceed the penal sum, it was held that the recovery should be for the penal sum and nominal interest, with an award of execution for the damages. *Camden v. Ward*, 67 N. J. L. 558, 52 Atl. 392.

In an action on a bond conditioned for the performance of covenants, judgment was held properly rendered *pro forma* for the full amount of the penalty, in *Hodges v. Suffelt*, 2 Johns. Cas. 406, and plaintiff, therefore, was entitled to recover full costs thereon, although only awarded nominal damages in the sum of 6 cents for the breach.

62 L. R. A.

1. Upon such a state of facts, no one can fairly or successfully contend that there is any legal *datum* furnished by the papers and files in the case, or by anything of record, or by the clerk's minute book, or by the judge's docket, that convicts the clerk of any clerical error, mistake, or misprision, or that in the slightest degree even tends to show that the court did not order such a judgment as the clerk entered, or that the court did order such a judgment to be entered as it afterwards entered by a *nunc pro tunc* entry. This is so true that it amounts to a demonstration, as can be very easily shown. The petition treats the bond as a penal bond conditioned for the payment of money. The prayer of the petition is for a judgment for \$6,000, "the penalty of said

The court says, in *Lewis v. Spencer*, 12 Wend. 140, that there is no doubt in an action in debt upon a bond, with a penalty, conditioned to pay money or perform covenants, the judgment must be for the penalty, except in the single case of a set-off.

In *Fairlie v. Lawson*, 5 Cow. 424, it was held that in actions on bonds other than for the payment of money, and even where they are for the payment of money except where met by a set-off, judgment is properly for the penalty, which is the criterion of the costs.

The bond in *Harvey v. Bardwell*, 6 Cow. 58, contained agreements to pay certain moneys as well as various other covenants. It was narrowed down to a mere money claim upon which less was found due than the amount necessary to carry costs; wherefore, the question was whether the penalty or the damages was the proper measure of judgment and the amount upon which costs could be reckoned, in deciding which, the court held that judgment must be for the penalty, the bond not being purely a money bond, and therefore not within the statute providing that, when the latter are in question upon a set-off, the sum really due is the debt for which judgment goes either for plaintiff or defendant, and that, with the exception of that statutory instance which is *sui generis*, judgment must be entered for the penal sum, and the plaintiff recovers costs according thereto.

It was declared error in *Nelson v. Bostwick*, 5 Hill, 37, 40 Am. Dec. 310, to insert the damages assessed in the ordinary judgment for the penal sum, as the statute gives the right to enter a further judgment that the plaintiff have execution to collect the amount of assessed damages, which should be specified in the judgment, but that, the error being but a partial one, and the sum distinguishable, it would be cause for a partial reversal only.

In an action against a surety upon a bond conditioned for the performance of an act by the principal obligor, it was held, in *Beers v. Shannon*, 78 N. Y. 292, that judgment should be for the penalty of the bond, with further judgment that plaintiff have execution for the damages assessed upon the assignment of breaches; and, having been entered otherwise, the court said that it was an irregularity to be corrected in that respect by motion.

In *Byrne v. Hayden*, 124 Pa. 170, 16 Atl. 750, an action on a bond conditioned for the perform-

bond," and that execution issue for \$375, "as damages aforesaid." The memorandum handed to the clerk by the judge was simply: "Judgment for plaintiff." What judgment? The judgment prayed for, of course. There was no hint by the judge that he intended or ordered any other kind of a judgment than one for \$6,000, "the penalty of said bond," with execution for \$375, "as damages aforesaid." The most powerful Röntgen ray cannot discover any order for any other kind of a judgment. The most penetrating X-ray would fail to show, even in the mind of the counsel or the court, up to that time, any idea of entering any other kind of a judgment than that prayed for. The clerk did faithfully enter an order for such a judgment on his minutes, and did en-

ter the only kind of a judgment that the petition asked, and that the order of the court, read in the light of the petition, directed to be entered. The clerk therefore did his duty, and was guilty of no clerical error, mistake, or misprision. If there was any mistake in the judgment as originally entered, it was the mistake of counsel in asking for that kind of a judgment. There was no mistake of the judge; for he simply ordered such a judgment as the plaintiff asked. But if there was a mistake of the judge in ordering such a judgment to be entered, he had no power to correct that mistake by a *nunc pro tunc* entry after the term at which the judgment was entered had expired. It is therefore as clear as the noonday sun that there is nothing in the

ance of a collateral undertaking, the court declares that, in actions upon penal bonds, the proper form of judgment is for the penalty named therein, to be released upon payment of the ascertained amount of damages occasioned by the breach of condition.

A judgment was declared defective in *McKnew v. Duvall*, 45 Md. 510, which was rendered only for the penalty of the bond sued upon, and costs, omitting the sum actually due; the court stating that it could be considered as interlocutory only, and not binding as a final judgment, or in a condition to be executed.

But in *Clark v. Digges*, 5 Gill, 109, a judgment rendered for penalty and costs, to be released upon the payment of ———, the amount of the sum to be paid not being stated, was held not interlocutory, but not binding as a judgment until that sum should be ascertained.

After holding that a sum mentioned in a covenant was a penalty, and not liquidated damages, judgment was rendered for the amount stipulated in the covenant, with an order that the case stand for chancery. *Bradstreet v. Baker*, 14 R. I. 546.

The judgment in *Haslet v. Pryor*, 5 Hayw. (Tenn.) 33, an action on a bond with collateral conditions, was entered for the damages, with interest and costs. The court held that, under the statute, this was erroneous,—that judgment should have been entered for the penalty of the bond to be discharged by the damages assessed and costs; but that it was only an informality, not affecting the merits of the case, and, therefore, the judgment was not annulled, but ordered to be entered in proper form.

The bond in *Overstreet v. Marshall*, 1 Hen. & M. 881, was conditioned for the judgment of a specified number of pounds of tobacco under a certain penalty. Judgment was entered for the penalty, to be discharged by payment of the stated number of pounds of tobacco, with interest and costs. The judgment was held erroneous and reversed, the court stating that damages should have been assessed for the breach, and judgment entered for the penalty of the bond after reducing it to specie according to the proper scale, to be discharged by the payment of the damages so assessed, and not by the payment of the tobacco, which was conditioned to be paid according to the bond.

But *Heldtke v. Krause*, 97 Wis. 118, 72 N. W. 351, seems to be an exception to the rule. As 62 L. R. A.

stated therein, "the former practice on the breach of the condition of a bond was to render judgment for the amount of the penalty, and to issue execution for the amount only which was due for the breach of condition. . . . This was changed by § 2890, Rev. Stat. The proper practice now is to render judgment for the amount which is due for the breach of the condition of the bond." This was an action to foreclose a mortgage given to secure a bond in a penal sum conditioned for the support of obligor's parents. Judgment was rendered for the amount found due on the bond, and foreclosure of the mortgage ordered.

2. Annuity and instalment bonds.

There seems to be no doubt that where a bond is in a penal sum conditioned for the payment of a lesser sum in instalments, or for a certain sum at a specified time, with interest at certain periods in the meantime, or for the payment of an annuity, or in that nature, the English rule of taking judgment for the penalty, and allowing it to stand as security, out of which the future payments as they become due may be had, is adopted in this country very largely.

Arguendo, in *Young v. Reynolds*, 4 Md. 375, the court states that, in an action on a bond conditioned for the payment of instalments, judgment is for the penalty of the bond; yet, under 8 & 9 Wm. III. chap. 3, where all the instalments are not due at the time of the rendition of judgment, *sci. fa.* must be issued to recover future instalments, the judgment standing as security.

Ridgely v. Lee, 3 Harr. & M'H. 94, was an action in debt on a bond in a certain sum conditioned for the payment of certain sums in instalments. Judgment was rendered for the penal sum, with a rule by the court that execution issue for the instalments then due, but the judgment to stand as security for future arrears of principal and interest to be collectible by execution upon application to the court from time to time.

Upon proof of the breach of a bond conditioned for the support of a wife by the payment of an annual sum, judgment was entered for the penalty, to stand as security for the past and future breaches. It was held that the judgment was effective only for the amount found in equity to be then due, and that the fact of defendant's removal to another state would

papers or files of the case, or in the record, or in the minutes of the clerk, or on the docket of the judge, that gives any color or countenance to the claim that the judgment of April 29, 1898, was a clerical error, mistake, or misprision of the clerk, or that the judgment so entered was not in truth and in fact the identical judgment the court ordered and intended to be entered. Not only is this the fact as it appears by all the data in the case that it is legal or proper to refer to, but that it is the fact is conclusively shown by the motion for a *nunc pro tunc* order itself. That motion is not based upon any idea or claim or pretense that the judgment was not the very judgment the court ordered to be entered. That motion may be searched, with a search

warrant, and no intimation can be found therein that the pleader intended to charge that the judgment was a mistake or misprision of the clerk, or that the clerk did not enter the exact judgment the court ordered, or that the court ever intended to have any other kind of a judgment entered. The motion for a *nunc pro tunc* entry is predicated solely upon the ground that the statute (§§ 869 and 871) prescribes the nature, character, and form of the judgment that must be entered in cases or bonds like this, and that the court erred in not ordering a judgment in conformity to those sections of the statute to be entered. Or, otherwise stated, that no matter what kind of a judgment the plaintiff asked in his petition, or the court ordered to be entered, or

give plaintiff no right in the new jurisdiction to recover upon the formal judgment for the penalty, but that the judgment could be recovered there only for the amount found due, and for which execution was issuable in the former jurisdiction. *Battey v. Holbrook*, 11 Gray, 212.

The bond in *Thatcher v. Taylor*, 3 Munf. 249, was conditioned for the payment of annual interest, and also a certain sum in two instalments upon a certain contingency. In an action brought upon the bond when a part only of the sums specified had become due, it was held that judgment should be entered for the penalty and costs, to be discharged upon the payment of the sum due and costs, with liberty to the plaintiff to resort to the judgment by *scire facias* to recover other damages which might thereafter arise under the condition of the bond.

In holding that, if one is bound by a penalty conditioned to be discharged by the payment of several sums at different times, a suit will lie immediately after the time fixed for the first payment has elapsed, although the other sums are not due, the court said: "The reason why this can be done is because, upon the failure to pay any instalment mentioned in the condition, the penalty is forfeited; and the obligee has a right to sue upon and recover the penalty itself; but his judgment is to be satisfied by the payment of the instalment due when suit was commenced, and the other instalments when they may afterwards become due." *Cocke v. Stewart*, 2 Overt. 231.

Underwood v. Lilly, 10 Serg. & R. 97, was an action in debt on a penal bond conditioned for the payment of a certain sum annually during obligee's lifetime, and at her death a further specified sum. Two payments being due, judgment was entered for the penalty, and execution issued for the penalty and costs, to be released upon the payment of the two instalments and costs. This was held proper, the court stating that, in entering up judgment upon a bond conditioned for the payment of money by instalments, or principal to become due at a distant day with interest payable annually, the court will take care to protect the party and render judgment for the penalty, giving plaintiff leave to take out execution as the instalments become due.

Judgment, in form, is for the penalty, in an action upon a bond in a certain penalty conditioned for the payment of a lesser sum with interest payable annually, as held in *Western* 62 L. R. A.

Bank v. Sherwood, 29 Barb. 383, the court stating that, by the agreement of the parties, the whole penalty has become due, but that the law will not, however, permit the party to collect it if, on looking at the condition, it is found to be inequitable; and that the defendant's rights will be protected by controlling the execution according to the law and practice prior to the Codes. This case is criticized, however, in *Howard v. Farley*, 18 Abb. Pr. 260 (II. b).

The court states, in *Outen v. Mitchels*, 1 Bibb, 360, that, in an action in debt upon a bond conditioned for the payment of money by instalments, the judgment should be entered for the penalty if at the time of the rendition of the judgment the instalments are not all due, but with stay of execution upon the instalments until such time as they respectively become due; and that, upon such judgment, execution may issue without suing out *scire facias* upon each instalment as it becomes due. But in the case at bar the judgment had been entered for the whole sum, to be discharged by the payment of two specified instalments, the penalty to stand as security for the payment of future instalments which might be recovered after the issue of *sci. fa.* and assignment of breaches. Upon this judgment as above entered, a subsequent judgment for an instalment was entered by default after *sci. fa.* but with no assignment of breaches, which the court held was, under the judgment as entered, a fatal omission, rendering it clearly erroneous.

The bond in *Kiehl v. Com.* 18 W. N. C. 505, 6 Atl. 389, was one given to the commonwealth in a penal sum conditioned for a wife's support. Upon breach thereof she brought suit upon the bond, wherein judgment was rendered for her damages only, and satisfaction entered upon the payment thereof. Upon a subsequent breach she again brought suit, and demanded judgment, which the court refused to grant, declaring that but one judgment could be entered upon the same bond against the same party, and that must be for the amount of the penalty; but, in order to relieve the plaintiff, and as no innocent third party would suffer, the court decided to strike off the entry of satisfaction theretofore granted, and allow the plaintiff to enter judgment for the penalty of the bond, from which, when entered, the amount previously paid on the erroneous judgment when satisfaction was entered would be deducted, and a receipt for the amount so deducted placed on

the clerk actually entered, the law prescribed the proper judgment, and if that kind of a judgment was not asked, ordered, or entered, still it was the absolute right of the plaintiff to ask, and the imperative duty of the court to have, the judgment so changed by a *nunc pro tunc* order as to make it such a judgment as the statute prescribed. For these reasons, it is worse than idle to devote any more time or attention to the first contention, for the question of clerical misprision in not entering the judgment the court ordered is not in this case at all, nor is there any foundation for such a contention under the record in this case.

2. The next question is, Does the statute prescribe the nature of the judgment that must be entered upon bonds like the one in

question here, and, particularly, does it require that the judgment entered *nunc pro tunc* in this case should have been originally entered? A review of the law relating to bonds will easily answer this question. At common law there were originally three kinds of bonds, a simple bond, a penal bond conditioned for the payment of money, and a penal bond conditioned to do a collateral thing. A simple bond was an obligation whereby the obligor bound himself, his heirs, executors, and administrators to pay a certain sum of money to a named obligee on demand or on a day certain. 2 Bl. Com. 340.

The bond in question here is clearly not such a bond. A penal bond conditioned for the payment of money was an obligation whereby the obligor bound himself to pay a

record. Upon appeal, it was held that, while the method adopted of correcting the error was not strictly proper, no one being prejudiced thereby, there was no cause for complaint.

The bond in *Harmon v. Dedrick*, 3 Barb. 192, was in a penal sum conditioned for the payment of a sum of money in instalments. It was held that judgment should have been entered for the penalty of the bond with costs of the suit, without assigning breaches, with a further judgment that execution issue for the levy of the instalment due, and so, again, from time to time as future instalments become due; and that there was no need for *scire facias* at those times.

In *Warwick v. Matlack*, 7 N. J. L. 165, the bond was conditioned for the payment of a certain sum in three years with interest annually. In an action commenced thereon upon nonpayment of the first year's interest, judgment was rendered for the penalty with a direction that execution issue for the interest due. This form of judgment was objected to, but the objection was not sustained, one of the judges stating that, by the principles of the common law, the whole penalty was due upon the nonpayment of interest, and that the judgment was always entered for the full amount, in order to be relieved from which it was necessary to resort to chancery; but that now the practice was to indorse upon the execution the sum or instalment actually due, and the levy was then made for that amount only.

In *Albany v. Evertson*, 1 Cow. 36, the judgment was for the penalty of a bond payable by instalments, with execution for all the instalments then due.

In an action in debt on a bond for the payment of a certain sum in instalments, the plaintiff was allowed to recover judgment for the debt, with a specified sum as damages, and full costs. *Pearson v. Bailey*, 10 Johns. 219.

In an action upon a bond conditioned for the payment of a certain sum in several instalments, judgment was rendered for the penalty, with a further judgment awarding execution for all of the instalments due up to the commencement of the action. This judgment was affirmed on appeal. It is not quite clear whether the judge would sanction judgment *pro forma* for the penalty, in all cases, or not, as will be seen from the following language: "When it appears to the court that the penalty of the bond is forfeited, judgment is to be entered (by statute provisions) for such sum as is equitably 62 L. R. A.

due to the plaintiff at the time of rendering the judgment. And, if the condition of the bond be such that future damages may arise for future breaches, judgment is to be rendered for the penalty and execution awarded for the damages already accrued, and the judgment stands as security for future damages to be rendered by *scire facias*." *Rich v. Warner*, 1 Pinney (Wis.) 640.

From a few decisions it appears that in some states statutes have been passed allowing set-offs in actions upon money bonds, and directing that in those instances judgment shall be rendered, not for the penalty, but for the sum really due.

As in *Van Antwerp v. Ingersoll*, 2 Caines, 107, an action on a penal bond for the judgment of instalments reduced by set-offs, the court stated that the statute was positive and peremptory that judgment must be for the balance only.

Sparks v. Garrigues, 1 Binn. 152, was an action in debt on a bond conditioned for the payment of a sum of money at a specified date with interest payable annually. The action was brought upon the nonpayment of the first year's interest. The defense put up, which was of a nature to avoid the bond rather than set-offs, did not prevail, and a verdict for plaintiff to the amount of the interest was returned, but as to the form of judgment to be entered there was much diversity of opinion among the judges, some inclining to the view that it should be entered only for the amount found due, in conformity with the practice allowed by the defalcation act in cases where set-offs have been introduced in action on bonds; but it was finally held, although not unanimously, that the judgment should be for the penalty, with leave to take out execution for the interest then due, and to move the court for future executions upon interest as it fell due, at which time defendant might present any defense other than that which had been tried and arising subsequent to the suit, thus preventing a multiplicity of suits. In regard to the defalcation act above referred to, the court pointed out that it did not control in this instance because the defense set up was not in the nature of set-offs, but such as would have avoided the whole bond had it been successful.

One of the judges, in *Longstreth v. Gray*, 1 Watts, 60, in discussing *Sparks v. Garrigues*, 1 Binn. 152, says that the principal question

certain sum of money on a day certain, under penalty of a larger sum, usually, but not necessarily double the principal. 2 Bl. Com 340. If the sum due was not paid exactly when and where due, the bond was considered forfeited, and the penalty became the debt, and the obligee was entitled to recover, not the sum actually due, but the penalty. Speaking of such bonds, that incomparable preceptor of the law, Prof. John B. Minor, in his *Institutes* (vol. 3, p. 350), says: "At common law, if the principal be not fully paid according to the stipulation, the penalty becomes the debt, for which the action is brought and judgment is recovered. Of course, therefore, it is at common law no answer to the whole action for the debtor to

plead that, after his default, he paid the principal. Such payment is a discharge as far as it goes, but, the penalty being then the debt, nothing less than the penalty can discharge the action, although, of course, any payment of less will be *pro tanto* a defense, and will reduce the amount for which judgment is to be given." 2 Bl. Com. 341; 2 Minor, *Inst.* 4th ed. 832; Bacon, *Abr. Obligations*, (F). The hardship of regarding the penalty as the debt wherever the obligor made default in the payment of even the smallest part of the principal, intolerable as it appears to us, was ultimately relieved against in equity, but by very slow degrees. Chancery, from an early period, had given relief against penalties and forfeitures in a few cases, such as where the money was

there was, in what manner the judgment should be entered,—whether for the penalty or for the interest for which suit was brought,—and states that, while on that question there was great diversity of opinion, it was admitted by the whole bench that, on principle, it was the same as a suit brought on a bond payable by instalments, and on that ground "it was relled that the judgment should be entered for the penalty."

Other decisions showing the influence of statutes allowing set-offs in actions on penal bonds, and directing the form of judgment therein are: *Græcen v. Allen*, 14 N. J. L. 74, *infra*, II. c. 4; *Alendorf v. Stickle*, 2 Cow. 412; *Fairlie v. Lawson*, 5 Cow. 424; *Harvey v. Bardwell*, 6 Cow. 58,—*supra*, II. c. 1.

8. Appeal bonds.

In *O'Neill v. Nelson*, 22 Ill. App. 581, an action in debt upon an appeal bond, a judgment merely for the amount of damages assessed and costs was held erroneous, the court declaring that judgment should have been rendered for the penalty to be discharged by the payment of the damages assessed, and that the execution should be issued for the debt with an indorsement of the damages assessed, which amount, only, could be collected by the execution.

And, for the same reason, the judgment in *Ackerman v. People*, 100 Ill. App. 128, a similar action, was held erroneous.

The breach of a penal bond for review of a judgment being established in *Quinn v. Brennan*, 148 Mass. 562, 20 N. E. 184, it was held that judgment was properly entered for the penal sum, but, it appearing that the damages sustained were merely nominal, execution was allowed to issue for only \$1 and costs.

In *Ing v. State*, 8 Md. 287, an action upon an appeal bond, the court states that, although judgment is always entered up for the amount of the damages laid in the declaration, yet it is accompanied by a statement—which, in fact, constitutes a part of the judgment—that it is to be released upon the payment of the sum awarded by the jury, court, or referee, as the case may be.

In *Fournier v. Faggott*, 4 Ill. 347, an action in debt upon an appeal bond, the judgment, which was rendered for the debt and damages, was held erroneous in form and substance, the court stating that it should have been entered for the debt alone, and the damages should have

been indorsed upon the execution for collection, in lieu of the debt.

The objection to the judgment entered in the same way in *Eggleston v. Buck*, 81 Ill. 254, an action of debt, on an appeal bond, that it should have been entered for the penalty of the bond, to be discharged upon payment of the damages found, was held well taken.

Likewise, in *Parisher v. Waldo*, 72 Ill. 71, where judgment entered in the same way was held erroneous, the court stated that the judgment should have been that the debt found be discharged upon payment of the damages.

In *Glidewell v. McGaughey*, 2 Blackf. 359, an action on a bond for security for costs by a plaintiff "for himself and others," it was held that the judgment, which should have been for the penalty with damages for its detention and costs, ought not, however, to have been rendered until after damages had been assessed upon the breaches assigned; when it should have been rendered as above, with award of execution for the damages assessed. But further, the court held that plaintiff should not sue for himself and others, as the judgment would stand as security, and any other person might sue out a *scire facias* upon it for himself.

In speaking of recognizances of appeal, the court, in *Cockrill v. Owen*, 10 Mo. 287, says that they are like bail bonds, replevin bonds, and some others which have been held not to be within the statute requiring the assignment of breaches on penal bonds; as the courts in those cases have, after entering judgment for the penalty, invariably given relief to the defendant without his being required to file a bill in equity.

Wisconsin seems to stand as an exception to the prevailing rule, as, in *Whereatt v. Ellis*, 103 Wis. 348, 79 N. W. 416, an action upon a bond in the nature of an appeal bond, it is stated, *arguendo*, that the practice in most jurisdictions has been done away with, of taking a judgment in form for the penalty in actions on penal bonds and issuing execution for actual damages, the matter being regulated by statute providing for the entry of judgment for the actual damages; and that such is the situation in Wisconsin. The statement as to the practice in other jurisdictions does not seem to be borne out, however, by the decisions as they appear.

4. Attachment bonds.

In *Morris v. Price*, 2 Blackf. 457, an action in

paid but no acquittance taken, or an acquittance not under seal, or the acquittance was lost, and afterwards where the obligor was prevented by fraud or casualty from paying the money punctually, and finally,—but not, it seems, until the reign of Charles I.,—in all cases of money bonds, however the default might have been brought about. 1 Spence, Eq. Jur. 628-630. In the progress of this amelioration by the court of chancery of the harsh exercise of the jurisdiction of the common-law courts, there took place, in the time of James I., a fierce conflict between Thomas Egerton, Lord Ellesmere, then lord chancellor, and Lord Coke, as to the power of the chancellor to interfere, by injunction, with an action at law, or with the judgment therein. Lord Coke insisted

that the suing out of a subpoena in chancery, thus to arrest the judgment or obstruct the proceedings of a court of common law, subjected to the parties, their attorneys, and all concerned to the penalties of the formidable statutes of *præmunire* (for, as it should rather be, *præmoneri*,—drawing the subject before a foreign jurisdiction. 4 Bl. Com. 103 *et seq.*, 428); and he used all his influence with the grand jury to cause all the parties, in what he considered a grievous infraction of the law of England, to be indicted for that offense. The strife was finally composed by the interposition of the King in council, who gladly availed himself of the occasion to exalt the royal prerogative by deciding in favor of the chancellor, and, to settle the question of jurisdiction in all

debt on an attachment bond, no different rule appears, the court holding that final judgment should have been rendered for the debt mentioned in the declaration, with costs, and execution awarded for the damages assessed, with costs.

5. Bail bonds.

This is one of the classes of bonds which were construed by the English decisions not to be within the scope of the statute of William, as shown in *supra*, I. c, for the reason that there was no need for an assessment of damages by the jury, as it was within the power of the court to adjust the amount to be collected from the basis of the amount of recovery in the original action in which the bond was given. This, however, does not operate in any way to change the form of the judgment, only going to the manner of deciding upon the amount collectible.

It will be observed that but little heed is given in this country to the doctrine that the assessment of damages should be made by the court, and not by the jury; or that, in fact, but little, if any, distinction is made in the procedure in actions upon this class of bonds from that in all others. But see *Corson v. Dunlap*, 83 Me. 82, 12 L. R. A. 90, 21 Atl. 173, *infra*, II. c, 6.

A decision recognizing, but not following, the English doctrine in regard to bail bonds is *Simmons v. Kelly*, 39 N. J. L. 441, an action upon a bail bond. In deciding as to the proper form of judgment, the court stated that the provisions of 8 & 9 Wm. III. were embodied in the New Jersey statutes, with the additional provision that they apply to any bond "with condition other than for the payment of money." After a review of several authorities going on the theory that bail bonds are not within the statute above referred to in regard to the necessity for an assessment of damages, the court held the more approved rule to be that bail are liable to pay a plaintiff the whole debt for which he might have had judgment against the original defendant, and that a writ of inquiry is, therefore, necessary. In conformity with such a practice, judgment for the penalty was ordered entered with the issuance of a writ of inquiry to assess the damages, that sum to be indorsed upon the execution as to the amount to be raised.

62 L. R. A.

In *Sprague v. Seymour*, 15 Johns. 474, an action upon a bond for jail liberties, judgment was held properly entered for the penalty; but the court said that plaintiff could not have execution for more than the original debt for which the prisoner was confined, and costs.

Judgment was rendered for the penalty of a bond, with 1 penny damages found by the jury, to be discharged upon the payment of a specified sum with interest from a certain date, subject to a deduction for credits indorsed on the bond. It was held that the deduction should have been made and judgment rendered to be discharged by payment of the real balance due. *Gray v. Hines*, 4 Munf. 437.

Judgment rendered for the sum assessed, in addition to judgment for the original debt or penalty, was held erroneous in *Smith v. Jansen*, 8 Johns. 111, an action in debt on a bail bond, and reversed as to that part, leaving it unimpeached as to the debt and costs.

So, in *Griggs v. Drake*, 21 N. J. L. 169, an action upon a bond given as security for appearance, the jury assessed damages at a certain amount, with costs. The minutes of the record then show that the court ordered judgment for the penalty of the bond, and also for the damages assessed, besides costs to be taxed. Judgment was finally entered to recover "the said debt as aforesaid assessed" and a certain sum as costs. It was contended that the judgment was erroneous, because condemning the defendant, not only in the amount of the penalty, but in the damages assessed; but the court held that, while not in strictly technical form, it was substantially correct, being a judgment for the debt as demanded in the declaration, and that the words "as aforesaid assessed" might be rejected as unmeaning and surplusage.

And in *Hunt v. Allen*, 22 N. J. L. 538, while admitting that the judgment entered in an action on a bail bond for "his said debt, and also for his damages," was erroneous, the court declared itself reluctant to reverse for such clerical error, and so suspended judgment until an amendment could be made in the court below that judgment be rendered for the penalty.

The judgment in *Leech v. Pirani*, 5 Ark. 118, an action upon a bail bond, was entered for the damages assessed. The court stated that, in point of form, the damages so assessed should have been merely stated on the record; and, instead of the judgment being entered therefor, it should have been entered for the penalty of the

time to come, ordered the royal decree to be enrolled in the court of chancery, accompanied by the declaration that it "appertained only to his princely office to judge over all judges, and to discern and determine such differences as at any time might arise between his several courts touching their jurisdictions, and the same to settle and determine as he in his princely wisdom should find to stand most with his honor." 2 Camp. Lives of Chancellors (Ld. Ellesmere), 210 *et seq.*; 1 Camp. Lives of Chief Justices (Ld. Coke), 282; 3 Bl. Com. 434, 435; 2 Swanst. 22, note (b); 2 Bacon's Works, 489. In 2 Swanst. 22, note (b), is a summary of the argument upon the authorities touching the question of the original jurisdiction of equity to enjoin judg-

ments at law, drawn up by Mr. Hargrave; and in 2 Bacon's Works, 489, is Lord Bacon's account of the proceedings of the King's council upon that subject, and also upon that of commendams, in which Lord Coke shows to more advantage than in his contest with Lord Ellesmere about the enjoining of the judgments of the courts at law.

Thus was settled the power of the chancery to intervene in fitting cases; but the precise extent of that power,—that is, in what cases it should be exercised,—was not determined as has been said, until the next reign. Meanwhile it appears that, even in the latter part of the reign of James I., after Lord Ellesmere's death, and the unhappy fall of Lord Bacon, whilst the great

bond, with nominal damages, and costs, upon which execution would have issued as in ordinary cases, except with an additional direction to the officer to stay further proceedings thereon when he should have levied the damages assessed, with interest and costs. But the court further said that, notwithstanding the judgment was not regularly entered up, no apparent injury having resulted to the plaintiff by reason of the informality, it was an error for which the judgment would not be reversed.

It is pointed out in *Graecen v. Allen*, 14 N. J. L. 74, that, in order to give a greater extent to the jurisdiction of a justice, the legislature in the case of a mere money bond changed the whole course of the common law, having enacted that, when a bond for the payment of any sum of money above \$100 shall, by payment or set-off, be reduced to \$100 or under, that balance shall be considered the real debt and recoverable before the justice without regard to the penalty, and the justice may render judgment for the sum actually due without regard to the penalty. But the bond in the case at bar was in the nature of a bail bond, and not, as the court held, within the legislation above referred to, which embodied bonds for the payment of money only, and, therefore, the judgment, although properly within the jurisdiction of the justice because the penalty was less than \$100, was held improper because rendered by him for the sum actually due, instead of for the penalty of the bond; the court stating that, in all other cases than those embodied in the legislation above referred to, the common law remains unaltered, and the judgment, in every action upon a bond, of whatever description, must be for the penalty, to stand as security for the real debt due or the actual damages sustained by the breach of the condition of the bond, and that the judgment can be entered in no other way.

But in *Hall v. White*, 27 Conn. 498, an action on a bail bond, judgment was ordered entered for the amount of the judgment recovered in the original suit, with interest from the return of the *non est* on the execution, and costs of the execution and the officer's fees thereon; the specific question, however, as to the form of judgment does not arise.

It is said, *arguendo*, in *Pierce v. Read*, 2 N. H. 363, an action on a bail bond, that the judgment rendered for the penalty of a bond in pursuance of the statute, is a mere creature of the 62 L. R. A.

statute, rendered, not for the purpose of being enforced by execution or by an action of debt, but to stand as a security for any damages resulting from any future breach of the condition of the bond.

6. Bastardy bonds.

In *Brett v. Murphy*, 80 Me. 358, 14 Atl. 934, an action in debt upon a bastardy bond, conditioned for the payment of a certain sum weekly, it was held that the order of judgment for the penalty of the bond was correct, but that the court rendering judgment might chancer the bond; and execution was stayed in order to have the damages assessed, which the court, relying upon *Philbrook v. Burgess*, 52 Me. 271, *supra*, II. c. 1, held might include past, present, and future damages, since the bond was not for the performance of any covenant or agreement, and included no covenant or agreement outside of, or apart from, the bond itself, and therefore the breach was once for all.

But the question in *Corson v. Dunlap*, 83 Me. 32, 12 L. R. A. 90, 21 Atl. 173, was whether, in an action upon a penal bond given in bastardy proceedings, the judgment should be for the penalty, and damages be assessed so far as they had accrued at the time of the assessment, future damages to be assessed by after process of *scire facias*, or whether judgment must be given, once for all, for all the damages that ever would be sustained, both past and prospective, where the liability of the principal in the bond was, by the order of the court, a continuing liability. After expressing the opinion that the first-named procedure is the proper one, the court discusses the question somewhat at large "on account of some adverse expressions on the point, to be found in our own cases." The Maine statute providing that, "in actions on bond or contract in a penal sum, for the performance of covenants or agreements, . . . when the jury finds the condition broken, they shall estimate the plaintiff's damages, and judgment shall be entered for the penal sum, and execution shall issue for such damages and costs,"—was declared to apply to actions on bonds containing a penal clause, where there may be breaches of the bond at different times, but not to apply to a bond conditioned to pay a single sum on a day certain, because in such case there can be but one breach and one assessment; nor to certain statutory bonds, bail bonds, recognizances, bonds for good behavior, bonds

seal was in the custody of Bishop Williams, not only was it not agreed that penalties should be relieved against, except in rare cases of fraud or casualty, but it was considered the better opinion that they should not be, for which Lord Ellesmere's authority was cited. This is discovered from an interesting MS. in the British Museum, printed by Mr. Hargrave, being an address touching "The Abuses and Remedies of Chancery, by Mr. George Norburie, and presented unto the Lord Keeper." In that address, Mr. Norburie discourses as follows of the "Matters Properly Relievable in Chancery:" "Touching the affirmative part, what matters are relievable in the chancery, I have heard they must be one of these kinds, viz.: Matters of fraud, trust, extremity, or casualty,

or else not lightly to be dealt in here. For almost all others besides these do arise from the remiss, careless, and negligent dealings of men, who, having precipitated themselves into some great inconveniences, come with open mouths into the chancery, seeking relief; wherein how far they shall be thought fit to be helped I will not presume to determine. Doubtless many wise men do think it better to smart in some measure for their follies, than that their adversaries, haply honest men than themselves, should be vexed here with a tedious and expensive suit, the court so much troubled as it is, and the course of honest, careful, and precise dealings between man and man should be inverted. For to what purpose are bonds made with penalties, leases with forfeitures,

to do or not to do some collateral act, and the like, since such bonds are not money or business bonds, and are not conditioned for the security of covenants and agreements in the sense of the statute, and can be chancery by the court with much more propriety than by a jury. In support of these conclusions, the court, after reviewing numerous decisions, states that, in its opinion, there could not be a better statement of the law than the one found in *Sevey v. Blacklin*, 2 Mass. 541, as follows: "When it shall appear to the court that the penalty is forfeited, then the equity powers of the court commence, and the judges are authorized to enter judgment for so much money as in equity and good conscience the plaintiff can claim, unless the condition of the bond be such that further damages may arise to him by future breaches. In such case judgment is rendered for the penalty, and execution is awarded for the damages already accrued; and the judgment is to stand as a security for future damages to be recovered by *scire facias*." The statement in *Philbrook v. Burgess*, 52 Me. 271, was criticized, that in that case, a bond for maintenance, all past and prospective damages should have been assessed, and that the bond did not come within the statute above referred to; and the decision was expressly overruled in this particular.

The bond in *Jordan v. Lovejoy*, 20 Pick. 86, was given in bastardy proceedings and conditioned for the appearance of the defendant in court at a stated time, there to abide any order that might be made. In debt therein, upon default, a prayer to be heard in chancery was granted, the court stating that "It is a general rule of law in this commonwealth, a rule prescribed by statute, . . . that every bond and obligation with penalty, shall be liable, after forfeiture established on issue or by default, to an inquiry in chancery, on which the judgment shall be entered, not for the amount of the penalty, but for such sum as may be found equitably due."

But in a later decision, *McGrath v. Conway*, 116 Mass. 360, also an action in debt upon default upon a bond conditioned for appearance and to abide the order of the court, given in bastardy proceedings, it was held that, upon a breach of the condition, plaintiff was entitled to judgment for the penalty, with execution for so much of the penal sum as was payable in equity and good conscience,—in this instance for a nominal sum only, but with the right to

sue out a *scil. fa.* and obtain execution for the damage caused by any failure to comply with any further or final order of the court.

The bond in question in *Erlinger v. People*, 36 Ill. 458, was a bastardy bond to secure the appearance of the obligor in court. In an action upon the bond judgment was rendered for the penalty to be discharged upon the payment of a lesser sum, found as damages and costs. It was contended that the judgment should have been rendered to stand as security for the payment of a certain sum per annum, but this contention was not sustained, as the bond was not given for the support of the child, but to secure the appearance of the obligor in court.

In *Trimble v. State*, 4 Blackf. 42, an action in debt on a bastardy bond conditioned for the payment of a certain sum, the rule is laid down that, after the damages have been assessed by the jury upon the assignment of breaches, judgment should be rendered for the penalty and costs, and execution awarded for the damages assessed and costs.

In an action on a bond given by a principal and sureties in bastardy proceedings in the penalty of \$500, conditioned for the appearance of the principal in court at a certain time there to abide any order that should be made, the order was for the payment of \$100 in gross and \$2 per week thereafter. Upon default in payments, action was brought against the sureties. Judgment was ordered entered for the penal sum, with an award of execution for the sum due under the order which the principal had failed to pay. *Barnes v. Chase*, 128 Mass. 211.

The court says, in *Freeman v. People*, 54 Ill. 153, an action upon a bastardy bond: "In actions upon penal bonds, the practice has been long and well settled, that, if plaintiff recover, it must be for the amount of the penalty, as debt, and such sum as may be found as damages. In such cases the jury should find the amount of the debt and damages separately, and the penalty in such cases is the debt, and the injury sustained is the damages, and the court should render judgment for the amount of the penalty, as the debt, to be discharged upon payment of the damages. . . . And when execution issues it is for the debt and damages, but an indorsement should be made thereon, that the debt will be discharged upon the satisfaction of the amount of the damages, and they, with the costs, are all the officer can collect." The judgment in this instance was en-

nomine pœne, and clauses of re-entry, if the wilful violators shall be exempt from all punishments, and who will take care to pay either debt or rent? I have heard the late honorable and worthy chancellor, Lord Ellesmere, say that he would not relieve any that forfeited a bond, unless it were in case of extremity, or that he could make it appear that by some accidental means he was occasioned thereunto; and, if he did help any, the party here complaining should pay all the defendant's charges, both at the common law and in chancery (if he were able), if there was cause. Whereas of late much lenity has been used to all debtors, so that many, after four or five years' suit and charges in this court, were glad to go away with their principal, without either cost or

damages." Hargrave, Law Tracts, 431. But when, in the time of Charles I., the equity of redemption, after forfeiture of a mortgaged estate, was established, it would have been inconsistent not to have extended the same doctrine to the forfeiture of the penalty in a money bond as between the parties beneficially interested in the performance of the condition. The principle in either case was the same, namely, that the substance of the transaction was to secure the payment of the money within a reasonable time, so that, if the debt were discharged within a reasonable time, with lawful interest, although the very letter of the engagement was not observed, yet the real substance of it was achieved; and it was not equitable, nor consistent with good com-

tered for the penal sum and a further sum as damages, together with costs, and directed that execution issue for the same. Inasmuch as the judgment, as entered, would authorize the collection of both the debt and damages, it was held erroneous.

7. Certiorari bonds.

It was held in *McConnel v. Swalles*, 3 Ill. 571, that, in entering up a judgment in an action for debt upon a certiorari bond, "it should be for the debt *in numero* the penalty to be discharged by the payment of the damages actually assessed, either by the jury or the clerk, upon the breaches assigned. The execution issues for the debt, with the indorsement of the clerk, of the damages assessed, and which amount only, so indorsed, the officer can collect."

8. Injunction bonds.

Judgment was rendered merely for the damages sustained, in *Romero v. Silva*, 1 N. M. 157, an action in debt upon an injunction bond. The court, upon appeal therefrom, held: "The verdict should have been: We, the jury, find for the plaintiff the penal sum of the bond and assess his damages on the same at \$50. The judgment should have been: It is therefore ordered by the court that plaintiff recover of the defendant \$100, the penal sum of said bond to be discharged by payment of \$50, the damages assessed by reason of the breach of the same, and also his costs on this behalf expended, to be taxed. But, as this only goes to the form, and not to the substance, it may be corrected in this court. Let the judgment be affirmed with the modification as to form, with costs."

Harrison v. Park, 1 J. J. Marsh. 174, was an action in debt upon an injunction bond. Judgment was rendered for the penalty only, with an entry on the record that it be discharged by a lesser sum found by the jury as damages. This was held unobjectionable under 8 and 9 Wm. III., as well as under an early Kentucky statute which was a substantial transcript of the English act.

The court states, in *Rubon v. Stephan*, 25 Miss. 253, an action in debt upon an injunction bond: "According to the common rule, the breach of the condition being established, the plaintiffs were entitled to recover the penalty of the bond; but, in our practice, the rule is, to enter the judgment for the debt to be discharged by the damages assessed by the jury."

62 L. R. A.

It is said, *obiter*, in *Sims v. Harris*, 8 B. Mon. 55, that, in an action in debt for the penalty of a bond conditioned for the payment of all costs and damages accruing in consequence of the discharge of an injunction the plaintiff is not confined in his recovery to the amount of damages laid in his writ, but shall have judgment for the amount of the penalty to be discharged by the damages sustained by the breach of the condition.

Error was assigned in *Moore v. Harton*, 1 Port. (Ala.) 15, an action upon an injunction bond, as to the manner in which judgment was entered; but the court held that it was immaterial whether it be for the amount of the penalty to be discharged by the sum assessed by the jury, or directly for the last-named; they being substantially the same.

9. Indemnity bonds.

In actions on this class of bonds, the procedure allowing judgment for the penalty to stand as security is often a particularly desirable and convenient practice, as shown in *Roll v. Maxwell*, 5 N. J. L. 493, an action brought upon an indemnity bond. It was held that judgment must be entered in the penal sum to stand as security for future breaches and in no other way, under a state statute which, the judge said, was a copy of 8 & 9 Wm. III., and construed in the same way. In an additional opinion, the chief justice said that, where a bond is conditioned for the performance of covenants, or for indemnifying and saving harmless against contingent damages, losses, or expenses, or for any other thing than the payment of money only, then the judgment is entered for the whole penalty, and execution is taken from time to time for the particular damages found by the jury on succeeding breaches, "for it is contrary to the whole policy of the law to put the party to a new action for every succeeding breach of the covenant, or item of the damage, against which the bond was intended to secure him."

So, also, in *Duffy v. Lytle*, 5 Watts, 120. The court, in holding that but one judgment can be had upon the same bond against the same party, explains that, since 8 & 9 Wm. III., judgment is still entered for the whole penalty of the bond; but, beyond the amount of the damages assessed by the jury upon breaches assigned, and costs, plaintiff is not allowed to levy execution upon his judgment; but that the

science, that the creditor should demand or be allowed to have more, agreeably to that maxim of the court, that "equity regards the substance, and not the form, of things." 1 Spence, Eq. Jur. 629, 630.

The student is desired to observe that in these cases where equity, either formerly or at present, interposes by injunction to prevent what it deems an iniquitous advantage from being taken of a judgment or other proceeding in a court of common law, it does not address itself to the common-law court over which it is acknowledged to have no control; but it directs its mandate to the parties, and, if need be, to the executive officers of the law, and prohibits those from suing out, and these from executing, any process in pursuance of the judgment, etc.

After the lapse of somewhat over half a century, the relief which at first was given dubiously, even in equity, was deemed so obviously to conform to substantial justice that it was directed by statute (4 & 5 Anne, chap. 16 [A. D. 1707]) to be administered in the courts of law, the provision being that, although suit should be brought and judgment given as before for the penalty, yet the judgment should be accompanied by an entry upon the record that it should be discharged by the payment of the principal sum and interest. And this statute is found in our Code in almost the same terms. 2 Bl. Com. 341; Bacon, Abr. *Obligations*, (F); Va. Code 1873, chap. 173, §§ 16, 17; Va. Code 1887, chap. 166, §§ 3393, 3394. And, as a corollary to this enact-

ment remains in full force as security for future breaches upon which execution may be had when shown to the court by *scire facias* upon notice to the defendant. The bond in question was an indemnity bond.

And it is recognized in *Holt v. Halcomb*, 32 N. H. 209, in a suit on an indemnity bond, that, by statute, judgment is to be for the whole penalty of the bond, but execution is to issue only for the damages which the plaintiff has sustained, the judgment to stand as security for damages subsequently accruing.

In several decisions nothing appears as to the judgment standing as security although it is held necessarily entered for the penalty.

In *Blair v. Perpetual Ins. Co.* 10 Mo. 559, 47 Am. Dec. 129, a judgment entered in an action in debt on an indemnity bond for the damages assessed by the jury was held improperly rendered; the court stating that the statute concerning penal bonds was expressed that the judgment should be rendered for the penalty, with an award of execution for the damages assessed.

So, in *White Sewing Mach. Co. v. Dakin*, 86 Mich. 381, 13 L. R. A. 313, 49 N. W. 583, a bond, given to secure any indebtedness which might be incurred by a party to his principal while acting as agent in selling sewing machines was declared to be not a money bond; and the court stated that, therefore, it was regulated by the statute providing that judgment must be rendered for the penalty with costs, and with a further judgment that the plaintiff have execution to collect the amount of damages assessed by the jury.

And a breach of an indemnity bond being established in *Valentine v. Wheeler*, 116 Mass. 478, it was held that judgment should be entered for the penal sum, the court remarking that no inquest would be made as to what amount of the penal sum execution should issue for, as that inquiry was not presented before the court.

Judgment was entered for the amount of the damages in *Suburban Mut. Bldg. & Loan Assn. v. Paulus*, 80 Mo. App. 36, an action upon a builder's bond, in reference to which it was held that the statute was plain and mandatory that it should have been entered for the penalty of the bond with execution for the damages assessed by the jury, and the cause was, therefore, remanded for correction, the court stating that the better practice was to have the correction made in the circuit court.

62 L. R. A.

In regard to the form of a judgment to be entered in an action upon a penal bond conditioned for the due performance of a cashier's duties, the court stated, *arguendo*, that technically it should have been for the penalty of the bond, and that partial payments which had been made thereon should have been applied in accordance with the principles transferred to courts of law from courts of equity in deciding on what terms a party should be released from the penalty of his bond, which always were upon the payment of the principal, interest, and costs. *McGill v. Bank of United States*, 12 Wheat. 511, 6 L. ed. 711.

In *State ex rel. Heye v. Frank*, 22 Mo. App. 46, an action upon an indemnity bond, judgment was finally rendered for less than the penalty. This, the court held, was irregular, as it should have been for the penalty with an award of execution for the damages assessed, but was inclined to amend the defect at that time; however, coming to the conclusion that the judgment was objectionable in other respects, it was reversed and the cause remanded.

The decisions following are examples of the leniency with which courts are coming to treat a departure from the strict common-law form in cases where its use is formal merely, and not, for some reason, essential.

Judgment was rendered for the sum found by the jury, and costs, in *Collier v. Southern Exp. Co.* 32 Gratt. 718, an action in debt upon an indemnity bond. The court stated that, regularly, it should have been for the penalty to be discharged by the payment of the principal sum found by the jury, and costs, but that the error was formal merely, and might be amended, and, as amended, affirmed; however, that it was substantially correct as it was, and that there was no necessity of changing the form of it.

So, a judgment was declared irregular in not having been taken for the penalty, in *Warren v. Gordon*, 10 Wis. 499, an action upon an indemnity bond, in conformity with a statute providing that, in all actions brought for the breach of the conditions of a bond, judgment shall be entered for the penal sum, with an award of execution for the sum actually due. But, as the irregularity did not affect the substantial rights of the defendants, the judgment rendered for the amount of damages assessed, with costs, was affirmed.

The bond, in *Williams v. Willson*, 1 Vt. 266, was an indemnity bond upon which two breaches

ment, it is provided that, "in any action of debt (meaning, doubtless, on a penal bill, or bond with condition, for such a plea was always proper on a single bill) the defendant may plead payment of the debt (or of so much as is due by the condition) before action brought."—that is, although after default made by the debtor. Va. Code 1873, chap. 168, § 1; Va. Code 1887, chap. 160, § 3295.

As at common law the penalty becomes the debt upon the obligor's default, so by that law the penalty usually limits the recovery, as it still does in respect to the surety. Equity, however, upon any application by the obligor for its aid (because he who asks equity must do equity), will compel the payment of principal and interest,

were assigned in an action brought thereon. Judgment was entered for the penalty and for damages in the shape of interest beyond the penalty, without any direction as to what sum execution should issue for, or statement that the judgment was to stand as security for future breaches. But, the plaintiff having proved an expenditure in the obligor's behalf, to the amount of the penalty, the court held that justice would grant interest upon the damages though the penalty be thereby exceeded; "and whether it is entered as debt and damages, or as damages alone, does not much affect the rights of the parties, otherwise than as they are bound to conform to the requisitions of the law with regard to the form, as well as the amount, of the judgment." The form of the judgment in this instance was held unobjectionable, under a statute giving the court the right to render judgment for the plaintiff in an action on a bond with condition annexed, upon breach thereof when there could, in the nature of things, be no future breaches for the sum actually due according to equity and good conscience, since there would be no object in having the judgment for the penalty to stand as security.

Colorado seems to have adopted legislation in the nature of a departure from the common-law rule.

The rule of practice governing penal bonds is stated in *Davis v. Wannamaker*, 2 Colo. 637, to be that the judgment must be for the full amount of the penalty of the bond to be discharged upon the payment of such damages as the plaintiff might be entitled to. But this decision is expressly overruled in *Allen v. King*, 4 Colo. App. 320, 35 Pac. 1061, which held that the practice is different in that state since the adoption of the Code, a judgment for the amount of the damages merely being proper since that time.

And so it seems in Maryland, as the court declared in *Orendorff v. Utz*, 48 Md. 298, that, while 8 & 9 Wm. III. might authorize the entry of judgment for the penalty of the bond to stand as security for future breaches to be recovered by sci. fa. thereon, it did not prevent repeated actions on the bond, as breaches thereof might occur under the state statute treating the sum really due as the true debt secured by a penal bond and so to be pleaded and allowed.

10. Official bonds.

The court, instead of entering judgment for 62 L. R. A.

though the aggregate exceed the penalty. Bacon, Abr. *Obligations*, (A.). In Virginia the courts of law habitually allow interest to be recovered in full, although, together with the principal, it may exceed the penalty, the excess being recovered as damages. *Tennant v. Gray*, 5 Munf. 494; *Baker v. Morris*, 10 Leigh, 285; *Tasewell v. Saunders*, 13 Gratt. 354.

It will be at once observed that in cases of penal bonds for the payments of money, where there is only a single sum due or secured, there can be but one breach of the bond, and hence there never was in the law such a thing, in suits upon such bonds, as a judgment for the penalty of the bond, with an assessment of the damages for the past breaches, with a further provision that the

the penalty of the bond, with a further judgment that plaintiff have execution for the damages assessed, as prescribed by statute, rendered judgment merely for the amount of damages found to be due the plaintiff, in *Taylor v. State*, 23 Ark. 225, an action upon an administrator's bond. Upon appeal, the court stated that, while it was not apparent that any substantial injury would be suffered, nevertheless, it was perhaps safest not to sanction a departure from the mode of entering such a judgment prescribed by the statute, and for that reason ordered a reversal.

A judgment was declared in conformity with the common-law rule, and was therefore unobjectionable, since that rule had not been disturbed by statute, which was entered up against each of several sureties on an official bond for the full amount of their liability and costs, with the direction that the plaintiff have execution only for the sum really due from the principal to the plaintiff on the bond. *People v. Love*, 25 Cal. 521.

Expressly approving and following *People v. Love*, 25 Cal. 520, it was held, in *People v. Rooney*, 29 Cal. 643, that in an action on official bonds "the judgment should first fix the amount of the defalcation or recovery, and thereafter proceed with a separate judgment against each of the sureties for the full amount for which he has made himself liable in the bond, and costs, and then close with a proviso to the effect that each shall be satisfied by the collection or payment of the amount of the defalcation or recovery, and costs."

And in *Heppe v. Johnson*, 73 Cal. 265, 14 Pac. 833, an action against sureties on an official bond, the judgment rendered, which was in the ordinary form of a judgment for the recovery of money, was ordered modified so as to conform to the form prescribed in *People v. Love*, 25 Cal. 520, and *People v. Rooney*, 29 Cal. 643, *supra*.

A verdict found by the jury for the damages only, in an action in debt on an official bond, was held bad both in form and substance, in *Frazier v. Laughlin*, 6 Ill. 347; the court stating that the jury should have found the debt as well as the damages, whereupon "the court could have rendered a judgment for the debt thus found, and have awarded execution for that amount, with directions to be indorsed thereon, that only the amount of the damages should be collected."

judgment should stand as security for further breaches. Under such bonds there could be only one breach, and the only question there ever was in the law was, whether the recovery should be for the sum actually due, or for the whole penalty. This being true, the judgment could not stand as security for further breaches, for there could be no further breaches. It is of such bonds that the statute of Anne treated, and, because there can be but one breach of such bonds, the statute provides that judgment shall be entered, not for the penalty, but for the sum actually due; and this also explains why neither at common law, nor under the statute of Anne, was there ever a provision that the judgment should stand as security for further breaches. Our statute

(Rev. Stat. 1899, §§ 464-467) is in most respects like the statute of Anne. It is like the statute of Anne in that it relates to penal bonds conditioned for the payment of money, with a defeasance to become void upon the payment of a lesser sum, and in that it permits a judgment only for the amount actually due, and not for the penalty at all. But it is unlike the statute of Anne in that it contemplates that there may be several breaches of the bond, and permits the assignment of as many breaches as have occurred at the time the action is begun. But our statute in respect to bonds conditioned for the payment of money is directly opposite to the statute in respect to bonds for the performance of a collateral thing other than the payment of money (§§ 468-

The proper form of judgment for the plaintiff in an action on a penal bond was declared, in *Austin v. People*, 11 Ill. 452, an action upon a guardian's bond, to be that he recover the amount of the debt found by the jury, to be discharged by the payment of the damages and costs.

And in *Stose v. People*, 25 Ill. 600, an action in debt on an executor's bond, it was held that judgment should have been entered for the penalty as the debt, to be discharged by the payment of such damages as might be proved and found.

The judgment included the damages found by the court, as well as the penalty, in *Armstrong v. State*, 7 Blackf. 81, an action on a guardian's bond, and was, therefore, held erroneous as to that portion.

The judgment was for the damages, instead of for the penalty, in *State ex rel. Abrahams v. Cross*, 6 Ind. 387; but this, while informal, was regarded as an irregularity which the court could consider amended, and on that condition the judgment was affirmed.

The bond in *Machiasport v. Small*, 77 Me. 109, was one conditioned to be void upon the faithful performance of official duty, and so declared by the court to fall within the class of bonds of defeasance; the procedure was, therefore, held to be that, upon a finding by the jury that the condition had been broken, judgment must be entered for the penalty; and, on a motion that the penalty be chancered as the equitable rights of the parties might require, the court, with the aid of the necessary auditing officers, will fix the amount for which execution shall issue.

The doctrine is stated, *obiter*, in *State use of Buckley v. Culler*, 18 Md. 418, that a judgment at law upon an official bond would be for the penalty thereof, although, under the statute of Wm. III, the defendant would be entitled to be released upon the payment of such sum as the jury might assess as damages for the breach of condition.

In *State use of Maulsby v. Tabler*, 41 Md. 236, it was held that judgment on an official bond should be rendered for the penalty of the bond to be released upon the payment of the sum found due by the verdict of the jury, with interest and costs.

The court recognized, in *Austin v. Moore*, 7 Met. 110, that, under the statute, upon the breach of a penal bond being shown, judgment should be entered for the penal sum, but re-

marked that a recovery for the whole penalty was not thereby authorized; that it was a judgment *sui generis*, and not like ordinary judgments, as no process could be awarded for its enforcement except to the extent of what was due in equity and good conscience, the burden of showing which being upon the plaintiff.

The court states, in *Hatch v. Attleborough*, 97 Mass. 533, that, in an action in the nature of debt on a penal bond, judgment is always rendered for the penalty of the bond if any breach thereof is proved, and that the hearing to ascertain for what amount execution should issue is an assessment of damages conducted according to equitable principles, to which no pleadings on either side are required.

Bassett v. Grainger, 136 Mass. 174, being an action upon a penal trustee's bond, the court said that, under the statute, it was clear that plaintiff was entitled to a judgment for the penal sum, with an award of execution for so much of the penal sum as was due and payable in equity and good conscience.

In *State use of Reyburn v. Ruggles*, 20 Mo. 99, an action brought to the use of three legatees upon an administrator's bond, judgment was held properly rendered for the penalty of the bond with an award of a single execution for the damages assessed for the breaches thereof, the opinion stating that the court had no authority to award separate executions for each distributee, but that the damages could be distributed upon being brought into court upon the return day of the writ.

The specific question in *State use of Stewart v. Hart*, 38 Mo. 45, was the amount of interest allowable upon a judgment; but it is incidentally held that, in suits against the sureties of the official bond of an assignee, the statute controlling the procedure in suits on bonds with collateral conditions applied, providing for judgment for the penalty of the bond and costs, with an entry upon the record of the damages assessed, and a further judgment that plaintiff have execution only for the damages assessed with interest from the time of the assessment.

The judgment was reversed in *State use of Gates v. Fitzpatrick*, 64 Mo. 185, because rendered for the damages assessed, and not for the penalty of the official bond sued upon with special execution for the amount assessed, as provided for law.

Citing *State use of Gates v. Fitzpatrick*, 64 Mo. 185, the judgment in *State ex rel. Cochran*

477) in this, that, under the former, the judgment is only for the amount due, and not for the penalty, nor that the judgment should stand as security for further breaches; while under the latter the judgment is for the penalty, the execution is issued for the damages, and the judgment stands as security for further breaches, to be recovered by *scire facias*.

It is to be observed that the bond in this case has been treated by the plaintiff and the lower court as a penal bond conditioned for the payment of money. The petition prays for a judgment for the penalty of \$6,000, "the penalty of the bond, and that execution issue for the sum of \$375, with interest, as damages" (nothing is said about the judgment standing as security for

further breaches). The original judgment was for \$6,000, "the penalty of the bond sued on, to be satisfied upon the payment of the sum of three hundred and eighty four and fifty one-hundredths (\$384.50) dollars damages." The only difference between the petition and the judgment, therefore, is that the petition asked that execution issue for the damages, while the judgment was that it be satisfied upon the payment of the damages. In neither, however, was there any idea expressed or involved that the judgment was to stand as security for further breaches, nor could there be such a thing if this bond was a penal bond conditioned for the payment of money, nor if the bond was such a bond as is covered by our statute or the statute of Anne. The

v. Cooper, 79 Mo. 464, an action upon a sheriff's bond, was reversed because rendered only for the amount of damages assessed, and not for the penalty of the bond with special execution for the damages as provided by law.

A nonsuit was affirmed in *State use of Maher v. Sondag*, 15 Mo. App. 312, an action upon an official bond, upon the ground, among others, that the petition asked judgment for only \$500, when the penalty of the bond was \$3,000; the court stating that it would have been erroneous to enter judgment for an amount not claimed in the petition, and that, in actions on bonds for the breach of a condition other than for the payment of money, it was erroneous to enter judgment for less than the penalty of the bond.

The judgment in *State ex rel. Owen v. Hollenbeck*, 68 Mo. App. 366, was reversed because not entered in conformity to the requirements of the statute, for the penalty of the bond with execution for the damages assessed. The bond in question was the official bond of a clerk of a circuit court.

A general judgment rendered for the amount mentioned in the complaint in an action upon a constable's bond, instead of for the penalty thereof, was held undoubtedly irregular in *New York v. Lyons*, 1 Daly, 296, the court remarking that it was not a bond merely for the payment of money in which no assessment of damages is necessary and nothing remains except to compute the interest, but that it is within the act of 1813, which was not repealed by the Code, providing that, if judgment is recovered in an action upon a constable's bond, the court shall, upon motion, direct so much money to be levied upon the judgment as shall be sufficient to pay the damages, with costs, to the party aggrieved.

The court was allowed to amend a judgment more than twelve months after its rendition, in *Wall v. Covington*, 83 N. C. 144, an action upon an administrator's bond, to recover the distributive shares of the next of kin, which was entered for the sum of the assets found for distribution, instead of for the penalty of the bond to be discharged by the payment of the assets so found.

While remarking that it was not material to the disposition of the case, the court took occasion to state, in *State ex rel. Anthony v. Estes*, 101 N. C. 541, 8 S. E. 347, that the judgment upon a guardian's or administrator's bond should be for the penal sum mentioned in the bond, to be discharged upon the payment of the 62 L. R. A.

damages assessed with interest from the first day of the term at which judgment is rendered.

Judgment was entered for the damages assessed only, in *Smith v. Licking County*, 2 Ohio, 312, on an action upon an official bond. This was held erroneous, not being in conformity with the statutory provision enacting that plaintiff shall "recover judgment for the amount of the bond, on which judgment an execution may issue for such sum as it may be ascertained will be sufficient to indemnify the person so suing."

A judgment entered *quod recuperat* the damages assessed, not the debt of the bond, was held clearly erroneous in *Farrar v. United States*, 5 Pet. 373, 8 L. ed. 159, and for that reason reversed. But the assessment of damages in this instance was also erroneous in that they exceeded the penalty of the bond, although it seems that, after that was remedied by agreement, the court still objected to the form of the judgment.

It was held to have been properly contended in *Campbell v. Pope*, Hempst. 271, an action upon a constable's bond, that judgment should have been for the full amount of the penalty of the bond to be discharged by the payment of such damages as the plaintiff had sustained by reason of the breaches assigned. The court construed a constable's bond to be within the statute providing that, upon any bond "for the payment of money" judgment should be entered as above specified, because it was also therein provided that the plaintiff may assign as many breaches as he may think fit, and the jury may assess damages upon each of the breaches; and on each verdict the like judgment shall be entered as heretofore has been usually done in such cases." And the court concluded that there was sufficient error in form to require it to remand the cause for a more perfect judgment.

The practice of allowing the judgment to stand as security for future breaches is often peculiarly expedient in this class of bonds as a means of preventing a multiplicity of suits for damages suffered from the breach by various persons, or by the same person for successive breaches.

In a review by the court in *McCourtie v. Davis*, 7 Ill. 298, of instances where the remedy by *scire facias* is given by Illinois statutes, is included cases of suits on official bonds where judgment is rendered for the penalty of the

third kind of a bond was a penal bond conditioned to do a collateral thing. Of such bonds Prof. Minor, in his *Institutes*, vol. 3, p. 355, says: "A bond with condition to do a collateral thing is a bond promising to pay a named sum of money, with a condition underwritten, that, if a stipulated collateral thing (something other than the payment of money) be done or omitted, the obligation shall be void. In this case also, as in the case of the bond with condition to pay money, the common law holds the whole penalty to be forfeited if the condition be not observed in every particular, however trivial; but the court of equity having interposed upon the same principle as before, to compel the obligee to accept a suitable compensation in damages in satisfaction of the

bond, it was provided by statute 8 & 9 Wm. III. chap. 11 [A. D. 1697], in terms which the Virginia statute substantially reproduces, that the plaintiff may assign as many breaches of the condition as he shall think fit, and a jury shall ascertain the damages sustained by reason of such breaches, and judgment shall be entered for the penalty, to be discharged by the payment of the damages so ascertained, and such further sums as may be afterwards assessed, or be found due upon a *scire facias* assigning a further breach. Va. Code 1873, chap. 173, § 17; Va. Code 1887, chap. 166, § 3394. But let it be observed that, whilst one complaining of subsequent breaches, say of an official bond, like that of a sheriff, may thus resort to a *scire facias* upon the judgment already

bond, and execution is afterwards allowed to issue upon the judgment from time to time for further violations after the summoning of defendants by *scilicet* fa. to show cause why the execution should not be awarded.

The judgment in *White v. Blake*, 74-Me. 489, an action upon a deputy sheriff's official bond, was, presumably by a clerical error, entered for the damages assessed. Instead of for the penalty. Subsequently, the satisfaction of this judgment preventing the recovery of expenses incurred by the sheriff on the deputy sheriff's behalf, it was asked that the judgment be changed to the proper form for the penalty, so that recovery might be had by *scilicet* fa. for the subsequent expenditure. This was done although several years had elapsed, the court stating that the form of entry was certainly erroneous, as, with possibly a single exception as to poor debtor's bond, there was no statute authorizing a judgment in actions of debt on bonds differing from that which must be rendered at common law; and that there was no difference in the course of proceeding to be followed in suits on bonds for the performance of covenants and agreements, and those with a condition of defeasance, although in the former and in a few other cases by special statutory provision the damages were to be assessed by the jury, instead of by the court.

Arguendo, in *Harris v. Davis*, 1 N. H. 249, the court says that, when the condition of a probate bond is in any respect broken, the judge is entitled to maintain an action and recover judgment for the whole penal sum named in the bond, but that the court awards execution only for such sum as, upon a hearing in chancery, is found equitably due at the time of rendering judgment; and for such sums as, upon *scire facias* brought for the purpose, may afterwards be found equitably due on account of further breaches of the condition.

In *Mitchell v. Laurens*, 7 Rich. L. 111, an action upon an official bond, it was held that the first judgment for the penalty recovered inured to the benefit of all persons who afterwards established a breach of the condition, to the extent of their recovery, until the penalty was exhausted.

And, *arguendo*, in *Parker v. Colcord*, 2 N. H. 39, it is said that there is no necessity for more than one recovery upon an administration bond, because judgment is then rendered for the whole 62 L. R. A.

penalty, and afterwards execution is awarded for such sums as in equity are found due.

In regard to the pendency of a number of suits by parties aggrieved upon a sheriff's bond, the court, in *The Treasurers v. Bates*, 2 Ball. L. 363, laid down the rule that, in the first suit in which verdict is had, judgment should be entered for the penalty and stand as security for any former or subsequent breaches of the bond; and any other person might afterwards come in, and, by suggesting breaches upon notice, have his damages assessed and execution awarded therefor with the penalty as security.

The judgment in *Bibb v. Cauthorne*, 1 Wash. (Va.) 91, an action upon a sheriff's official bond, was that the commonwealth recover, for the benefit of the plaintiff, the penalty of the bond and costs, to be discharged by the payment of the damages assessed and such other damages as might be thereafter assessed upon suing out *scire facias* and assigning new breaches. But the court declared the judgment erroneous in attaching the recovery as to future injuries solely to the plaintiff, and directed that it be reversed and entered, as to future recoveries, also for the benefit of any other person or persons injured.

In *Call v. Ruffin*, 1 Call. (Va.) 333, an action in debt by one of the two obligees on a guardian's bond, judgment was rendered for the whole penalty to be discharged by the plaintiff's demand; and the court stated that, if subsequently, in addition to the amount paid on this judgment, the security should be obliged to pay the other obligee a sum also, which, taken together, would exceed the penalty of the bond,—in such a case the court would reduce both claims to the aggregate of the penalty which would be proportioned between the two obligees.

But a distinction is made in a number of decisions as to whether the action is brought by the commonwealth or in its name, or by the person aggrieved,—if by the former, the judgment must be rendered for the penalty, but if by the latter, only for the damages suffered.

Thus, in *People v. Summers*, 16 Ill. 173, it is stated that, in an action on an administrator's bond, the judgment need not be for the penalty of the obligation, but only for the damages the party has sustained by the failure to perform its condition, and that such a recovery is no bar to subsequent suits which might continue

obtained at the relation of someone else, yet he is not precluded from a new action on the bond, as if there had been no previous recovery. *Sangster v. Com.* 17 Gratt. 124." The statute of 8 & 9 Wm. III. prescribed "that in all actions . . . upon any bond or bonds, or on any penal sum, for nonperformance of any covenants or agreements in any indenture, deed, or writing contained," the plaintiff might assign as many breaches as he pleased, and the judgment should be for the penalty of the bond, but execution should issue for such damages; only as were due by reason of such breaches; and that the judgment should stand as security for further breaches, for which a scire facias might issue wherever such further breaches were thereafter found by the court to have oc-

curred. Our statute (§§ 468-477, inclusive) is somewhat similar to the statute of Wm. III., but in some respects it is different. Section 468 provides: "When an action shall be prosecuted in any court upon any bond for the breach of any condition other than the payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant or written agreement," etc. The bond in question in this case is not such a bond as is contemplated by this statute. It is not a penal bond conditioned other than for the payment of money, and it is not a penal bond conditioned for the performance of any covenant or written agreement. It is not a penal bond at all. It contains none of the elements of a penal bond. It contains no

to be prosecuted until the whole amount of the penalty was recovered.

This decision is expressly followed in *Pinkstaff v. People*, 59 Ill. 148, also an action upon an administrator's bond. Although the penalty was in the sum of \$2,500, the court affirmed a judgment for only \$900 debt, to be discharged upon the payment of \$812.48 damages.

Where an action upon an administrator's bond was brought in the name of the person aggrieved, and not in the name of the people, it was held, in *O'Connor v. Such*, 9 Bosw. 318, that judgment should be entered only for his damages, with costs, and not for the amount of the penalty.

Judgment, in a suit on a guardian's bond, is for the commonwealth in the penalty of the bond, and for the plaintiff in the amount of damages proved. *Com. v. Julius*, 8 York Legal Record, 80.

In a suit by an individual upon a marshal's bond, it is held, in *Adler v. Newcomb*, 2 Dill. 45, Fed. Cas. No. 83, that the petition should ask judgment for the damages sustained, and not for the whole penalty of the bond.

Hagood v. Blythe, 37 Fed. 249, was an action on a marshal's bond by a private person. It was held that judgment should be rendered for his damages legally assessed, with interest and costs, and that execution issue therefor under an act of Congress providing that any person injured may institute in his own name a suit on a marshal's bond, and thereupon recover such damages as should be legally assessed, with costs, for which execution should issue; and, in a subsequent section, that the said bond should remain after any judgment rendered thereon as security for the benefit of any person injured by breach of condition of the same until the whole penalty was recovered; and that the proceedings should always be as directed in the preceding section. The court said, *obiter*, that, were the suit in the name of the United States, the judgment should be for the penalty, and remain as security for any person aggrieved who might come in under it and suggest his interest.

In *Curtis v. United States*, 100 U. S. 119, 25 L. ed. 571, an action upon a paymaster's bond, judgment was rendered for the amount of damages assessed, with interest; no question, however, as to the proper form of judgment arose.

A somewhat different practice appears in 62 L. R. A.

Sangster v. Com. 17 Gratt. 124, an action in debt upon an official bond. The court recognizes as true that, in actions on bonds conditioned for the payment of an annuity, or of money payable in instalments, where there are further payments of the annuity, or further instalments to become due after the commencement of the action, or for the performance of other collateral agreements, the statute requires that the judgment shall be entered for the penalty of the bond, to be discharged by the damages assessed, and providing for the assessment of future sums falling due in the future upon sci. fa. and the assignment of breaches; but it was held that official bonds were not within this statute, being controlled by another providing that suits might be prosecuted from time to time upon official bonds, in the name of the commonwealth, for the benefit of any person injured by any breach of the condition of such bond, as often as any such breach may be alleged, until damages shall be recovered for such breaches equal to the penalty of the bond. The judgment entered in the case at bar was not for the penalty of the bond, but simply for agreed damages; but, it appearing that the parties expressly consented that judgment might be entered up in this form, the court refused to interfere, stating that the error, if any, was a mere informality, for which the judgment would not be reversed, even had the parties not consented thereto.

The judgment in *Gott v. State*, 44 Md. 319, was entered upon the verdict of the jury as to the sum found due; but the court, while agreeing that the proper form would have been to enter judgment for the penalty of the bond, to be released upon the payment of the sum found due by the jury, held that the informality was not sufficient to vitiate the judgment as entered.

A judgment for the penalty, costs, and damages, in an action on a sheriff's bond, while stated to be informal, was held, nevertheless, to be a substantial compliance with the statute, in *Adams v. State*, 11 Ark. 466.

A judgment entered for the penalty of a bond upon a general verdict of the jury for that amount was held unsustainable when the demand in the petition was for a less amount. No reasons are given, except, the court says that, upon no possible grounds, could the judgment be sustained. *Cox v. United States*, 6 Pet. 172, 8 L. ed. 359.

penalty whatever. It provides for the payment of a sum certain, to wit, \$6,000, not in gross, but in instalments of \$50 a month. It nowhere provides that, if any instalment is not paid at the time specified, the whole sum of the bond shall become at once due and payable. In our statute the provisions of law relating to penal bonds conditioned for the payment of money, and also penal bonds conditioned to do a collateral thing other than the payment of money, are contained in article 1 of chapter 6 of the Revised Statutes of 1899, but, although this is true, it is plain that the article is made up of two originally different acts. The main idea permeating the provisions of law relating to the two kinds of bonds are the same as the statutes of Anne and William.

But there are such differences apparent between our statute and the English statutes as to arrest, at once, the attention, and to force the inquiry whether our statute is made up of the statutes of Anne and William, with such changes as suggested themselves to the minds of our legislators, or whether our statute is borrowed from the statutes of some other state. Induced by this thought, the mind is at once prompted to look to the statutes of the state of New York, principally because so large a part of our statute laws have been borrowed from that state. The result of such an inquiry is that the laws of New York are found to be almost identical with our statutes. The phraseology of both statutes compels the conviction that our statute, passed for the

11. *Post-obit bonds.*

The bond in suit in *Tracy v. Strong*, 2 Conn. 662, was for the payment of a certain sum annually in the nature of an annuity; but, after the commencement of action for one of the instalments, the annuitant died, whereupon, as the court declared, the same situation was presented as though the bond had been conditioned for the payment of a single liquidated sum, instead of several successive instalments. Therefore, a distinction was made, *arguendo*, in this instance, and the entry of judgment merely for the amount which appeared from the terms of the condition of the bond to be due was declared proper. But, as to bonds with conditions where the breach may happen several times, and the suit is brought for the first breach only, the rule that judgment must be rendered for the whole penalty, to stand as security for further breaches, is tacitly recognized. This decision seems most consistent and satisfactory, and in harmony with the reasoning at common law, which excluded this kind of a bond from the scope of the statute of William, *supra*, I. c.

12. *Replevin bonds.*

Another class of bonds held to be outside the scope of the statute of William, by the English decisions, was replevin bonds (see *supra*, I. c.) for the same reason that it was so held in regard to bail bonds, i. e., that the court had full power to render relief, and it was not, therefore, necessary to have a writ of inquiry to and assessment of damages by a jury. But, as observed in the case of bail bonds, this has no effect upon the form of judgment, but only goes to the manner of arriving at the amount collectible.

It was held in *Gould v. Warner*, 3 Wend. 60, an action upon a replevin bond, that judgment was properly entered for the full amount of the penalty without assigning breaches or assessing damages, because, as in the case of bail bonds, the court had full power by statute to render the necessary relief, and also for the reason that the sureties are answerable to the amount of goods replevied; and this amount was ascertained before the bond was given, so that there was no necessity for a jury to inquire into the matters.

It was held that the judgment proper to be rendered in *Williams v. Howard*, 3 Munf. 277, an action upon a replevin bond, was for the 62 I. R. A.

penalty, to be discharged by the payment of the amount for which the goods were distrained, with interest from the date of the bond until paid.

The judgment in an action on a replevin bond should be for the penalty, to be discharged by the performance of the judgment in the action of replevin for the return of the goods, or, if that is impossible, their value, as held in *Scott v. Elliott*, 63 N. C. 215.

But a number of decisions seem to be unaffected by the common-law theory as to the non-necessity of an assessment of damages by the jury.

A judgment entered for the penalty, to be released on the payment of the amount of damages found by the jury, in an action on a replevin bond, was affirmed in *Gorman v. Lenox*, 15 Pet. 115, 10 L. ed. 680.

The judgment in *Com. use of Price v. Hamilton*, 4 T. B. Mon. 132, an action on a replevin bond, was for the penalty, to be discharged by the sum assessed by a jury as damages.

A breach being shown on a replevin bond, it was shown, in *Wright v. Quirk*, 105 Mass. 44, that, according to a state statute, judgment should be rendered for the penalty, with execution for only so much of the penal sum as was payable in equity and good conscience, and that either party had the right to have the assessment made by the jury.

The practice of taking judgment for the amount of the penalty, and having the damages assessed by the jury after the assignment of breaches, seems to be the one approved by the court in *Perkins v. Smith*, 2 Blackf. 171, an action of debt on a bond conditioned for the delivery of property taken on execution.

Cameron v. Boyle, 2 G. Greene, 154, was an action at law on a replevin bond. The court stated that, under the statute, the practice in Iowa was to enter judgment in debt for the penalty as security for the damages proved to have been sustained by the plaintiff, for which judgment was also entered.

In conformity with the state statute, the court holds, in *Leighton v. Brown*, 98 Mass. 515, an action on a replevin bond, that judgment is to be entered for the penalty of a bond with interest from the date of the breach, but with award of execution for so much, only, of the penalty as shall be ascertained to be justly due, which sum can in no event exceed the judgment.

first time in 1835 (Rev. Stat. 1835, p. 430), was borrowed from the New York statutes of 1829. The New York statutes relating to penal bonds, however, are not collected in the same article. Sections 464-467, inclusive, of our statute, are in essence and spirit and procedure like §§ 12, 13, title 2, chap. 6, p. 353, 2 N. Y. Rev. Stat. 1829; while §§ 468-477, inclusive, of our statute are in letter, essence, spirit, and procedure like article 2, title 6, chap. 6, p. 378, N. Y. Rev. Stat. 1829. For the purpose of perspicacity, § 468 of our statutes and § 5 of article 2 of the New York statute are hereby placed in parallel columns. They are as follows:

Section 468, Mo. Rev. Stat. 1899:

"When an action shall be prosecuted in any court upon any bond for the breach of any condition other than the payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant or written agreement, the plaintiff, in his petition shall assign the specific breaches for which the action is brought."

Section 5, art. 2, title 6, chap. 6, N. Y. Rev. Stat. 1829:

"When an action shall be prosecuted in any court of law, upon any bond for the breach of any condition other than for the payment of money, or shall be prosecuted for any penal sum for the nonperformance of any covenant or written agreement, the plaintiff, in his declaration, shall assign the specific breaches for which the action is brought."

In *Lewis v. Warren*, 49 Me. 322, an action in debt on a replevin bond, judgment was directed to be for the amount of the penalty of the bond, the court declaring that in Maine there was no existing statute which authorized a judgment in actions of debt on bonds, differing from the common-law rule, except, perhaps, in the case of poor-debtor bonds given upon execution in actions upon which judgment is directed by statute to be rendered without regard to the penalty of the bond.

A judgment in an action in debt upon a replevin bond was held erroneous in *Mathison v. Stephens*, 9 Ill. App. 435, because it was entered for the amount of the damages sustained in addition to the amount of the penalty of the bond; the court stating that it should have been that the debt found should be discharged on payment of the damages.

Judgment was ordered entered for the penalty, in an action in debt on a replevin bond, with award of execution for the amount due and interest. *Hovey v. Coy*, 17 Me. 266.

In *Nelson v. Gray*, 2 G. Greene, 397, also a suit on a replevin bond, the court held that the judgment should have been for the penalty of the bond with an assessment of damages to the amount proved to have been sustained by the plaintiff by reason of the breach, the judgment for the penalty to stand for such other breaches as might afterwards happen, the execution, however, to issue only for the amount of the breaches assessed, and an order to that effect to be entered of record as a part of the payment of the case.

The tendency towards leniency by the court upon a departure from the common-law form appears again in *Doak v. Duncan*, Litt. Sel. Cas. 176, an action upon a replevin bond. Execution was issued for the sum named in the condition of the bond, instead of for the penalty to be discharged by the payment of the conditional sum. The court held that, while the latter was the usual, formal, and correct mode, nevertheless it was substantially the same, and the distinction was too nice and technical to be fatal.

An early advocate of a simpler and consistent form is *Sevey v. Blacklin*, 2 Mass. 541, an action in debt on a replevin bond. It appearing from the plea that the penalty of the bond was forfeited, the court declared that, under state statutes, when that should appear, then the equity powers of the court commence; and the judges are authorized to enter judgment for 62 L. R. A.

so much money as in equity and good conscience the plaintiff can claim, unless the condition of the bond be such that further damages may arise to him by future breaches. In such case judgment is rendered for the penalty, and execution is awarded for the damages already accrued; and the judgment is to stand as a security for future damages to be awarded by scire facias. By virtue of these statutes the defendants may have relief against the penalty of the bond, by availing themselves of the equitable powers of the court, who can render judgment only for the damages really sustained by the plaintiff by the breach of the condition. The statute of William, providing for the assessment of as many breaches as plaintiff should think fit, was expressly declared never to have been adopted in Massachusetts.

In *Prentiss v. Spalding*, 2 Dougl. (Mich.) 89, the court said that, had the action been brought for breach of condition of the replevin bond, or to recover the penalty, judgment, according to the statute, should be for the penalty, with an award of execution for damages duly assessed; but, being merely an action in covenant, that the judgment was correctly entered for the damages as in ordinary cases.

13. Title bonds.

There is nothing to distinguish title bonds from any other bonds conditioned for the performance of a collateral act, but, out of the four decisions, three treated a departure from the usual form as an irregularity which was not injurious, and refused to disturb the judgment.

In *Caldwell v. Richmond*, 64 Ill. 30, an action in debt on a title bond, the court says: "As has often been decided by this court, the verdict should have specified the debt and damages, and a judgment should have been rendered for the debt, to be satisfied by the payment of the damages and costs."

But where judgment was rendered merely for the damages assessed by the jury, with interest thereon and costs, in *Wilson v. Spencer*, 11 Leigh, 271, an action in debt on a title bond, this was held to be an irregularity; but, there being but the one breach possible on the bond, the court declared that the form of the judgment was not essential for the preservation of the plaintiff's or defendant's rights, since the bond was satisfied by the recovery had, and, therefore, affirmed the judgment.

And judgment was rendered for the damages

The only difference between our statute and the New York statute are the four words italicised herein in the New York statute, and those are immaterial. Now read the corresponding part of the statute of 8 & 9 Wm. III., which is as follows: "That in all actions which from and after the said five and twentieth day of March one thousand six hundred ninety and seven, shall be commenced or prosecuted in any of His Majesty's courts of record, upon any bond or bonds, or on any penal sum, for non-performance of any covenants or agreements in any indenture, deed, or writing contained, the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit," etc. The similitude between our

statute and the New York statute is further apparent in our § 469 and their § 6; in our § 471 and their § 9; in our §§ 473-477 and their §§ 11-15. It is therefore convincingly apparent that our statute is borrowed from the New York statute, and not from the English statute. It is a rule of law that when a statute is borrowed from another state the decisions of the state from which the statute is borrowed, interpreting such statute, are borrowed also. For it is presumed that the legislature adopting the statute of a sister state knew of the interpretation placed upon the statute by the courts of such sister state, and intended that a like interpretation should be put upon the statute after it became a part of

assessed by the jury, besides interest and costs, in *Pate v. Spotts*, 6 Munf. 394, an action in debt upon a title bond. Upon an objection being made to the form of the judgment, the court stated that, although it should have been for the penalty to be discharged by the sum found due by the jury, yet that this was an irregularity which was not injurious to the defendant because, being an action for a failure to make a title to a tract of land, the remedy extended to the whole injury, and the action could in no form be repeated; and the court, therefore, refused to reverse the judgment.

So, the entry of the judgment for the damages assessed by the jury, and not for the penalty of the title bond, was relied upon in *Bradford v. Curlee*, 41 Miss. 558, as ground of error; but the court said: "It is true it would have been more technical to render the judgment for the debt mentioned in the bond, to be released on payment of the damages assessed by the jury. In such case, the effective thing would be the judgment for the damages the plaintiff had sustained. When that amount is paid, the judgment in either case would be satisfied, and it would be an effectual bar to any other action, on the same cause of action against the defendants; so that the rights of both parties are as fully protected by the judgment in this form as if it had been entered in the technical form."

III. Effect of improper form.

Judgments were reversed for improper form, in *Hankin v. Broomhead*, 3 Bos. & P. 607, *supra*, I. d.; *Garnett v. Yoe*, 17 Ala. 74, *supra*, II. c. 1; *Taylor v. State*, 23 Ark. 225, *supra*, II. c. 10; *Mathison v. Stephens*, 9 Ill. App. 435; *O'Neill v. Nelson*, 22 Ill. App. 531; *Fournier v. Faggott*, 4 Ill. 347, —*supra*, II. c. 3; *Freeman v. People*, 54 Ill. 153, *supra*, II. c. 6; *Ackerman v. People*, 100 Ill. App. 128, *supra*, II. c. 3; *State use of Gates v. Fitzpatrick*, 64 Mo. 185; *State ex rel. Cochran v. Cooper*, 79 Mo. 464; *State ex rel. Owen v. Hollenbeck*, 68 Mo. App. 366; *New York v. Lyons*, 1 Daly, 296; *Smith v. Licking County*, 2 Ohio, 312; *Bibb v. Cuthorne*, 1 Wash. (Va.) 91, —*supra*, II. c. 10; *Overstreet v. Marshall*, 1 Hen. & M. 381, *supra*, II. c. 1; *Moore v. Fenwick*, Gilmer (Va.) 214, *supra*, II. b; *Farrar v. United States*, 5 Pet. 373, 8 L. ed. 159; *Campbell v. Pope*, Hempst. 271, —*supra*, II. c. 10.

A judgment in an action in debt upon a penal 62 L. R. A.

bond, which found the amount of the debt and damages, and recited that the plaintiff should recover the damages and costs, while declared to be informal and subject to reversal on error, was held not to be so irregular as to be absolutely void, in *Wales v. Bogue*, 31 Ill. 464, since it declared the legal rights of the parties, as, in the language of the court, under the law, the plaintiff is entitled to receive no part of the debt, but is only permitted to receive the damages and costs which operate to satisfy the whole debt.

Where the damages assessed were inserted in the ordinary judgment for the penal sum, it was held cause for partial reversal only, in *Nelson v. Bostwick*, 5 Hill, 37, 40 Am. Dec. 310; *Smith v. Jansen*, 8 Johns. 111; *Armstrong v. State*, 7 Blackf. 81.

But in the following decisions the courts refused to disturb the judgments for a failure to follow the common-law form when the rights of the parties were not thereby affected, and the irregularity was formal merely:

The judgment in *Leech v. Pirani*, 5 Ark. 118, being entered for the damages assessed, the court said that, notwithstanding the judgment was not regularly entered up, no apparent injury having resulted to the plaintiff by reason of the informality, it was an error for which the judgment would not be reversed.

The court declared that the irregularity of a judgment entered for the damages assessed was formal merely, and might be amended, and, as amended, affirmed; but that it was substantially correct as it was, and that there was no necessity of changing the form of it. *Collier v. Southern Exp. Co.* 32 Gratt. 718.

And in *Warren v. Gordon*, 10 Wis. 499, it was held that, as the irregularity did not affect the substantial rights of the defendants, the judgment rendered for the amount of damages assessed, with costs, would be affirmed.

A judgment for agreed damages was entered by consent in *Sangster v. Com.* 17 Gratt. 124, but the court stated that, had the parties not agreed thereto, the error, if any, was a mere formality, for which the judgment would not be reversed.

So, in *Gott v. State*, 44 Md. 319, a judgment entered for the sum found due was held to be an informality not sufficient to vitiate the judgment as entered.

And a judgment for the penalty, costs, and damages, while stated to be informal, was held, nevertheless, to be a substantial compliance

the laws of the adopting state. When we adopted the New York statutes we therefore adopted the interpreting decisions of that state also.

It is conceded by everyone that the bond in this case is not such a bond as comes within the express terms of either the statute of Anne or the statute of Wm. III., or of our statute. And this is strictly true. It does not come within the statute of Anne, because it is not a bond for the payment of money with a condition or defeasance to become void upon the payment of a lesser sum. It does not come within the statute of William, because it is not a bond for the breach of any condition other than for the payment of money, or for a penal sum for the nonperformance of any covenant or written agree-

ment. It is a bond for the payment of \$6,000 in instalments of \$50 a month. But it is said that the English courts have held that bonds payable in instalments, and likewise bonds conditioned for the payment of annuities, are within the statutes. It is true, as pointed out in the opinion of Sherwood, J., in this case, that the earlier English cases held that, while such bonds were not within the letter, they were within the equity, of the statute of Anne, while other English cases place such bonds within the statute of William. But this very conflict between the English cases is enough to raise a question as to the correctness of any of those cases. A reading of the statutes does not warrant any such interpretation of either statute, and the fact that those courts

with the statute, in *Adams v. State*, 11 Ark. 466.

In *Doak v. Duncan*, Litt. Sel. Cas. 176, execution was issued for the sum named in the condition of the bond, instead of for the penalty to be discharged by the payment of the conditional sum. The court held that, while the latter was the usual, formal, and correct mode, nevertheless, it was substantially the same, and the distinction was too nice and technical to be fatal.

Judgment for the damages merely was held an irregularity in *Wilson v. Spencer*, 11 Leigh. 271; but, there being but the one breach possible, the court declared that the form of the judgment was not essential for the preservation of the plaintiff's or defendant's rights, since the bond was satisfied by the recovery had, and, therefore, affirmed the judgment.

So, in *Pate v. Spotts*, 6 Munf. 394, where judgment was entered in the same manner, the court stated that, although it should have been for the penalty to be discharged by the sum found due by the jury, yet that this was an irregularity which was not injurious to the defendant, because, being an action for a failure to make a title to a tract of land, the remedy extended to the whole injury, and the action could in no form be repeated; and the court refused to reverse the judgment.

Likewise, in *Bradford v. Curlee*, 41 Miss. 558, in regard to a judgment in the same form, for the damages merely, the court said: "It is true it would have been more technical to render the judgment for the debt mentioned in the bond to be released on payment of the damages assessed by the jury. In such case the effective thing would be the judgment for the damages the plaintiff had sustained. When that amount is paid the judgment in either case would be satisfied, or it would be an effectual bar to any other action on the same cause of action against the defendants; so that the rights of both parties are as fully protected by the judgment in this form as if it had been entered in the technical form."

In *Moore v. Harton*, 1 Port. (Ala.) 15, the court held it to be immaterial whether judgment was rendered for the amount of the penalty to be discharged by the sum assessed, or directly for the last-named amount, they being substantially the same.

And the court says, in *Williams v. Willson*, 1 Vt. 266: "And, whether it is entered as debt 62 L. R. A.

and damages, or as damages alone, does not much affect the rights of the parties otherwise than as they are bound to conform to the requisitions of the law with regard to the form, as well as the amount, of the judgment." And a judgment for the penalty, and for damages in the shape of interest beyond the penalty, without any direction as to what sum execution should issue for, was held unobjectionable, it appearing that an amount equal to the penalty of the bond was due, under a statute giving the court the right to render judgment for the plaintiff in an action on a bond, with conditions annexed upon breach thereof, when there could, in the nature of things, be no future breaches, for the sum actually due according to equity and good conscience.

In a number of instances the irregular judgment has not been reversed, but merely amended and ordered to be entered in proper form.

It was declared that a judgment irregularly entered for the damages, and not the penalty only, went to the form, and not the substance, and could be corrected in the appellate court, with which modification it was therefore affirmed, in *Romero v. Silva*, 1 N. M. 157.

The irregularity was held to be only an informality in *Haaset v. Pryor*, 5 Hayw. (Tenn.) 33, not affecting the merits of the case; and, therefore, the judgment was not annulled, but ordered to be entered in proper form.

The court, in *State use of Heye v. Frank*, 22 Mo. App. 46, was inclined to amend the irregularity in the judgment at the time; but, it being irregular in other respects, it was reversed.

The judgment was for the damages, instead of for the penalty, in *State ex rel. Abrahams v. Cross*, 6 Ind. 387, but this, while informal, was regarded as an irregularity which the court could consider amended, and on that condition the judgment was affirmed.

Although in several instances the amendment was deemed more properly made in the court below.

While admitting that a judgment entered "for his said debt, and also . . . for his damages," was erroneous, the court declared itself reluctant to reverse for such a clerical error, and so suspended judgment until an amendment could be made in the court below. *Hurt v. Allen*, 22 N. J. L. 533.

The judgment in *Suburban Mut. Bldg. & L. Asso. v. Paulus*, 80 Mo. App. 36, was remanded for correction, the court stating that the better

were compelled to say that such bonds came within the equity of the statute shows how hard pressed they were to bring such bonds within the statute. But, for the purposes of this case, let it be conceded that the English courts have so held, and then let the legal tests be applied to see if those cases should be followed in this case. Take, first, annuities. Under the old English practice the grantee of an annuity had three remedies to collect arrears due: First, by an action of annuity; second, by an action of debt; and, third, by an action of covenant. Of these, the old action of annuity has been abolished and entirely superseded by the action of covenant, and the action of debt is now held not to lie during the life of the annuity. So that, for the recovery of ar-

rears of an annuity, during the continuance of the annuity, only the action of covenant remains. Under the action of covenant, the recovery is only for the arrears due, and no more. Under the obsolete action of annuity, the judgment was for the arrears due, and the judgment remained as a security for subsequent breaches. During the space of a year after the judgment, the plaintiff was entitled to take out executions to collect any arrears that fell due during that time, and after the year the plaintiff was entitled to a scire facias for subsequent arrears. Lumley, *Annuities*, p. 392. On the other hand, under the action of covenant, which, as stated, has entirely superseded the action of annuity, the plaintiff "recovers all the arrears which may be due when the action is

practice was to have the correction made in the circuit court.

The judge, in *Webb v. Fish*, 4 N. J. L. 371, stated that the judgment was erroneous in not being entered for the whole penalty, but, were that the only error, he would have been disposed to suspend the judgment until the amendment could be made by the court to which the writ of error was directed.

The irregularity was held to be one to be corrected by motion, in *Beers v. Shannon*, 73 N. Y. 292.

The court was allowed to amend a judgment more than twelve months after its rendition, in *Wall v. Covington*, 83 N. C. 144, which was rendered for the sum of assets found for distribution. Instead of for the penalty of an administrator's bond in an action thereon.

A judgment rendered and satisfied for the damages only was, upon a subsequent breach, allowed to be re-entered for the penalty, and the satisfaction stricken from the record, in *Kiehl v. Com.* 18 W. N. C. 305, 6 Atl. 389, the amount previously paid being deducted, and a receipt therefor placed on record.

It was held in *Goodrich v. Yale*, 97 Mass. 15, that the plaintiff had no right to complain of the irregularity in form of the judgment because the bond in question was conditioned for the abstinence from trespass to certain mill property which had been sold by him before the commencement of the action.

On account of the lack of official proof, according to the rules of the court, of the irregularity in form of the judgment, the court declared itself unable to take notice of an objection to it, in *Durkey v. Hammond*, 2 Mill. Const. 151.

IV. Summary.

The strict common-law form of judgment in an action in debt on a penal bond is for the debt mentioned in the declaration (i. e., the penalty), with nominal damages for its detention and costs, whereupon execution is sued out to collect the debt and costs recovered by the judgment, but indorsed to levy only the damages assessed for the breaches with all reasonable costs and charges. This seems to have been the form in all actions upon penal bonds, with an additional provision in the judgments in those actions upon bonds upon which there could be future breaches, and so within the statute of William, that

the judgment be allowed to stand as security for the future breaches. It has been shown in the introduction that annuity and instalment bonds, by analogy, and the construction of the courts, came to be considered as included within the scope of the statute of William, although that statute at first, and from its language, seems to have been intended to provide for the procedure only in bonds for the performance of covenants and agreements, other than the payment of money.

The English cases and statutes (Introduction) form the basis of the legislation and decisions in this country, with the exception of a few states which, as appears from their decisions, seem to have broken away partially or entirely from the old forms, and to have adopted the practice of a judgment merely for the damages sustained, or the amount really due on account of the breach. *Mutual Ben. Ins. Co. v. Brown*, 80 Mo. App. 459, *supra*. II. b; *Heldtke v. Krause*, 97 Wis. 118, 72 N. W. 351, *supra*. II. c, 1; *Whereatt v. Ellis*, 103 Wis. 348, 79 N. W. 416, *supra*. II. c, 3; *Hall v. White*, 27 Conn. 498, *supra*. II. c, 5; *Allen v. King*, 4 Colo. App. 320, 35 Pac. 1061; *Orendorff v. Utz*, 48 Md. 298, — *supra*. II. c, 9. Florida also has legislation to this effect, but no decisions.

By far the greater number of the states, however, follow substantially the common-law practice, or modifications of it, and in those cases to which it is peculiarly adapted the result is beneficial and desirable, but in those instances where there is no object in entering judgment for the penalty, loyalty to the established form seems unnecessary and unreasonable, and is, at least, at the expense of that simplicity in practice which is the modern tendency.

For example, in all actions upon bonds upon which successive and future breaches may or are liable to happen, a judgment *pro forma* for the penalty, with an award of execution for the amount due, or of damages suffered, the judgment to stand as security out of which damages for future breaches of the bond may be recovered by proceedings in the nature of scire facias, seems a most appropriate and desirable procedure, calculated to save the expense of litigation and prevent a multiplicity of suits. But, on the other hand, where, in the nature of things, the breach complained of is the only one, or the last one that can happen upon the bond, the practice of taking judgment for the penalty with an award of execution therefor, but to be

commenced, but no more. The judgment does not remain as a security for the annuity in future, but a fresh action must be commenced on each subsequent default." Id. p. 402. And the author there says also: "Here there is a disadvantage in comparison with the action of annuity." After thus pointing out the state of the law in England in cases where there is an agreement or covenant to pay an annuity, the same author (p. 399), in speaking of cases where there was a bond conditioned to pay an annuity, calls attention to the case of *Morant v. Gough*. 7 Barn. & C. 206, in which an action of debt was brought against the devisee of the obligor, after the obligor's death, and after the devisee's estate in the land had ceased, and says: "The point decided there was that, as the bond was for the payment of the annuity, and there was no penalty, the devisee was only liable to pay the annuity while his estate in the land continued. If it had been secured by a penalty, and that had been forfeited, either before the devisor's death or during the continuance of the devisee's interest, the latter might have been liable for the whole amount of the penalty, provided the value of his interest in the land was equivalent." The author then adds (pp. 399 *et seq.*): "At present, when an annuity is frequently granted by a bond in a penalty conditioned for the due payment of the annuity, the bond becomes forfeited on the breach of that condition by default of payment, and the obligee may sue in debt for the penalty. Where an action is brought on such a bond, the plaintiff must assign breaches, under the statute 8 & 9 Wm. III. chap. 11, as was holden in *Collins v. Collins*, 2 Burr. 820. And on judgment for the plaintiff on demurrer, or on default or confession, there must be a suggestion of breaches on the roll. In these cases the judgment, by the provision of that statute, remains as a se-

curity for the annuity as far as the penalty of the bond, and farther breaches which may occur, after the satisfaction of those for which the action is first brought, may be recovered thereon, though a scire facias must be sued out, calling upon the defendant to show cause why he should not satisfy these last accrued arrears. So that the proceedings appear very similar to those in the writ of annuity. After the judgment of the court in *Collins v. Collins*, two cases occurred in the court of common pleas where a sort of equitable discretion was exercised, and this statute was not called in aid. In one, *Howel v. Hanforth*, 2 W. Bl. 843, where judgment was entered upon a warrant of attorney given to confess judgment on an annuity bond, and execution was sued out for the several breaches from time to time, without any scire facias, the court directed the judgment to stand as a security for the annuity, and execution to be taken out from time to time, as might be necessary, on application to the court. And, in a subsequent case of a judgment on an annuity bond, the judgment was ordered to stand as a security, with a like liberty to issue execution for the arrears. Hence, it was thought that this statute did not apply to annuity bonds, but after it had been held in *Roles v. Rosewell*, 5 T. R. 538, that the statute was compulsory on the plaintiff, it was determined by the court of King's Bench that the judgment in *Collins v. Collins* was correct, and that on such bonds, after judgment for the plaintiff on demurrer, he must suggest breaches on the roll, and proceed according to the directions of the act; which decision has been recognized in subsequent cases, and the practice has been conformable with it." It is instructive to briefly analyze the English cases referred to by the author for the purpose of seeing the facts in judgment in those cases, and the reasoning employed by the courts in re-

discharged by the payment of the amount really due, seems a cumbersome and unnecessary form, with no reason to support it except that it has long been the practice based upon the fact that the recovery at one time in England was actually the penalty, and when equity, and finally the legislature, afforded relief, the form of the judgment was left unchanged. The tendency, however, to treat a departure from the established form with decided leniency observable in numerous decisions (*supra*, III.), together with a few opinions in which the inconsistency and lack of necessity of a judgment *pro forma* for the penalty under the circumstances above indicated is discussed, perhaps point toward a simpler and more consistent practice in this regard. Another indication along this line is the practice, shown in some of the actions upon official bonds (*supra*, II. c. 10), of a judgment for the penalty, to stand as security when the prosecution is conducted in the name

of the commonwealth, but merely for the damages sustained when brought by the individual aggrieved.

As to the decision in *BURNSIDE V. WAND*, it is certainly justified and logical under the statutes of Missouri and all states where an exception is made as to bonds for the payment of money being included in the class denominated as bonds for the performance of covenants or agreements; but it cannot be denied that the weight of authority generally, where such an exception is not expressly made by statute, allows annuity and instalment bonds to be governed by the same rules as those governing bonds for the performance of covenants or agreements, collateral or otherwise, upon which there can be successive breaches, and no objection can be discovered to the expediency of such a practice where, of course, it is not in derogation of some state statute.

gard to the applicability of the statute of William.

Collins v. Collins, 2 Burr. 820, was an action of debt upon a bond. The amount of the bond is not stated, nor does it appear whether it was a penal bond or a single bond. Upon oyer, the condition of the bond appeared to be, "to pay the plaintiff an annuity of £10 a year during his life; and likewise to maintain him in meat, drink, washing, and lodging in the dwelling house at Crundall End, for and during his life." To the annuity the defendant pleaded a set-off, viz., that there was only £80 due, and that the plaintiff owed the defendant £500. To the maintenance clause, the defendant pleaded that the plaintiff voluntarily left the dwelling house at Crundall End, and continued to absent himself therefrom, and that the defendant was ready and willing to maintain him at said house. The plaintiff demurred to these pleas. The question, therefore, was whether a debt could be set off under the statute of 8 Geo. II. against an annuity, and whether the defendant had been guilty of a breach of the condition of the bond to maintain the plaintiff when he had voluntarily left the house at which he was agreed to be maintained. The discussion of the case took a wide range. It was agreed that under the statute of set-offs, the judgment was required to be entered for the plaintiff for the sum truly and justly due after one debt had been set off against the other, and that the judgment was conclusive as to the rights of the parties: whereas, in suits upon bonds under the statute of William, the judgment was for the penalty of the bond, the execution for the damages then due, and the judgment remained as a security for further breaches. From which it was contended that the right of set-off did not exist in such case, for it would cut off the plaintiff's right to recover for subsequent annuities. Lord Mansfield held that both the statute of George and of William were for the benefit of the defendant; that before the passage of these statutes defendants were compelled to go into a court of equity to obtain the relief that is afforded by those statutes at law. The learned jurist then said: "It is objected, first, that this is not an action brought upon a penalty for nonperformance of an agreement or covenant contained in any indenture, deed, or writing." This is an agreement between the parties, and an agreement in writing; the condition of the bond is an agreement in writing; and people have frequently gone into courts of equity upon conditions of bonds, as being agreements in writing, to have a specific performance of them. It is said that, if the plaintiff should take his judgment upon

this act of Parliament, it would not be a judgment for the penalty, but a judgment only for the sum due, and no more; and that, after the matter has once passed in *rem judicatum*, the plaintiff cannot afterwards recover any more upon this bond, whatever may become due by future nonpayments, for there is no provision 'that the judgment shall stand as a security for future payments,' as there was in the act of 8 & 9 Wm. III. chap. 11, made for the better preventing frivolous and vexatious suits. The judgment is, indeed, by this act of 8 Geo. II. directed to be entered 'for no more than shall appear to be justly and truly due to the plaintiff:' but, as it is clearly within the words and meaning of the act, that the penalty is to remain as a security against future breaches, in this case of a set-off pleaded, as much as it would have done upon the act of 8 & 9 Wm. III. chap. 11, if payment had been agreeably to the directions therein contained. But, as this case has not been before settled, 'that a set-off may be pleaded in such a case as this, where the condition is for the payment of an annuity of growing sum,' leave is given to withdraw the demurrer and plead over.

This is the case, and these are the facts in judgment in the case, which is relied on to support the English doctrine that bonds for the payment of annuities come within the statute of 8 & 9 Wm. III. It will be observed that the question of whether such bonds came within the statute of Wm. III. was not raised in that case at all. What is said there about that statute was wholly *arguendo*. The point in the case was whether a set-off was allowable against arrears due upon an annuity. However, as will be hereinafter pointed out, even if annuity bonds do properly fall within the statute of William, it by no means follows that the bond in question here falls within §§ 468 *et seq.* of our statutes.

The cases of *Howel v. Hanforth*, 2 W. Bl. 843, and *Ogilvie v. Foley*, 2 W. Bl. 1111, were not held to be controlled by the statute of William, and need not, therefore, be considered here. *Roles v. Rosewell*, 5 T. R. 538, was an action of debt for a penalty of £100. It arose in this way: There was a controversy between the plaintiff and the defendant respecting the title to certain chattels, and for the purpose of settling the controversy it was agreed "that B. L. and W. W. should take an inventory and make a valuation of the goods; that the defendant should give his note, payable to the plaintiff, for so much as the goods should be valued at; that the note should remain in the hands of B. L. until the opinion of the counsel could be obtained on a case to be stated between the parties as to their

respective claims, such case to be drawn up by H. Stephens and W. Tinney; that the defendant, on giving such note, should be put into the actual possession of the goods; and that the said opinion should be conclusive on the parties; and each party bound himself to the other in £100 for the abiding by that opinion, and for the performance of the agreement." The defendant got possession of the goods, and gave his note. The arbitrators valued the goods at £73 18s. 11d. The plaintiff's attorney prepared a draft of the case, but the defendant refused to join in it or to settle. The suit was to recover the £100. The defendant made default. The plaintiff, without executing a writ of inquiry, took out execution for the whole penalty, but indorsed on the writ, "Levy £73 18s. 11d., besides costs and poundage." Upon a rule to show cause why the execution should not be set aside, because the plaintiff had not assigned breaches as required by the statute of William, it was argued for the plaintiff that, notwithstanding the statute, the plaintiff was entitled to sue as at common law for the whole penalty. The court of exchequer held that the plaintiff could elect to proceed as at common law, or under the statute of William, and discharged the rule. Upon writ of error to King's Bench, this judgment was reversed, and Lord Kenyon, Ch. J., and Buller, J., were "strongly inclined to think that the statute of William was compulsory, as being made for the benefit of the defendants. They said that the plaintiff in this case had made his election to proceed under the statute, though he had not named the statute formally." It is to be noted that that case did not involve the question of whether a bond conditioned for the payment of an annuity is or is not within the statute of William. On the contrary, the bond involved in that case was a bond conditioned for the performance of an agreement in writing, and, hence, was clearly within the statute of William; and would also fall within the provisions of § 408 of our statutes, because it was a penal bond for the performance of a covenant or written agreement.

Willoughby v. Swinton, 6 East, 550, arose under a rule to show cause why a fieri facias should not be quashed, and the money paid thereon be restored to the defendant. It appeared that the defendant had given the plaintiff a bond in the penal sum of £1,080, conditioned for the payment of £494 4s. 5d., by yearly instalments of £50 each. The condition was that, if default be made in the payment of any of the instalments, the bond should remain in full force. At the time the bond was given, the plaintiff

gave the defendant a memorandum which recited the terms and the giving of the bond, and then stipulated as follows: "Now I do hereby declare that nothing in the said bond contained shall authorize me to proceed upon any default of payment for any sum which shall not have become actually due at the time, nor tend in any manner to accelerate any of the other payments mentioned in said bond or the condition thereof." Under this bond the defendant made payments, but became in arrears on account thereof in the sum of £75. He was arrested in an action of debt for the whole penalty, but held to bail only for £75, the sum due at that time. The defendant pleaded that the bond was procured by covin, but made default at the trial, so that the plaintiff obtained a judgment for £80 0s. 6d., the amount of the instalments due, with interest, which was paid. Thereafter the defendant did not pay another instalment, and the plaintiff sued out a scire facias for £1,080, and also £61 damages, and indorsed to levy £50 and interest, and under this writ £53 6s. were paid. Lord Ellenborough, Ch. J., held that *Collins v. Collins* was decisive of the case, and that there was no difference between a bond to secure an annuity for life and a bond to secure a certain number of annual payments for so many years. Grose, J., was of the same opinion. Lawrence, J., said that, if a bond securing an annuity was within the statute of William, he could not say that a bond payable in instalments was not within the statute. And Le Banc, J., was of substantially the same opinion.

Walcot v. Goulding, 8 T. R. 126, was an action of debt on a bond for £5,000, conditioned to pay an annuity of £250 to the plaintiff during his life. The plaintiff had judgment, and took out execution for £204 10s., without suggesting on the roll any breach of the condition; whereupon the defendant obtained a rule to show cause why the judgment and execution should not be set aside on the ground that the plaintiff ought to have suggested a breach of the bond, under the statute of William. The court said "that it was established by the case of *Collins v. Collins* that a bond conditioned for the payment of an annuity was within the statute 8 & 9 Wm. III., and that it was decided in the cases of *Hardy v. Bern*, 5 T. R. 636, and *Roles v. Rosewell*, after great consideration that in all cases within the provision of the statute 8 & 9 Wm. III. the plaintiff must assign breaches on the record, that statute being compulsory on him." Therefore, the rule was made absolute.

Thus it will be seen that the evolution of the law in England relating to bonds was as

follows: First. Originally, in all cases of penal bonds, whether conditioned for the payment of a lesser sum of money or conditioned to do a collateral thing, if the condition was not strictly performed and obeyed, the penalty became the debt, and the obligee was entitled to recover the whole penalty. Second. This was considered so harsh that courts of equity relieved against the forfeiture, and, without operating directly upon the judgments of the courts of law for the whole penalty, indirectly did the same thing by reaching the parties and the law officers, and required the defendant to pay the whole penalty into court, then gave the plaintiff what was really due, and, if it was a penal bond for the payment of a single smaller sum, returned the balance of the money to the defendant, or, if it was a penal bond to do a collateral thing, required the defendant to pay the amount of damages due up to that time, and stayed the execution as to the balance, and permitted the judgment of the court of law for the whole penalty to remain as a security for further breaches. If further breaches occurred within a year, the plaintiff might issue other executions as of course, but after the year the plaintiff was required to sue out a scire facias. In consequence of this interference by courts of equity with the judgments of courts of law, the famous conflict between Lord Coke and Lord Ellesmere arose, which required the royal edict to settle. Third. These reasons led to the passage, first, of the statute of William, and, ten years later, of the statute of Anne. These statutes were intended to remedy the harshness of the common law in permitting a recovery of the whole penalty if there was the slightest default in the condition of the bond, and to require courts of law to do, in such cases, what courts of equity had theretofore done. Fourth. At first it was held that bonds conditioned for the payment of annuities and bonds payable in instalments were not within the statute of Anne. *Ex parte Groome*, 1 Atk. 118; *Land v. Harris*, 1 Strange, 515. It was not then even supposed that such bonds came within the older statute of William Fifth. Later, it was held that such bonds, while not within the letter, were within the equity, of the statute of Anne, and the defendant was permitted to bring the arrears in court, and be discharged, but there was no judgment for the whole penalty, the judgment to stand as security for further breaches. *Bridges v. Williamson*, 2 Strange, 814. Sixth. Then the case of *Van Sandau v. —*, 1 Barn. & Ald. 214, arose. It was an action of debt on a penal bond for £10,000, conditioned for the payment of £5,250 on September 20, 1820, with interest in the meantime, payable

semi-annually. The obligor did not pay the interest due September 29, 1817. The plaintiff sued for the whole penalty. Lord Ellenborough held that there had been a breach of the bond which entitled the plaintiff to a judgment for the whole penalty, but added that it was another question to what extent the court would feel disposed to relieve the defendant against the consequences of the judgment, and concluded by permitting the plaintiff to proceed, "the judgment to stand as a security." It is not said whether this was by virtue of the statutes, or the old or later English rules, or according to the rule in equity. It seems clear that it cannot be properly classified under any of those rules of law. Seventh. Then the case of *Murray v. Stair*, 2 Barn. & C. 82, was decided. It was an action of debt upon a penal bond for £4,000, conditioned for the payment of £2,000 six months after the death of the earl. It was held that it was not within the statute of William, but was controlled by the statute of Anne, and that, upon payment of the lesser sum, the defendant was entitled to be discharged. Eighth. Then the case of *Collins v. Collins*, 2 Burr. 820, arose. It was an action of debt upon a bond conditioned to pay an annuity, and to maintain the plaintiff in meat, drink, washing, and lodging. There was no question presented for adjudication, except the right to set off a debt the plaintiff owed the defendant against the arrears of annuity the defendant owed the plaintiff. Lord Mansfield, however, held that the condition of the bond was an agreement in writing within the meaning of the statute of William, and that the bond was therefore within that statute, and allowed the set-off. Thus, bonds conditioned for the payment of annuities were first held to be within the statute of William Ninth. *Willoughby v. Swinton*, 6 East, 553, was an action upon a penal bond conditioned to pay a lesser sum in instalments, and it was held that, if annuity bonds were within the statute of William, bonds payable in instalments were also within the statute. Tenth. *Walcot v. Goulding*, 8 T. R. 126, was an action of debt on a bond for £5,000, conditioned to pay an annuity of £250 for life. It was held, upon the authority of *Collins v. Collins*, that such bonds were within the statute of William, and therefore the plaintiff must assign breaches.

But if it be conceded that the English courts finally found a proper classification of annuity bonds, and bonds payable in instalments, under the statute of 8 & 9 Wm. III., still that fact is by no means decisive of the case at bar, nor are those decisions controlling here, for the following reasons:

First, because our statute is borrowed from New York, and not from the English statutes, and the decisions of New York construing the statute were borrowed with the statute, and those rendered since then are persuasive authority; and the New York courts hold that annuity bonds and bonds payable in instalments are not within the statute. *Spaulding v. Millard*, 17 Wend. 331; *Harmon v. Dedrick*, 3 Barb. 192; *Wood v. Wood*, 3 Wend. 454; *Nelson v. Bostwick*, 5 Hill, 37, 40 Am. Dec. 310. The courts of that state further hold that the several breaches are in the nature of distinct causes of action. *Beach v. Burons*, 13 Barb. 305. In *Harmon v. Dedrick*, 3 Barb. 192, the supreme court of New York refer to the English rule laid down in *Willoughby v. Swinton*, 6 East, 550, and hold that no such rule obtains in New York in cases of bonds payable in instalments, and accordingly held that scire facias would not lie to recover after breaches. *Nelson v. Bostwick*, 5 Hill, loc. cit. 40, 40 Am. Dec. 310, was an action on a bond for \$250, conditioned to pay the costs of a certain case, and Bronson, J., discussing the difference between the New York statute and the English statutes, said: "The statute 8 & 9 Wm. III. chap. 11, provided that the plaintiff might assign breaches, and only extended, in terms, to bonds for the performance of covenants. And yet, upon the construction of that statute, it has been settled that the plaintiff must assign breaches, and that he must do so in all cases, except upon bail bond, where the condition is not for the payment of a gross sum of money by the obligor at a specified time. He must even do so where the condition is for the payment of an annuity. 2 Wms' Saund. 187, note 2; *Walcot v. Goulding*, 8 T. R. 126. But with us breaches need not be assigned where the condition is that the obligor will pay a certain sum of money in specified instalments. *Spaulding v. Millard*, 17 Wend. 331. Under the English decisions, this was clearly a case for assigning breaches, and our statute is much broader in its terms than theirs. The words are, the plaintiff shall assign breaches when the action is upon a bond 'for the breach of any condition other than for the payment of money.' 2 Rev. Stat. p. 378, § 5. It extends to every kind of condition, excepting one that the obligor will pay a certain sum of money at a particular time or in specified instalments." In the same case Cowen, J., said: "2 Rev. Stat. 300, 2d ed. § 6, requires breaches to be assigned by the declaration in an action on a bond for the breach of a condition other than for the payment of money; also in an action for any penal sum for the non-performance of any covenant or written

agreement. The bond in question was conditioned to pay money. The award of costs could be for nothing else. The case is therefore out of the words of the statute. In *Mann v. Eckford*, 15 Wend. 502, 514, cited for the plaintiff in error, the action was on a bond or penal sum to secure the payment of money due by the written agreement of another. It came literally within the last clause of the statute. Here the penalty is to secure the payment of money to become due under a future award of costs. This is the same as a sum *in numero*, except that the certainty is to arise by the act of a court. It is none the less certain in legal construction for that is certain which can be made so. It may be admitted that, where the condition is not to pay money in terms, but only to do what may or may not be resolved into an obligation to pay it; *e. g.*, to perform an award, breaches must be assigned. *Allen v. Watson*, 16 Johns. 203, 209; *Welch v. Ireland*, 6 East. 613. The rule must be drawn from the peculiar phraseology of our own statute, however, rather than that of 8 & 9 Wm. III. chap. 11, § 8, whose language is different. There are some decisions under the latter act which certainly cannot be applied to ours, such as that a bond conditioned to pay money by instalments calls for an assignment of breaches. *Willoughby v. Swinton*, 6 East, 550. The case cited by the counsel for the plaintiff in error, *viz.*, *Walcot v. Goulding*, 8 T. R. 126, would probably come within the second clause of our statute, as being of a bond conditioned to pay money due on an independent written agreement. To say, as some of the English cases do, that the statute extends to a condition for performing an agreement implied by the condition itself, would destroy all exception, and require breaches in an action on every common money bond. *Vide*, 1 Wms. Saund. 58, note 1; 1 Selwyn N. P. ed. of 1839, 588. However, if the rule be taken, as it is understood by Sergeant Williams (2 Saund. 187, a note 2), that breaches must be assigned in all cases, except where the condition is to pay a gross sum of money, or where the action is on a bail bond, it can scarcely be said to follow that the present case would not be without the statute." These decisions are emphasized and accentuated by the case of *Wood v. Wood*, 3 Wend. 454, which arose prior to the passage of their statute, in which the cases of *Collins v. Collins*, *Willoughby v. Swinton*, and *Walcot v. Goulding*, are cited and approved, and the English rule followed. It is only necessary to add that our statute was borrowed from New York, and is impressed with the construction of the New York

courts, and the decisions of those courts are and ought to be controlling here.

Since writing the foregoing, my attention has been called to the fact that the statute of 1835, hereinbefore referred to, was not the first statute on the subject of penal bonds that was enacted in this state, but that prior to that, in 1821, there was enacted a law on that subject which was carried unchanged into the revision of 1823, and appears in volume 2, pp. 615, 616, and is as follows:

An Act to Regulate Proceedings on Penal Bonds.

Be it enacted by the general assembly of the state of Missouri, that in all actions brought upon bonds or bills, in which there is a condition or defeasance to be void on payments of a lesser sum at a day certain, if the defendant shall bring into court all the principal, interest, and costs of such action, the money so brought in shall be deemed a free discharge, and the court shall give judgment accordingly, and in all actions brought on such bonds or bills, the plaintiff shall set out the condition in his declaration, and may assign as many breaches as he may think proper, and if judgment be recovered either on verdict, confession, by default or *nil dicit*, such judgment shall be entered for the sum or sums of money really due, according to such condition or defeasance with interest and costs, and execution shall issue thereon accordingly, and for no more.

Sec. 2. Be it further enacted, that in all actions upon deeds or bonds for any penal sum for nonperformance of any conditions, covenants, or agreements in any indenture, deed, or writing contained, the plaintiff may assign as many breaches as he may think fit, and the jury upon the trial of such action, may assess damages for such of the said breaches so to be assigned, as the plaintiff upon the trial of such issues shall prove to have been broken, and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions; and if judgment shall be given for the plaintiff on a demurrer, or by confession, default, or *nil dicit*, the plaintiff upon record may suggest as many breaches of the covenants and agreements as he shall think fit, upon which a jury shall be summoned as in other cases, to inquire into the truth of every one of those breaches, and to assess damages which the plaintiff may have sustained thereby, and in case the defendant after such judgment entered, and before any execution executed, shall pay into the court where the action shall be brought, to the use of the plaintiff or his executors or administrators, such

62 L. R. A.

damages so to be assessed by reason of all or any of the breaches of such covenants or agreements, together with the costs of suit, a stay of execution on the said judgment shall be entered upon record; or if by reason of any execution executed, the plaintiff, or his executors or administrators, shall be fully paid or satisfied, all such damages so to be assessed, together with his costs of suit, and all fees for executing the said execution, the body, lands or goods of the defendant, shall be forthwith discharged from the said execution, which shall likewise be entered upon record, but notwithstanding in each case such judgment shall remain as a further security to answer to the plaintiff and his executors or administrators, such damages as shall or may be sustained for the further breach of any covenant or agreement in the same indenture, deed, or writing contained; upon which the plaintiff may have a *scire facias* upon the said judgment against the defendant, his heirs, terre-tenants, his executors or administrators, suggesting other breaches of the said covenants, conditions, or agreements, and to summon him or them respectively to show cause why execution shall not be had or awarded upon the said judgment, upon which there shall be the like proceedings as was on the action of debt upon the bond or obligation for assessing damages upon the trial of issues joined upon such breaches or inquiry thereof; upon a judgment on a demurrer, or by confession or *nil dicit* in manner aforesaid, of such future damages, costs, and charges as aforesaid, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*; and the defendant, his body, lands, or goods, shall be discharged out of execution as aforesaid. This act shall take effect and be in force from and after the 1st day of August next.

Approved, 27th June, 1821.

It is apparent that § 1 of this act is substantially the same as the statute of Anne, and that § 2 is almost literally the act of William. So that originally we adopted the English statutes, and with them we adopted the decisions of the English courts construing those statutes. Thereafter, the act of 1835 was enacted, and the question is, Was that act evolved out of the brains of our legislators as an original act, founded upon and built up from the act of 1821, or was it borrowed from the New York statutes? The similarity of language employed in the act of 1821 with the statutes of Anne, and especially with the statute of William, clearly shows that the statute of 1821 was borrowed from the English statute, with only such changes as the difference in our

practice and in the composition and character of our courts necessitated. On the other hand, the language, arrangement, and genius of our statute of 1835 is so nearly identical with that of the New York statute of 1829 as to point unerringly to the latter as the model and source of the former. Our statute and the New York statute are so much alike that the conclusion is unavoidable that our statute was borrowed from the New York statute, or else that both came from a common source, and that source was not the statutes of Anne or William. In fact, the likeness between our statute and the New York statute is so great that if any man had claimed that, with the English statutes as a basis, he had written our statute without having seen the New York statute, no one would have believed him, and he would have convicted himself of being a plagiarist. Upon this showing, the impartial legal mind is forced to the conclusion that our statute of 1835 was borrowed from the New York statute of 1829, and, this being true, we took the New York cases, reviewed herein, with it. Therefore, the New York cases enunciate the rule that should obtain in the construction of our statute, and the English cases, construing the essentially different English statutes, are not proper precedents to follow. But, for the sake of argument, let it be assumed that our statute was not borrowed from the New York statute, but was a wholly independent, original production; the question then arises, How should our statute be construed? Under this assumption, the question is a matter of first impression in this state, Which cases ought this court to follow, the English cases, construing the dissimilar English statutes, or the New York cases, construing the exactly similar New York statute? Can there be but one answer to this question? But suppose the mind is still in doubt, there is yet one consideration which ought to settle the question, to wit: Why was the act of 1835 passed? What evils was it intended to remedy? If the act of 1821, borrowed from the English statutes and understood as the English courts construed it, was intended to be the law in this state thereafter, why did the legislature pass the act of 1835? If the English law and the English cases had proved satisfactory from 1821 to 1835, why was the law amended in 1835? It cannot be said that the act of 1835 was intended as a simple continuation of the act of 1821, but dressed in different words. For, as the New York courts have aptly pointed out, there is so much difference between their act of 1829 and the English statutes as to compel the courts of that state to cease following the English cases, and to take a radically different and diametrically opposite view of their statute.

I repeat, if the act of 1821 was intended to be the rule of law in this state, why was the act of 1835 passed? If the English statutes so filled the wants of our people, why did our legislators change the act of 1821? If the English decisions were acceptable to our conditions, why did our legislature change our act of 1821? There must have been a reason for such a change in the law of this state. It must have been because the English decisions were not acceptable to our people. It must have been for the same reason that induced the legislature of New York to enact their statute of 1829. As already pointed out, prior to 1829 the courts of that state followed the English cases relied on in this case. The people then enacted a law of their own, manifestly because they were dissatisfied with the English statutes and the English decisions. Thereafter the New York courts ceased to follow the English cases, and held that the English decisions did not apply to the New York statute.

The conditions that thus operated to change the course of decision in New York are present in this case in Missouri to-day. The only difference is that in New York, prior to 1829, they had only the English decisions, construing the English statutes, as a guide and precedent, while in Missouri, prior to 1835, we had our act of 1821, which was clearly taken from the English statutes, with the English decisions impressed thereon. The difference therefore is not real, and hardly seeming. The same reasons must therefore have operated to cause the repeal of the act of 1821, by the passage of the act of 1835, in Missouri, that operated to cause the passage of the New York statute of 1829, and the consequent abandonment of the English rule and of the English cases. That reason could only have been that our people were not satisfied with the old law and the English decisions, and therefore changed the law by enacting the act of 1835. This being true, the New York cases, construing the similar New York law, are the only cases extant that construe a law like ours, and hence these decisions, even if not adopted by us, ought to be followed here.

Aside from these considerations, the New York decisions correctly construe the New York statute, and therefore apply to our similar statute. Bonds securing the payment of annuities and bonds payable in instalments are not within the letter of our statute, nor are they within the evils intended to be remedied by our statute. Such bonds are conditioned for the payment of money, and therefore they do not fall within the first class of bonds treated of by §

866, Rev. Stat. 1889, for that pertains only to bonds conditioned "other than for the payment of money." Neither do such bonds fall within the second class of bonds treated of by § 866, for that pertains to actions for a "penal sum for the nonperformance of any covenant or written agreement." Such bonds are not penal bonds at all. They have no penalty prescribed for the nonperformance of any covenant or written agreement. The evil sought to be remedied in England, first by courts of equity, and later by statute, was to prevent the recovery of the whole penalty wherever the obligor failed in the slightest particular to comply with his agreement, and to limit the recovery to the damage actually suffered. In bonds payable in instalments there is no penalty; hence, there could be no action to recover any penal sum, and therefore such bonds do not fall within the terms of the statute. And this is true even if the condition of the bond be construed to be a written agreement, as Lord Mansfield held in *Collins v. Collins*. That eminent jurist failed to observe the fact in that case that the suit was not to recover a penal sum, and that the statute of William only covered suits to recover a penal sum for the nonperformance of a covenant or written agreement, and that the evil intended to be remedied by that statute was the recovery of the penalty, and not of the real damages. The original idea of having the judgment upon a bond conditioned to do a collateral thing,—remain as security for further breaches,—was that the bond became merged in the judgment, and therefore the same or any other person who might thereafter be injured by a further breach must proceed on the judgment and not on the bond. This was true as to all such bonds, even official bonds. But the English courts did not adhere to this. For, later, they permitted parties to proceed on the judgment by scire facias, or to bring new actions on the bond, as they elected. There is no more reason for treating bonds payable in instalments as merged in the judgment, when suit is brought and judgment entered for one instalment, than there is to treat leases as merged in the judgment rendered for a month's rent. As hereinbefore pointed out, in England an annuity must now be recovered in an action of covenant, and the judgment does not merge the agreement or covenant, nor does the judgment stand as security for further breaches; and there is therefore no reason for holding that a judgment on a bond securing an agreement to pay an annuity should be treated differently from a judgment on the agreement to pay the annuity itself. It is a suit to recover exactly what its name expresses, an instalment. That is what the obligor agreed to pay at that time, and that is the sole breach in the case. The obligor did not agree that, if any instalment was not paid when due, the whole bond should become due; nor did he agree to pay a penal sum in the event the instalments were not promptly paid. Hence, such bonds do not fall within our statute, nor, for that matter, within the English statutes, except by what I deem a misconstruction of those statutes; nor do they come within the evils intended to be remedied.

It necessarily and logically follows that the statutes of this state relating to penal bonds conditioned other than for the payment of money (§§ 468 *et seq.*, Rev. Stat. 1899) do not apply to bonds payable in instalments; and, therefore, there was no law which commanded, required, or permitted the entry of such a judgment as was entered by a *nunc pro tunc* order in this case. It also follows that the cases of *Rees v. Morgan*, 3 T. R. 349, *Jones v. Hart*, 60 Mo. 358, and *Lexington & St. L. R. Co. v. Mockbee*, 63 Mo. 348, have no application to this case, for the reason that in each of those cases the law prescribed the form and nature of the judgment that should be entered.

For these reasons, I am of opinion that the Circuit Court has no power to enter the *nunc pro tunc* judgment in this case, and therefore its judgment should be reversed. I further agree with the opinion of *Sherwood, J.*, in this case.

All concur.

The opinion of Judge *Sherwood* was as follows:

This case had its origin in the following circumstances now about to be related:

Elizabeth Burnside obtained a divorce from her husband, James Burnside, in the circuit court of St. Louis on June 5, 1894, with an allowance of \$50 a month for alimony and maintenance of herself and children. Thereafter, on March 29, 1895, the court, on plaintiff's motion, ordered the defendant in the divorce case to give bond, with surety, "in the sum of \$6,000 within ten days, conditioned for the payment of the monthly allowance of \$50 a month to plaintiff," and, in default thereof, the decree to be a lien on his real estate. Pursuant to this order, on the 8th day of April, 1895, James Burnside, as principal, and Thomas Wand, the defendant herein, as surety, executed a bond to Elizabeth Burnside, containing the following recitals and conditions: "Now, therefore, be it known that we, the undersigned, James Burnside as principal, and Thomas Wand, as surety,

are held and firmly bound unto the said Elizabeth J. Burnside in the sum of six thousand dollars for the payment of which, well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. The condition of this bond is such, however, that if the said James Burnside shall well and truly pay unto the said Elizabeth J. Burnside the said monthly allowance of fifty dollars a month to plaintiff mentioned in said order of March 29th, 1895, in accordance with the terms and provisions of the above-recited decree of June 5th, 1894, then this bond to be null and void; otherwise to remain in full force and effect." James Burnside failed to pay the \$50 a month, but became in arrears on account thereof as follows: Fifteen dollars of the \$50 due on February 1, 1897, and \$50 a month from March 1, 1897, to September 1, 1897, aggregating \$375. Thereupon, on September 9, 1897, Elizabeth Burnside brought suit on said bond against Thomas Wand, alleging the facts here stated, and assigning as a breach of said bond the failure to make the payments above specified. The prayer of the petition is as follows: "Wherefore plaintiff prays judgment against defendant, Thomas Wand, for \$6,000, the penalty of said bond, and that execution issue for the sum of \$365, with interest, as damages aforesaid, and the costs." James Burnside was not made a party to that suit, nor does it appear from the record before us whatever became of him. That case was tried without a jury, and on the 20th day of April, 1898, the court handed down the following memorandum of its decision: "*E. J. Burnside v. Thomas Wand*. Judgment for plaintiff." Thereupon counsel for Mrs. Burnside gave to the clerk of the court the following memorandum, which the clerk filed with the papers in the case: "In the Circuit Court of the City of St. Louis, April 20th, 1898. *Eliza J. Burnside v. Thomas Wand*. I compute amount due plaintiff at three hundred, eighty-four and fifty-hundredths dollars (\$384.50)." Thereupon the clerk made the following entry in his minute book: "1898, April 20. Judgment for plaintiff for \$6,000, penalty of bond; damages \$384.50." The clerk then entered the following judgment upon the records: "*E. J. Burnside v. Thomas Wand*. Judgment for plaintiff. St. Louis, April 20, 1898. Now, at this day, this cause coming on for hearing, come the parties hereto, by their respective attorneys, and submit said cause to the court upon the pleading and evidence adduced, and the court having heard and duly considered the same, and being fully advised of and concerning the premises, doth find that the plaintiff is entitled to re-

62 L. R. A.

cover of the defendant the sum of six thousand (\$6,000) dollars, the penalty of the bond sued on, with a further judgment of three hundred and eighty-four and fifty one-hundredths (\$384.50) dollars damages. It is therefore considered and adjudged by the court that the plaintiff recover of the defendant the sum of six thousand (\$6,000) dollars, the penalty of the bond sued on, to be satisfied upon the payment of the sum of three hundred and eighty-four and fifty one-hundredths (\$384.50) dollars damages, together with her costs and charges in this behalf expended, and that execution issue therefor." This judgment was set aside and re-entered, in the same terms, on April 29, 1898. The defendant appealed from this judgment to the St. Louis court of appeals, and that court affirmed the judgment of the lower court on the 13th day of December, 1898. The defendant thereupon paid to the plaintiff's attorney the amount of the judgment, with interest, aggregating \$425.45, and on January 3, 1899, the plaintiff acknowledged in open court satisfaction of the judgment, and her attorney filed the following memorandum: "Satisfaction of judgment acknowledged in open court." On the 14th of February, 1899, plaintiff, after notice to defendant, filed a motion in the St. Louis court of appeals to correct the judgment of the circuit court, "so as to make said judgment to stand as security for future breaches, and to provide in terms for execution for damages assessed, in conformity with the provisions of chapter 22, art. 1, of Revised Statutes of Missouri, 1889." The court of appeals struck the motion from the files, and directed the plaintiff to apply to the circuit court for relief. The plaintiff then, on February 27, 1899, filed the following motion in the circuit court, giving the defendant notice thereof: "Now comes the plaintiff, by her attorney and moves the court to correct by *nunc pro tunc* order the informality in entry of judgment in this cause, so that it shall not express the debt to be discharged upon the payment of damages, but shall express the amount of damages awarded, with provision for execution therefor, and a further provision that the judgment for the penalty of the bond, \$6,000, shall stand as security for further breaches of said bond, in conformity with chapter 22, art. 1, of Revised Statutes of Missouri of 1889, and particularly with §§ 869 and 871 of said article." Upon a hearing, the circuit court, on March 22, 1899, sustained the motion, and amended the judgment as requested, *nunc pro tunc*, as of April 29, 1898, and defendant, after saving proper exceptions and taking proper steps, appealed, and this is the matter now before this court for adjudication. It also

appears that on the 8th of December, 1899, on motion of plaintiff, upon notice to defendant, the circuit court set aside the satisfaction entered on January 3, 1899.

1. A *nunc pro tunc* judgment, at a subsequent term, can only be made upon evidence furnished by the papers and files in the cause, or something of record, or in the clerk's minute book, or on the judge's docket. In other words, a *nunc pro tunc* entry can only be employed to correct a clerical mistake or misprision of the clerk. It can never correct a mistake or oversight of the judge, nor be used to correct judicial errors, nor to render a judgment different from that actually rendered, even though the judgment actually rendered was not the judgment the judge intended to render. *Freeman*, Judgm. 3d ed. § 69n; *Ross v. Ross*, 83 Mo. 100; *Exchange Nat. Bank v. Allen*, 68 Mo. 474; *State v. Jeffers*, 64 Mo. 376; *Belkin v. Rhodes*, 76 Mo. 652; *Woolbridge v. Quinn*, 70 Mo. 371; *Gamble v. Daugherty*, 71 Mo. 599; *Missouri, K. & E. R. Co. v. Holschlag*, 144 Mo., *loc cit.* 256, 45 S. W. 1101; *Young v. Young*, 165 Mo. 624, 65 S. W. 1016. Tested by these rules, there is nothing in this record which authorizes or justifies an amendment of the judgment *nunc pro tunc*. The judgment, as entered by the clerk, is strictly in conformity to the prayer of the petition, the memorandum of the decision of the court, the memorandum filed with the clerk by the plaintiff's counsel, and with the entry on the minute book of the clerk. The petition, the memorandum for judgment filed by counsel, the entry by the clerk on the minute book, and the judgment entered of record, all treated the bond as a penal bond for the payment of money, "in which there is a condition of defeasance, by which the same is to become void on the payment of a less sum;" in other words, as such a bond as is contemplated and governed by Rev. Stat. 1889, §§ 862-865, and not as a bond with collateral condition, other than the payment of money, such as is contemplated and governed by §§ 866-875, *Id.* There was no mistake or misprision of the clerk in entering the judgment therefor. He entered exactly the kind of a judgment asked for in her petition, and precisely the kind of a judgment, and in the form, evidently contemplated by the court and the counsel. There is nothing in any paper, pleading, entry, memorandum, minute, or record in the case that gives the faintest color to the present claim that the plaintiff thought, believed, expected, or asked, or that the court intended, that the judgment should be for the penalty of the bond, with an execution for the amount then due, and that the judgment should stand as security for

further breaches, and that the plaintiff should have a right by *scire facias* to have executions for further breaches, as, or if, they occurred. That this is true, and that the plaintiff had no such idea or thought in mind, and that all the subsequent proceedings along those lines are a clear and palpable afterthought, is conclusively shown by the fact that, immediately after collecting the judgment of April 29, 1898, of which she acknowledged satisfaction on January 3, 1899, the plaintiff, on January 7, 1899, started a new suit upon the same bond against the defendant to recover \$50 a month from October 1, 1897, to January 1, 1899, amounting to \$800, and that she kept such suit pending until after the 22d day of March, 1899, when she procured the *nunc pro tunc* judgment here in question, and then she dismissed that suit. It will be noted that this new suit was instituted before the plaintiff applied to the court of appeals for a *nunc pro tunc* judgment on February 14, 1899. The fact that this judgment now entered *nunc pro tunc* was not the judgment asked or expected by the plaintiff, or intended to be entered by the court, is thus conclusively established by the acts of the plaintiff and her counsel. And the institution of such second suit also indubitably proves that at that time counsel for plaintiff either did not know of the provisions of the statute whose aid he now invokes, permitting a judgment to be entered for the full penalty of the bond, with an execution for the damages then due, the judgment to stand as security for further breaches, or damages, if any, or else, knowing thereof, he did not intend a judgment to be entered in this case in conformity therewith, and, in either event, the fact stands out prominently that the judgment actually entered by the clerk was not the result of a clerical mistake or misprision of the clerk, and hence it cannot be amended or corrected or changed at a subsequent term by a *nunc pro tunc* entry such as was done in this case.

2. In the whole proceeding in this case, from its inception to the satisfaction of the judgment, the plaintiff treated the bond as a penal bond,—such a bond as is contemplated by Rev. Stat. 1889, §§ 862-865; that is, a penal bond containing a condition or defeasance that it shall become void upon the payment of a lesser sum. But this bond is in no sense a penal bond, with such a condition or defeasance. It is a bond for the payment of money,—that is, for the payment of \$6,000, in equal payments of \$50 a month. There is no condition or defeasance by or under which the \$6,000, which is nowhere spoken of as a penalty, shall become satisfied by the payment of a les-

ser sum. The bond in question, therefore, is not a penal bond at all, and it is not such a bond as is within the contemplation of Rev. Stat. 1889, §§ 862-865, which sections are in some respects the same as the act of 4 Anne, chap. 16, §§ 12, 13, as will be more fully demonstrated hereafter.

3. Neither is the bond in question such a bond as is contemplated by Rev. Stat. 1889, §§ 866-875, which is in some respects the same as the act of 8 & 9 Wm. III. chap. 11, § 8. The bond contemplated and governed by these sections and this act is a bond with a "collateral condition, other than the payment of money." In other words, it is a bond for the faithful performance of a covenant or agreement other than the payment of money. These sections of the statute have, therefore, no bearing upon the bonds or suits upon bonds like the bond in question.

4. It is contended, however, that under Rev. Stat. 1889, chap. 22, art. 1. and particularly under §§ 869 and 871 thereof, the judgment of April 29, 1898, was a clerical mistake or misprision of the clerk, and that, by virtue of those provisions of the statute, the law required that the judgment should be entered for the penalty of the bond, with execution for the damages then due, the judgment to stand as security for further breaches, and that, this being true, the clerk made a mistake in not entering the only kind of a judgment the law permitted in such a case, and hence that clerical mistake can be cured by a *nunc pro tunc* entry. and *Lexington & St. L. R. Co. v. Mockbee*, 63 Mo. 348, is relied upon as a case on all fours with the case at bar. This is a misapplication of the case cited, and a misconception of the statutory provision quoted. The case of *Lexington & St. L. R. Co. v. Mockbee*, 3 Mo. 348, was a suit to condemn land of defendant for right of way for a railroad. Commissioners to assess the damages to the defendant were appointed, and made a report, which found that the defendant would not be damaged by the taking. The defendant filed exceptions to the report. The court overruled the exceptions, and ordered a judgment for the railroad company as prayed for in the petition. The clerk entered a judgment that the plaintiff take nothing by his action, and that defendant recover costs. It was held that "this was not the judgment required and authorized by the law governing the case. When the objections were overruled and judgment given for the defendant, it should have been a judgment vesting the title in the company." The correction of the judgment by a *nunc pro tunc* order was, therefore, held proper. It is significantly said, however: "All this sufficiently appears

of record, and presented the requisite data to amend by." But there are no data in this case to amend by, and the statutory provisions relied on do not authorize or require such a judgment as was entered by the *nunc pro tunc* order in this case, for Rev. Stat. 1889, §§ 866-875, have no application to bonds of the character of the bond in question here.

5. Rev. Stat. 1889, chap. 22, art. 1, is in some respects, like the acts of 4 Anne and 8 and 9 Wm. III., and in other respects there is a vast difference between the English statutes and ours. Sections 862-865 relate to penal bonds with a condition or defeasance making the bond void upon the payment of a less sum. The defendant is permitted to plead payment of the principal sum and interest due by the condition of the bond, before the commencement of the action, although the payment was not strictly according to such condition. § 863. The defendant is also permitted at any time before judgment rendered to pay to the plaintiff, or bring into court for the plaintiff's use, the principal sum and interest due on such bond, together with costs, "and thereupon such action shall be discontinued." § 864. If neither is done,—that is, if payment of the amount due on the penal bond is not pleaded or proved, or if it is not tendered before judgment, with interest and costs, and if the plaintiff obtains judgment,—"such judgment shall be rendered for the sum really due, according to such condition, with interest and costs, and execution shall issue accordingly." § 865. It will be observed that nothing is here said about a judgment for the penalty of the bond, with an execution for the damages then due, the judgment to remain as security for further breaches. But, on the contrary, the judgment is required to be for the sum really due at the date of the judgment. Now observe the provisions of the statute of 4 Anne, chap. 16, §§ 12, 13, which are as follows:

"Sec. 12. And be it further enacted by the authority aforesaid, that from and after the said first day of Trinity term, where any action of debt shall be brought upon any single bill, or where action of debt or scire facias, shall be brought upon any judgment, if the defendant hath paid the money due upon such bill or judgment, such payment shall and may be pleaded in bar of such action or suit, and where an action of debt is brought upon any bond which hath a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors, or administrators, have, before the action brought, paid to the obligee, his executors or administrators, the principal

and interest due by the defeasance or condition of such bond, though such payment was not made strictly according to the condition or defeasance; yet it shall and may nevertheless be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition or defeasance, and had been so pleaded.

"Sec. 13. And be it further enacted by the authority aforesaid, that if at any time, pending an action upon any such bond with a penalty, the defendant shall bring into the court where the action shall be depending, all the principal money, and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the court shall and may give judgment to discharge every such defendant of and from the same accordingly."

On the other hand, Rev. Stat. 1889, §§ 866-875, relate to bonds with a collateral condition other than the payment of money, and provide that, if the plaintiff recovers, the verdict assessing the damages shall be entered on the record, and that a judgment shall be rendered for the penalty of the bond, or for the penal sum forfeited, and with a further judgment that the plaintiff have execution for the damages so assessed. § 869. The judgment rendered for the penalty of the bond, or for the penal sum forfeited, is required by § 871 to remain as security for further breaches. And, when further breaches occur, the plaintiff is given authority by *scire facias* to suggest further breaches, and like proceedings are then had as were originally taken, and execution awarded for such further damages. § 872.

Now note the provisions of the act of 8 & 9 Wm. III. chap. 11, § 8, which are as follows:

"Sec. 8. And be it further enacted, that in all actions, which from and after the said five and twentieth day of March, one thousand six hundred ninety and seven, shall be commenced or prosecuted in any of His Majesty's courts of record, upon any bond or bonds, or on any penal sum, for non-performance of any covenants or agreements in any indenture, deed, or writing contained, the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit, and the jury, upon trial of such action or actions, shall and may assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned, as the plaintiff upon the

trial of the issues shall prove to have been broken, and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions; and if judgment shall be given for the plaintiff on a demurrer, or by confession, or *nihil dicit*, the plaintiff upon the roll may suggest as many breaches of the covenants and agreements as he shall think fit; upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justices or justice of assize, or *nisi prius*, of that county, to inquire of the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby; in which writ it shall be commanded to the said justices or justice of assize, or *nisi prius*, that he or they shall make a return thereof to the court from whence the same shall issue, at the time in such writ mentioned; and in case the defendant or defendants, after such judgment entered, and before any execution executed, shall pay unto the court where the action shall be brought, to the use of the plaintiff or plaintiffs, or his or their executors or administrators, such damages so to be assessed by reason of all or any of the breaches of such covenants, together with the costs of suit, a stay of execution of the said judgment shall be entered upon record; or if by reason of any execution executed, the plaintiff or plaintiffs or his or their executors or administrators, shall be fully paid or satisfied, all such damages so to be assessed, together with his or their costs of suit, and all reasonable charges and expenses for executing the said execution, the body, lands, or goods of the defendant, shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record; but notwithstanding in each case such judgment shall remain, continue, and be, as a further security to answer of the plaintiff or plaintiffs, and his or their executors or administrators, such damages as shall or may be sustained for further breach of any covenant or covenants in the same indenture, deed, or writing contained, upon which the plaintiff or plaintiffs may have a *scire facias* upon the said judgment against the defendant or against his heir, terre-tenants, or his executors or administrators, suggesting other breaches, of the said covenants or agreements, and to summon him or them respectively to show cause why execution shall not be had or awarded upon the said judgment, upon which there shall be the like proceeding as was in the action of debt upon the said bond or obligation, for assessing of damages upon trial of issues joined upon such breaches, or inquiry thereof upon a writ to be awarded in

manner as aforesaid; and that upon payment or satisfaction in manner as aforesaid, of such future damages, costs, and charges, as aforesaid, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*, and the defendant, his body, lands, or goods, shall be discharged out of execution, as aforesaid."

The act of 8 & 9 Wm. III. was passed in 1697, and the act of 4 Anne was passed in 1707. For a proper understanding and appreciation of the force and reason of these respective English statutes, a short retrospect of the law in England prior to their enactment is both necessary and pertinent. The old English law is dramatically shown by Shakespeare, when he pictures Shylock demanding his pound of flesh. That is, in England, before the adoption of the statutes quoted, in cases upon a penal bond, or a bond providing for a certain penalty in case a certain debt or sum of money was not paid by a certain date, the plaintiff was entitled to recover the whole penalty, and not simply the debt or sum of money due. The recovery of a larger amount than the debt or sum of money due was authorized as a penalty for nonpayment of the debt or money promptly when due. Hence Shylock's demand for the penalty, and not for the debt or money due. The practice obtained in England, in every sort of action, to permit the defendant to bring into court the principal, with interest and costs, demanded, and thereupon to obtain a stay of further proceedings against him. Tidd, Pr. *541. The learned author just cited says (p. 542): "In debt on bond, conditioned for the payment of a less sum, it was usual for the courts, even before the statute 4 Anne, chap. 16, § 13, to relieve the defendant against the penalty of the bond, on payment of the principal, interest, and costs; but then the whole penalty must be brought into court, and, when the plaintiff was satisfied, the defendant might have taken what remained." The author then points out that, under the statute of Anne, the defendant must bring in the whole principal and interest due on the bond, with the costs, and, upon his doing so, "the court shall and may give judgment to discharge every such defendant of and from the same accordingly." The difference between the practice of the courts and the rule of action prescribed by this statute is, the courts required the defendant to bring into court the full amount of the penalty, with interest and costs, paid the plaintiff what was really due him, and returned the balance, if any, of the fund so paid into court to the defendant. Whereas, under the statute of Anne, the defendant was only required to pay into court the sum actually

due on the bond (not the whole penalty), with interest and costs, and then, if the plaintiff did not accept such payment into court (like our tender by payment into court), and prosecuted his case further in hopes of recovering a larger sum than the amount tendered, he did so at his peril. If he accepted the tender, the defendant was entitled to be discharged without the payment or the depositing in court of the whole penalty. Our statute (Rev. Stat. 1889, § 864), like the statute of Anne, permits the defendant to tender or pay into court the amount really due on the bond (not the penalty), with interest and costs, and thereupon directs that the action shall be discontinued. Neither the statute of Anne nor our statute contemplates that in suits on penal bonds for the payment of money,—that is, bonds "in which there is a condition or defeasance by which the same is to become void on the payment of a less sum,"—any judgment shall ever be rendered for any more than the sum really due on the bond. Neither statute gives any authority to the court in suits upon such bonds to enter a judgment for the penalty of the bond, award an execution for the amount really due, and have the judgment for the penalty remain as security for further payment. But, on the contrary, the English statute expressly declares that, upon the defendant bringing in the sum really due, and with interest and costs, he shall be discharged; and our statute provides that, upon the payment into court of the sum really due, with interest and costs, "thereupon such action shall be discontinued." § 864. In addition, instead of our statute allowing a judgment for the whole penalty, and an execution for the sum really due, the judgment to stand as further security, it is expressly provided by § 865, Rev. Stat. 1889: "If judgment be rendered on any such bond, such judgment shall be rendered for the sum really due, according to such condition, with interest and costs, and execution shall issue thereon accordingly." The statute of Anne abolished and superseded the practice of the courts requiring the whole penalty, with interest and costs, to be paid into court, the plaintiff to be allowed what was really due him, and the balance to be returned to the defendant, and in lieu thereof permitted the defendant to pay into court the amount really due, according to the condition of the bond, with interest and costs, and thereupon to be discharged. And our statute is practically the same. It is necessary to say, however, that our statute does not include all that is embraced in the statute of Anne, in this: The statute of Anne, like our statute, covers bonds for a penalty, with a con-

dition or defeasance by which they shall become void upon the payment of a lesser sum. But the statute of Anne also covers actions for debt brought upon any single bill, or upon any judgment, in which case the defendant may discharge himself by paying into court the full amount of the debt, bond, or judgment, with interest and costs. Whereas our statute contains no such provision. In fact, such bonds are not treated by our courts as penal bonds, nor as falling within the same class as penal bonds, but they are treated like any other agreement to pay money, where the plaintiff is only entitled to recover what he can prove was actually due at the time the suit was brought. In other words, such a bond is properly a *simplex obligatio*, whereas a bond for the payment of money upon a condition is denominated a "double" or "conditional" bond. 4 Am. & Eng. Enc. Law, 2d ed. pp. 620, 621, notes. Thus it will be seen that neither our statute nor the statute of Anne authorizes a judgment for the penalty of a penal bond for the payment of money, with a defeasance that it shall become void upon the payment of a lesser sum, with an award of an execution for the amount then due, the judgment to stand as security for further breaches, etc.; but that it is only in cases of penal bonds, other than for the payment of money, with a collateral condition that the judgment is entered for the penalty, with an execution for the damages then due, the judgment to stand as security for further breaches; and that our statute in this regard is like the statute of 8 and 9 Wm. III. It will be noted that the statute of 8 & 9 Wm. III. was in existence in England for ten years before the statute of Anne was passed, but it was never thought, during that time or afterwards, that it had any application to penal bonds for the payment of money, with a condition or defeasance. It is too plain, therefore, to admit of argument or serious discussion, that our statute does not give any authority for entering a judgment in the case at bar for the penalty of the bond, with an execution for the sum really due, the judgment to stand as security for further breaches. No such judgment was asked or contemplated by court or counsel when the suit was brought, or at any stage of its progress through the court, nor when the judgment was rendered, or when the satisfaction was entered; and no such judgment is permitted by our statutes or by any English statute. This being so, it is not true that the circuit court has any power to enter such a judgment by a *nunc pro tunc* order, on the theory that the statute provided that such should be the form and character of the judgment, and that it was, 62 L. R. A.

therefore, a mere mistake or misprision of the clerk not to enter such a judgment. No such judgment is permissible under our statute, and, therefore, no such judgment could legally be entered by the court in the first instance, and, *a fortiori*, not by a *nunc pro tunc* entry.

The plaintiff admits that the bond in question in this case is a bond for the payment of money, and not a penal bond for the payment of a penalty with a condition or defeasance that it shall become void upon the payment of a lesser sum, and not a bond, other than for the payment of money, with a collateral condition. In other words, the plaintiff admits that this bond is not such a bond as is defined or provided for by our statute. But the plaintiff contends that this is a bond for the payment of money in instalments, or like a bond for the payment of an annuity, and that, therefore, upon failure to pay any instalment when due, the whole bond became due, and that she was entitled to a judgment for the whole amount of the bond, with an execution for the instalments then due, the judgment to remain as security for the future instalments. In support of this contention the plaintiff relies upon the practice of the English courts. Tidd, Pr. *543, says: "It was formerly holden that this statute [he refers to the statute of Anne] did not extend to an action of debt on bond conditioned for the payment of an annuity or of money by instalments. But it is now settled, upon the equity of the statute, that in such an action, when the defendant is solvent, the courts will stay the proceedings, on payment of the arrears and costs, and giving judgment as a security for future payments, with a stay of execution till they become due. . . . And if an instalment of an annuity secured by bond be not paid on the day, the bond is forfeited, and the penalty is the debt in law." In other words, in the earlier English cases construing the statute of Anne (*Ex parte Groome*, 1 Atk. 118; *Land v. Harris*, 1 Strange, 515), such a bond was held not to be within the words or the meaning of the contemplation of the statute of Anne, while in the later English cases such bonds, while held not to be within the letter of the statute, were said to be within the equity of the statute,—whatever that may mean. An analysis of the cases cited by the author in support of the text, and the course of procedure adopted in those cases, is interesting and pertinent. Thus, in *Bridges v. Williamson*, 2 Strange, 814, the condition of the bond was to pay £40, by £5 per annum, and the defendant had leave to bring the arrears of £5 per annum into court, under the statute of Anne. But it will be observed that there was no

judgment for the whole amount of the bond, nor was the judgment ordered to stand as further security, etc. The judgment was for the sum then actually due. *Masfen v. Touchet*, 2 W. Bl. 706, was an action of debt on a bond conditioned to pay £ 600 and interest in three years, in instalments of £15 half-yearly, and £615 at the end of the term, which had not arrived when the suit was brought. The obligor failed to pay the interest when due, and the obligee brought suit for the whole amount of the bond. The obligor moved to stay proceedings on payment of the interest due, but the court ordered judgment entered for the whole amount, with stay of execution on payment of the interest due. It will be observed that neither the statute of Anne, nor that of 8 and 9 Wm. III., was referred to, nor relied on as authority for such a judgment; but that the proceeding was one of pure judicial invention, and was unlike even the practice that obtained before the passage of those acts, because the whole amount was not required to be paid into court at once, the plaintiff to be satisfied once for all, and the balance, if any (in such cases there would be no balance), returned to the defendant, as was the old practice in cases on penal bonds. *Rogers v. Stanford*, Barnes, N. C. 288, was an action for rent on covenant broken. Under a rule of court, the defendant paid the rent into court. Nothing further was done during the life of the plaintiff. After his death his executor moved for leave to take the money out of court for the rent that had accrued up to the testator's death, with the accrued costs. The defendant did not object to the money for the rent being taken out of court, but did object to the costs being taxed against him. It was shown that, if the executor was not allowed to do this, he could bring another suit for the rent that accrued between the institution of this suit and the testator's death, and in such other suit he would recover costs. Thereupon the defendant withdrew his objection, and judgment was rendered by consent for the executor that the money in court be applied to the rent that was due up to the time of the death, with costs, and that no action should thereafter be brought by the executor for the same cause of action for which the former action was brought. It will be noted that neither the statute of Anne, nor of 8 & 9 Wm. III., nor the old English practice that obtained before the passage of those statutes, nor the rule of procedure adopted in *Masfen v. Touchet*, 2 W. Bl. 706, of entering a judgment for the whole amount, issuing an execution for the rent then due, and letting the judgment stand as a security for future instalments of rent, was cited. L. R. A.

served, referred to, or followed; but that a new procedure was adopted, by consent, of entering judgment only for the amount that was really due at the death of the testator.

Van Sandau v. —, 1 Barn. & Ald. 214, was a suit on a penal bond for £10,000 conditioned for the payment of £5,250 on the 29th of September, 1820, with interest in the meantime payable half-yearly. The obligor did not pay the interest due on September 29, 1817. He had left bills of exchange with his agent to have discounted and applied to the payment of the interest, and had left London two days before the interest fell due, and did not return until the end of October. His agent failed to pay the interest. The obligee sued for the penalty of the bond. The obligor applied to King's Bench for a rule to stay proceedings on the payment of the interest due and costs. Lord Ellenborough, Ch. J., said: "The defendant in this case has been guilty of a slip which amounts to a breach of the condition of the bond; he has thereby given to the plaintiff the advantage of obtaining a judgment for the whole penalty. To what extent the court may feel disposed to relieve the defendant against the consequences of such a judgment is another question; but we are of opinion, at present, that the plaintiff is entitled to proceed in this action, and that the judgment must stand as a security. Rule absolute." This decision was rendered in 1817, and the statute of Anne was passed in 1705. That statute was not noticed by the court or counsel, but counsel for the plaintiff cited 8 & 9 Wm. III., and argued that, under it, the defendant was entitled to pay the interest into court, and that the judgment must stand as security, etc. And it is plain that the court fell into the error of applying that statute to the case, and it is equally plain that that statute, which related only to bonds other than for the payment of money, with a collateral condition, had no possible application to the bond in suit in that case, because it was a penal bond with a condition or defeasance making it void upon the payment of a lesser sum, which was directly such a bond as was contemplated, provided for, and governed by the statute of Anne, and not by that of 8 & 9 Wm. III., and the defendant was clearly entitled, under the statute of Anne, to be discharged upon the payment of the lesser sum, with interest and costs, and the court erred in holding that a judgment could be recovered for the whole penalty, the judgment to stand as security, etc.

Murray v. Stair, 2 Barn. & C. 82, decided in 1823, was a suit on a penal bond for £4,000, conditioned to become void upon the

payment of £2,000 within six months after the death of the earl of Stair. Default was made, and suit brought for the full penalty. The court held that it was a post-obit bond; that it was not within the statute of 8 & 9 Wm. III., but was controlled by the statute of Anne, and that the defendant was entitled to be discharged upon tendering or paying into court the money due (the lesser sum), with interest and costs, and that the plaintiff was not entitled to recover the full penalty of the bond, because he was cut off by the statute of Anne from enforcing a claim for the whole penalty. This case practically overruled the *Van Sandau Case*, decided by Lord Ellenborough, and is undoubtedly the correct construction to place upon the statutes of Anne and of William, and supports and justifies the criticism herein made of the decision in the *Van Sandau Case*. Therefore, notwithstanding loose and unguarded statements of text writers and of some courts, that bonds securing the payment of annuities, or bonds payable in instalments, fall within the statute of 8 & 9 Wm. III., and the equally illogical statements of other courts that such bonds do not fall within the statute of William, but do come within the statute of Anne, and the likewise incomprehensible statement of some text writers that, while such bonds do not come within the letter of either of those statutes, still they do come within the equity of the statute of Anne,—whatever may be meant by that statement,—it is perfectly manifest to the analytical and logical mind that such bonds do not come within either of those statutes (and do not come within our statute), for the following reasons: First, they do not come within the statute of William, because that statute applies only to bonds, other than for the payment of money with a collateral condition, and such bonds are for the payment of money, and not for the performance of a collateral condition. Second, such bonds do not come within the statute of Anne, because that statute applies only to penal bonds with a condition or defeasance making the bond void upon the payment of a lesser sum, and such bonds are not of that kind or nature at all, but call for the payment of a sum certain in instalments. Therefore such bonds are not regulated by statute at all. This being true, there was no law which required that the judgment should be for the penalty, with execution for the damages then due, the judgment to stand as security, etc.; and hence, there was no mistake or misprision of the clerk in not so entering the judgment, which the court had power to correct by a *nunc pro tunc* entry or for manifest irregularity.

62 L. R. A.

The practice of the earlier English cases of entering a judgment for the penalty, with execution to issue for the damages then due, the judgment to stand as security, etc., that obtained before the passage of the statutes of William and Anne, never obtained in Missouri, for the reason that it was abrogated by those statutes in England, and such a practice is not within the letter or spirit of our statute relating to penal bonds for the payment of money. It is easy to understand why the English courts construe such bonds to be governed by the old English practice, before the passage of the statutes of William and Anne, and why those courts, having invented that old rule of having the judgment entered for the full penalty, with execution for the damages due, the judgment to stand as security, should have disagreed as to whether bonds securing annuities or payable in instalments came within the one or the other of those statutes. Such judgments were creations of the court, designed and fitted to relieve against the rigors of the old law that a breach of a bond entitled the obligee to his "pound of flesh." But we have never had any such harsh rule, and therefore our courts have never been put to the necessity to invent such protective remedies. Our law is opposed to forfeitures wherever it is possible. It has ever been considered unconscionable to demand the full penalty where a lesser sum is only really due. Hence, it has ever been the law in our state that, in suits on penal bonds, the obligor can discharge himself by paying what is really due, with interest and costs, and thereupon the cause is discontinued. There is no more reason for entering a judgment for the whole amount in a suit on a bond securing an annuity or payable in instalments, where default occurs in the payment of one or more instalments, than there is for entering judgment for the full amount of rent upon a lease for years when default occurs in the payment of a month's rent. With us, the failure to pay an instalment does not forfeit the bond, and thereby make the penalty the debt in law, as is the theory upon which some of the English courts and some of the American courts have attempted to justify their judgments for the whole penalty in cases upon bonds securing the payment of an annuity or payable in instalments.

The premises considered, it follows that the circuit court erred in entering the *nunc pro tunc* order in this case, and, likewise, in setting aside the satisfaction of the judgment, and its judgment is therefore reversed, but the cause will not, for reasons already given, be remanded.

All concur.

William F. CHANDLER, *Respt.*,
v.
KANSAS CITY, MISSOURI, GAS COM-
PANY, *Appt.*

(174 Mo. 321.)

A gas company giving strangers permission to take cinders from the end of its dump, which is reached by a track laid over the cinders, does not owe its employees the duty of anticipating that the licensees may take them from beside the track, so as to undermine it and make it unsafe for use, and of taking precautions against such conduct.

(April 1, 1903.)

A PPEAL by defendant from a judgment of the Circuit Court for Jackson County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Statement by **Valliant, J.:**

Action for damages for personal injuries sustained by plaintiff while in the service of defendant, and which plaintiff alleges were the result of defendant's negligence. Defendant is a manufacturer of illuminating gas, having several factories in Kansas City, near the intersection of Front and Harrison streets; one of which is on the south side of Front street, and another one on the north side. There is an ash pit in the basement of the latter, into which cinders and ashes are deposited, and thence removed in a car up an incline to a point about 35 feet east of the factory, from which point the car is pushed by hand down an incline to a track along a level on which it is further pushed by hand eastward 80 or 100 feet, where the ashes and cinders are dumped, and the car is then returned to the ash pit for another load. The business was so extensive that the ash pit had to be cleaned out three times a day, and 5 car loads, containing a cubic yard each, were taken out at each cleaning. The cinders were being used by the defendant to raise the surface of the ground in front of the factory. The track along which the car was pushed was made of iron rails laid on longitudinal sills elevated 4 to 6 feet above the natural surface of the ground, but at the time of this accident the process of filling had progressed so far that the space under the track and on both sides to a considerable distance

north and south had been filled with cinders and leveled. The process of filling was being extended eastward, and, when the ground at the end of the track was filled and leveled north and south as far as desired, the track would be extended further east to continue the process. The plan of the defendant was to use the cinders from this factory for this filling purpose. But the factory south of Front street produced cinders in considerable quantity also, which were not so convenient to dispose of, and those cinders the defendant sold to concerns in the vicinity, who hauled them away in wagons, and used them for filling up low grounds of their own. It sometimes occurred that there were not enough cinders output from this south factory to meet the demand, and when that was the case the defendant allowed the wagons to take cinders from the north side. To do this the usual course was for the wagons to go to the east end of the track above described, and take the cinders from the dump. Among the concerns hauling cinders from these gas works was a lumber company, whose driver was named Knight. He had been hauling there a considerable time, usually getting his loads from the south factory, but also, when there were no cinders there, getting them from this dump. He was so engaged on December 27, 1899. He had hauled one load from the dump in the afternoon of that day, and returned about 5 o'clock for another. He loaded his wagon at the dump, but he experienced some difficulty in hauling it from that point, and thereupon he threw out the load he had taken, and drove his empty wagon west along the north side of the track about 60 feet from the dump, and there stopped and filled his wagon with cinders which he dug out from the side and under the track, making a hole or pit under the track about 4 feet deep and 6 feet long. It was about half past 5 o'clock when he did this, and it was just about dark. No one saw him do it. He drove away in the dark, leaving the hole as he had dug it. Plaintiff was in the service of the defendant as a common laborer. Cleaning out the ash pit and pushing and dumping that cinder car were not his regular duties, but he was frequently called on to do it, and was familiar with the work. He had made several trips with the car on the day in question, when he was ordered to another part of the works on some duty, and was to return to the cinder pit at 6 o'clock to clean it out. He did so, and, passing along the south side, pushed a car of cinders out to the end of the track, and dumped it, then returning, walking in the track, pushing the car, he fell into the hole which Knight, the driver of the lumber company, had recently

NOTE.—As to liability of railroad company for accidents caused by wrongful acts of strangers, whether causing injuries to servants or others, see also, in this series, *note to Fredericks v. Northern C. R. Co.* 22 L. R. A. 307, and *East Tennessee, V. & G. R. Co. v. Kane*, 22 L. R. A. 315.
62 L. R. A.

made as above mentioned, and received severe injuries. Knight, as a witness for plaintiff, testified that the orders from the defendant's man to him were to haul cinders from the south side, but when there were no cinders there, for accommodation, he could go on the north side, and get them, and he did so, and as did also other haulers, all of whom usually went to the end of the dump for their loads. The witness, in undertaking to tell what orders he had from the defendant's superintendent as to where he could take cinders from, used this expression: "We could get them where we pleased, and all we had to do was to come to the office and pay for them." But on the further examination he said that no one pointed out to him where he was to get the cinders, except that he was told he could go over to the north side and get them.

Q. But you went over there, and took them from the end of the dump, for several days?

A. Yes, sir.

Q. And you saw others taking them from the end of the dump?

A. Yes, sir.

Q. That was the place where it would do no injury to the track, was it not?

A. Yes, sir.

Q. On this occasion you had a team of young mules that did not work very well, or, at least, got stuck with a load in the hole at the end of the dump, and you then unloaded, and drove up, and made this excavation under the track?

A. Yes, sir.

Q. Without any authorization from anybody connected with the gas company?

A. Yes, sir.

And on further examination by plaintiff's attorney:

Q. And he told you that, when the cinders gave out at the south dump, to go over to the north dump, where the cinder track was, and get them wherever you pleased?

A. No, sir; he did not.

Q. You disobeyed his instructions?

A. He did not tell me I could get them wherever I pleased. He told me I could go around there and get my load.

The evidence showed that the ground along this track which had been raised by the deposit of cinders was leveled off, and used for storing gas pipe by defendant. The evidence for the defendant was to the effect that the men hauling cinders were directed to get them from the south side, but 62 L. R. A.

when there were no cinders there they were told that they might go to the end of the dump on the north side and get them, and the defendant never knew that any cinders were taken from the north side except from the end of the dump. Defendant knew nothing of this hole that Knight dug in the track until after the accident, which happened about an hour after the hole was dug. It was after dark, and no one in the employ of defendant had occasion to go out there, except the man who pushed the cinder car. At the close of the plaintiff's evidence the defendant requested an instruction to the effect that the plaintiff was not entitled to recover, which the court refused, and defendant excepted. The case was given to the jury under an instruction that declared the defendant liable if the defendant authorized Knight and others to take cinders from the vicinity of the cinder track, and in doing so "the defendant knew, or as a reasonably careful and prudent person might have known, that in doing so said persons would be liable to excavate cinders near or under said cinder track," etc. And at the request of the defendant the court instructed the jury that there was no evidence that defendant, or any of its agents, "knew, or by the exercise of ordinary care might have discovered, before the plaintiff was injured," that the excavation had been made. There was a verdict and judgment for plaintiff for \$7,500, from which defendant appeals.

Messrs. Gage, Ladd, & Small, for appellant:

A master is not bound absolutely to furnish a safe place for his servant to work, but only to exercise reasonable care to do so. He is, therefore, not an insurer of his servant against defects in the place where he works, nor liable as such, but is only liable, it being in safe condition in the first place, for negligently permitting it to become defective, or negligently failing to repair it.

Krampe v. St. Louis Brewing Co. 59 Mo. App. 277; *Devlin v. Wabash, St. L. & P. R. Co.* 87 Mo. 545; *Higgins v. Missouri P. R. Co.* 43 Mo. App. 547; *Guttridge v. Missouri P. R. Co.* 105 Mo. 529, 16 S. W. 943; *Siela v. Hannibal & St. J. R. Co.* 82 Mo. 430; *Covey v. Hannibal & St. J. R. Co.* 86 Mo. 635; *O'Donnell v. Baum*, 38 Mo. App. 245; *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149; *Brown v. Hershey Land & Lumber Co.* 65 Mo. App. 162; *Marshall v. Kansas City Hay Press Co.* 69 Mo. App. 256; *Friel v. Citizens' R. Co.* 115 Mo. 503, 22 S. W. 498.

There was no evidence of negligence on

defendant's part, and no case to go to the jury.

Burnes v. Kansas City, Ft. S. & M. R. Co. 129 Mo. 41, 31 S. W. 347; *Goodrich v. Kansas City, C. & S. R. Co.* 152 Mo. 223. 53 S. W. 917; *Atchison, T. & S. F. R. Co. v. Swarts*, 58 Kan. 235, 48 Pac. 954; *Raymond v. Keseberg*, 91 Wis. 191, 64 N. W. 861; *Frassi v. McDonald*, 122 Cal. 400, 55 Pac. 139; *Clapp v. LaGrill*, 103 Tenn. 164, 52 S. W. 134; *Clough v. Hoffman*, 132 Pa. 626, 19 Atl. 299; *Harrison v. Collins*, 86 Pa. 153, 27 Am. Rep. 699.

Every person has the right to presume that every other person will perform his duty.

Moerberly v. Kansas City, St. J. & C. B. R. Co. 17 Mo. App. 518; *O'Connor v. Missouri P. R. Co.* 94 Mo. 150, 7 S. W. 106; *Jennings v. St. Louis, I. M. & S. R. Co.* 112 Mo. 268, 20 S. W. 490; *Kenney v. Hannibal & St. J. R. Co.* 105 Mo. 270, 15 S. W. 983, 16 S. W. 837.

The right to get the cinders was simply a license to go upon the gas company's land, and authorized Knight to get them at the usual place, which was at the end of the dump under the trestle. There was no necessity for undermining the track; consequently, he was not authorized to do so.

Harrison v. Collins, 86 Pa. 153, 27 Am. Rep. 699; 13 Am. & Eng. Enc. Law, p. 539; *Ancaster v. Milling*, 2 Dowl. & R. 714.

Negligence consists in the failure to guard against what will likely or probably happen in the usual course of events, under the circumstances, and not what is liable to happen, or may possibly happen, as declared by this instruction.

Fuchs v. St. Louis, 167 Mo. 620, 57 L. R. A. 136, 67 S. W. 610; *Beasley v. Linehan Transfer Co.* 148 Mo. 414, 50 S. W. 87; *Stone v. Boston & A. R. Co.* 171 Mass. 536, 41 L. R. A. 794, 51 N. E. 1.

Messrs. Scarritt, Griffith, & Jones, for respondent:

The employer should furnish and maintain a reasonably safe place for his servant while at work.

20 Am. & Eng. Enc. Law, 2d ed. p. 55; *Southern P. Co. v. Lafferty*, 6 C. C. A. 474, 15 U. S. App. 193, 57 Fed. 539; *Benjamin v. Metropolitan Street R. Co.* 133 Mo. 284, 34 S. W. 590; *Golden v. Clinton*, 54 Mo. App. 100; *Smith v. St. Joseph*, 42 Mo. App. 392; *Birmingham v. McCary*, 84 Ala. 469, 4 So. 630; *Stephens v. Macon*, 83 Mo. 345; *District of Columbia v. Woodbury*, 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990; *Hoyer v. North Tonawanda*, 79 Hun, 39, 29 N. Y. Supp. 650; *Musick v. Dold Packing Co.* 58 Mo. App. 322; *Bartley v. Trorlicht*, 49 Mo. App. 231.

The breach of a duty imposed by law up-
62 L. R. A.

on a licensor is actionable though the breach is committed by a mere licensee.

McCoy v. Kansas City, St. J. & C. B. R. Co. 36 Mo. App. 445; *Price v. Barnard*, 65 Mo. App. 649; *Kansas City, Ft. S. & G. R. Co. v. Fwing*, 23 Kan. 273; *Macon & A. R. Co. v. Mayes*, 49 Ga. 355, 15 Am. Rep. 678; *Sturges v. Society for Promotion of Theological Education*, 130 Mass. 414, 39 Am. Rep. 403; *Covington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 55 N. E. 618; *St. Paul v. Seitz*, 3 Minn. 297, 74 Am. Dec. 753, Gil. 205.

The chance or possibility of licensees taking cinders from or near the path, and thereby making it dangerous for the employee in passing, is sufficiently great and proximate for such a hazard to be guarded against by a reasonably prudent person under obligation to maintain the premises in a safe condition.

Beasley v. Linehan Transfer Co. 148 Mo. 420, 50 S. W. 87; *Clifford v. Denver, S. P. & P. R. Co.* 9 Colo. 333, 12 Pac. 219; *Stollenberg v. Pittsburg & L. E. R. Co.* 165 Pa. 377, 30 Atl. 980; *Southern P. Co. v. Lafferty*, 6 C. C. A. 474, 15 U. S. App. 193, 57 Fed. 536; *Mechem, Agency*, § 747, p. 596.

Valliant, J., delivered the opinion of the court:

The court should have given the instruction asked by the defendant in the nature of a demurrer to the evidence. There was no evidence tending to show any negligence on the part of defendant. The court correctly instructed the jury that there was no evidence that defendant knew, or could have known by the exercise of ordinary care, that the hole had been dug in the track before the accident occurred; yet an instruction given at the request of plaintiff authorized the jury to convict the defendant of negligence if a reasonably careful and prudent person might have known that the persons hauling the cinders were liable to dig them out from under the track. On that theory the defendant, under the circumstances in the case, would not be a reasonably careful and prudent person, if, in granting permission to the men to haul cinders from the end of the dump, it trusted that they, in availing themselves of the permission, would act as reasonable men usually act under like conditions, or that they would at least refrain from acts of wilful wrongdoing. Such a rule of law would impose on one in defendant's position the duty of exercising the utmost care which distrust could suggest, and unceasing vigilance. Ordinary business could not advance under such a rule. The learned counsel for respondent, in their brief, say: "It is a far call from the certainty that a thing is to

happen to the bare possibility that the thing is to happen." All the shades of difference between the certainty and the bare possibility there referred to are covered when we say that the thing is liable to happen. It may be probable or improbable, a reasonable or an unreasonable expectation; yet, if it may possibly occur, it is liable to occur. These men, permitted to enter defendant's premises, and load their wagons with cinders, were liable to do just what this man did; more liable, perhaps, to do so when, as in this case, darkness assisted him. But the fact is that, although a number of men from different concerns—this man among them—had been hauling cinders from there for a considerable time, no one had ever done such a thing before, and there is nothing to suggest that such a thing was at all likely to occur. The utmost caution that distrust of mankind could suggest might possibly have anticipated it, and unceasing vigilance have prevented it; but the law required of defendant no such degree of caution and no such vigilance. Reasonable care is all that the law demands. In *Fuchs v. St. Louis*, 167 Mo. 620, *loc. cit.* 645, 57 L. R. A. 136, 67 S. W. 610, this court, per Tittmann, J., quotes with approval Ray on Negligence, pp. 133, 134: "A reasonable man does not consult his imagination, but can be guided only by a reasonable estimate of probabilities. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what his reason and experience will enable him to forecast as probable, nor conduct, on a basis of bare chances, a business whose success is dependent upon his accuracy in forecasting the future. He will order his precaution by the measure of what appears likely in the usual course of things." Reference is also made in that opinion to Webb's *Pollock, Torts*, pp. 45, 46, from which is quoted: "This being the standard,

it follows that if, in a particular case (not being within certain special and more stringent rules), the harm complained of is not such as a reasonable man in defendant's place should have foreseen as likely to happen, there is no wrong, and no liability." See also *Beasley v. Linehan Transfer Co.* 148 Mo. 414, 50 S. W. 87, and *Stone v. Boston & A. R. Co.* 171 Mass. 536, 41 L. R. A. 794, 51 N. E. 1. Applying the law as above quoted (with the statement of which we are entirely satisfied) to the facts of this case, even as made out by the plaintiff's evidence alone, there is nothing to show a neglect of duty on the part of the defendant, and nothing to render it liable. True, the witness Knight said he could get cinders from where he chose, but, when questioned on that point, he said that no one had told him he could do so, and he knew that the place they were expected to get their loads from was at the end of the dump. He also said that he had before taken cinders from the side of the track; but he was very indefinite on that point, and, if he did so, there is nothing to show that defendant knew it. The formation of the raised surface of the ground and its obvious use showed to any reasonable man that defendant would not knowingly allow a pit to be dug under the track, as was done. The evidence of defendant was explicit that the men were ordered to get the cinders from the end of the dump, and that, so far as defendant knew, or could reasonably have known, that was done. The evidence of plaintiff, though not so explicit, is yet practically to the same effect.

The instruction asked by the defendant in the nature of a demurrer to the evidence should have been given.

The judgment is reversed.

All concur.

Rehearing denied.

OHIO SUPREME COURT.

E. B. MAUK, *Plff in Err.*,
v.

N. E. BRUNDAGE *et al.*

(.....Ohio.....)

*1. Where, at the trial of a cause to a jury, a party offers evidence competent to the issue, which, upon objection by the op-

*Headnotes by SPEAR, J.

NOTE.—As to liability for defamatory words used in course of duty, see also, in this series, *Hemmens v. Nelson*, 20 L. R. A. 440; *Caldwell v. Story*, 45 L. R. A. 735; *Redgate v. Roush*, 48 L. R. A. 230; and *Finley v. Steele*, 52 L. R. A. 832.

62 L. R. A.

posite party, is not permitted to be given, but afterward, during the trial, the same witness being upon the stand, the subject of the former inquiry is, without objection, fully entered upon, both in chief and on cross examination, and the questions which had been held incompetent fully answered, the error in sustaining the objection will be deemed cured.

2. In an action for libel, the question whether the publication is or is not libelous *per se* is a question for the court. And, where the publication is claimed to be privileged, the question whether or not the occasion gives the privilege, the controlling facts being conceded, is also for the court.

3. The board of health of a village, as a preamble to an order directing the conduct of physicians and surgeons in the

treatment of obstetrical cases, passed and published the following: "Whereas the board of health of the village of Delphos, Allen and Van Wert counties, Ohio, after careful consideration, has become satisfied that in said village a number of deaths have recently resulted from the carelessness and negligence of the physician attending the patients in childbirth soon after attending and handling other patients affected by blood poison and other infectious diseases, and that from the same cause others in said village have barely escaped death." In an action by a physician against members of the board for libel in causing to be published the above preamble in a newspaper, the answer admitted the passage by defendants of the preamble and order as charged, and that the same was placed on the record of the board's proceedings, but averred that defendants passed the order as members of the board of health; that they had reasonable and probable cause to believe, and did believe, the facts stated to be true, and published the same under an honest belief that such publication was required of them in the due discharge of their official duties as such board, and denied that the same was published maliciously, or with any intent to injure the plaintiff. *Held*:

(a) **The preamble, construed in connection with the order and the pleadings, was libelous *per se*, and the publication of it was not privileged.** It was the duty of the court to so instruct the jury, and not to submit those questions for their determination.

(b) **Upon showing by a preponderance of the evidence that the preamble was published as charged, and that the plaintiff was the physician intended by defendants and understood by the community as such physician, plaintiff was entitled to recover at least such compensatory damages as were attributable to the publication.**

4. **If, in such case, the evidence warranted a finding that, in the passing and publication of such preamble, some of the defendants were actuated by express malice and others were not, and the jury should so find, it is proper practice to render a verdict against all of the defendants for compensatory damages, and an additional amount as exemplary damages against those found to have been guilty of express malice.**

(March 2, 1903.)

ERROR to the Circuit Court for Van Wert County to review a judgment affirming a judgment of the Court of Common Pleas in favor of defendants in an action brought to recover damages for the alleged publication of a libel. *Reversed.*

Statement by **Spear, J.:**

The plaintiff below, plaintiff in error here, is a practising physician located at the village of Delphos, Ohio. The defendants below, defendants in error here, were members of the board of health of that village. Plaintiff's action was in libel for publishing in the month of March, 1900, of and concerning plaintiff, in the columns of the Delphos Herald, the following resolution, *viz.*:

Board of Health—Resolutions Adopted at a Meeting This Morning.

A meeting of the board of health was held at the mayor's office, and the appended resolution adopted:

"An order to prevent and restrict infectious diseases. Whereas, the board of health of the village of Delphos, Allen and Van Wert counties, Ohio, after careful consideration, has become satisfied that in said village a number of deaths have recently resulted from the carelessness and negligence of the physician attending the patients in childbirth soon after attending and handling other patients affected by blood poison and other infectious diseases, and that from the same cause others in said village have greatly suffered and barely escaped death:

"Therefore, it is hereby ordered by the board of health of the village of Delphos, Allen and Van Wert counties, Ohio, that no physician and surgeon or midwife or other person who has heretofore or may hereafter practise or attempt to practise medicine, surgery, or midwifery in any of its branches, shall within said village attend as physician, surgeon, or midwife, or touch or handle, any woman in childbirth, nor perform any act of surgery, or touch the mucus membrane of any person within thirty days after such physician and surgeon, midwife, or other person practising or attempting to practise medicine, surgery, or midwifery has touched or handled any person affected with blood poison, gangrene, erysipelas, or other infectious disease, except in continuing to treat his or her patients affected with the same, and no other infectious disease.

"This order shall take effect and be in force from and after its adoption and publication according to law. Adopted March 6th, 1900.

"W. R. Cochran, Jr., President.

"N. E. Brundage, Clerk."

Defendants' answer admitted that plaintiff was and is a practising physician at Delphos, and that defendants were, at the date named, members of the board; admitted the passage of the resolution in their official capacity as such board, and that the same was placed on the record of their proceedings as such board; and denied all the other averments of the petition. The answer further averred that defendants had cause to believe, and did believe, the facts mentioned in said order to be true, and that they did not publish said article and order maliciously, nor with any intent to injure the plaintiff, nor with the intent charged in

the petition. Further, that said order was passed by them under an honest belief that such publication was required of them in the due discharge of their official duties as such board, and believing that the same was in all respects true. Plaintiff's reply took issue with the new matter. At the trial the jury found for the defendants, "No cause for action." Judgment was entered upon this verdict, and this was affirmed by the circuit court. It is insisted here that there are errors in the rejection of evidence offered by plaintiff, in the admission of evidence offered by the defendants, and in the charge of the court to the jury.

Mr. C. S. Mauk, for plaintiff in error:
The preamble is libelous *per se*.

The defendants charge the plaintiff with the murder of his patients by carelessness and negligence, laying a crime at the door of the plaintiff,—one of the most serious crimes one can possibly charge a physician with; one which will, and did, ruin plaintiff's business; which charge is false, malicious, and untrue.

Watson v. Trask, 6 Ohio, 531, 27 Am. Dec. 271; *Dial v. Holter*, 6 Ohio St. 228; *Alfede v. Wright*, 17 Ohio St. 238, 93 Am. Dec. 615; *Hayner v. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303; *Newbraugh v. Curry*, *Wright (Ohio)* 47; *Townshend, Slander & Libel*, 4th ed. pp. 156, 158, 251, § 193.

All the witnesses on both sides say that it referred to the plaintiff, and it is competent to show such evidence where the name is not mentioned, had the defendants not admitted that, in their opinion, it was the plaintiff.

McLaughlin v. Russell, 17 Ohio St. 475; *Townshend, Slander & Libel*, 4th ed. p. 629, § 375A; 13 Am. & Eng. Enc. Law, p. 486.

The preamble is not privileged, nor conditionally so.

Post Pub. Co. v. Moloney, 50 Ohio St. 84, 33 N. E. 921; *Cooley, Torts*, p. 250.

The publication of a resolution of a city council attacking the character of a private citizen is not within the scope of official authority, and, hence, is not privileged.

Trebby v. Transcript Pub. Co. 74 Minn. 84, 76 N. W. 961; *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. 474; *Buckstaff v. Hicks*, 94 Wis. 34, 68 N. W. 403.

To be privileged a publication must be relevant and proper to the facts at hand; but the right or privilege is limited to the reasonable necessities of the case.

Landon v. Watkins, 61 Minn. 137, 63 N. W. 615; *Valley v. State*, 42 Neb. 123, 60 N. W. 347; *Townshend, Slander & Libel*, pp. 296, 207; *Smith v. Smith*, 73 Mich. 445, 3 62 L. R. A.

L. R. A. 52, 41 N. W. 409; 13 Am. & Eng. Enc. Law, p. 411; *Bronson v. Bruce*, 59 Mich. 467, 60 Am. Rep. 307, 26 N. W. 671; *Whittemore v. Weiss*, 33 Mich. 353.

It is no defense that the slanderer believes his words to be true, when he has no grounds for so believing.

Hayner v. Cowden, 27 Ohio St. 297, 22 Am. Rep. 303; *Smith v. Smith*, 73 Mich. 445, 3 L. R. A. 52, 41 N. W. 409; *Bronson v. Bruce*, 59 Mich. 467, 60 Am. Rep. 307, 26 N. W. 761; *Whittemore v. Weiss*, 33 Mich. 352; *Trebby v. Transcript Pub. Co.* 74 Minn. 84, 76 N. W. 961; *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. 474; *Buckstaff v. Hicks*, 94 Wis. 34, 68 N. W. 403; *Republic Pub. Co. v. Conroy*, 5 Colo. App. 262, 38 Pac. 423; *Landon v. Watkins*, 61 Minn. 137, 63 N. W. 615.

A publication which goes beyond the occasion exceeds the privilege.

Callahan v. Ingram, 122 Mo. 355, 26 S. W. 1020; *Townshend, Slander & Libel*, p. 296.

Malice is presumed from publication and falsity.

Whittemore v. Weiss, 33 Mich. 353; *Fowler v. Chichester*, 26 Ohio St. 9; *Shanks v. Stumpf*, 23 Misc. 284, 51 N. Y. Supp. 154; *Van Derveer v. Sutphin*, 5 Ohio St. 294; *Owen v. Dewey*, 107 Mich. 67, 65 N. W. 8; *Cincinnati Gazette Co. v. Bishop*, 6 Ohio Dec. Reprint, 488; *Roscoe, Nisi Prius*, p. 830; *Fowles v. Bowen*, 30 N. Y. 20; *Gussett v. Gilbert*, 6 Gray, 94; *Van Derveer v. Sutphin*, 5 Ohio St. 294; *Hamilton v. Eno*, 81 N. Y. 116; *Levis v. Chapman*, 16 N. Y. 369; *Steen v. Friend*, 20 Ohio C. C. 459; *Hayner v. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303; *Alpin v. Morton*, 21 Ohio St. 536; *Cheadle v. Buell*, 6 Ohio, 71; *Hicks v. Foster*, 13 Barb. 663; *True v. Plumley*, 36 Me. 466; *Westfield Gas & Mill. Co. v. Abernathy*, 8 Ind. App. 73, 35 N. E. 399; *Bath v. Metcalf*, 145 Mass. 274, 14 N. E. 133; *Westfield Gas & Mill. Co. v. Noblesville & E. Gravel Road Co.* 13 Ind. App. 481, 41 N. E. 956; *Rollins v. Pennock*, 5 West, Law Month. 184.

Messrs. B. J. Brotherton and H. A. Reeve for defendants in error.

Spear, J., delivered the opinion of the court:

1. A preliminary question. A question was made by defendants in error at the oral hearing with respect to the sufficiency of the petition in error in this court. This pleading avers the rendition of judgment by the circuit court in favor of defendants in error and against plaintiff in error, and adds: "A transcript of the docket and journal entries whereof, together with the original papers and bill of exceptions, are

filed herewith. There is error in said record and proceedings in this, to wit." Then follow eight specific assignments of error, applicable only to the proceedings of the court of common pleas. A ninth assignment is in these words: "And there are other errors prejudicial to the plaintiff in error which are manifest on the face of the record," and then a prayer that said judgment be reversed, and that plaintiff be restored to all things he has lost by reason thereof. Voluntary appearance to this petition in error was entered by defendants in error without objection, and none was made to it until the oral argument. It is insisted that, inasmuch as there is no direct averment that the circuit court affirmed the judgment of the common pleas, and no direct allegation of error in the judgment of the circuit court, there is no pleading here for this court to act upon. Certainly such indifference to form and correctness in pleading is not to be commended. But, considering that the record brought up and referred to includes what is lacking in the statement of the petition as to the rendition of judgment by the circuit court, and considering the general allegation of other errors in the record, and further considering the lateness of the objection, and that no prejudice to defendants in error can possibly have resulted from the irregularity, we have concluded that it does not require at our hands a dismissal of the cause.

2. As to the testimony. Many objections are made by plaintiff to the action of the trial court, a few only of which do we find it necessary to notice. In considering the merits of the case it is important to understand that it is the preamble only which is charged as libelous. The resolution itself is not assailed. In regard to this preamble plaintiff complains that the trial court refused to allow evidence offered by him on the part of one Dr. Eger, a member of the board, to show that at the time the resolution was being considered by the board he (Eger) said to the board that the preamble was false; that he (witness) was with Dr. Mauk in those cases, and he used proper care; and that, if they passed the resolution with the preamble attached, they would get into trouble. The evidence was clearly competent, and, unless the error was cured, the ruling was certainly prejudicial error. It is claimed that it was cured because the same witness, when on the stand afterward, was interrogated as to all the conversation which occurred at the time of the meeting of the board when the preamble and resolution were being considered, and testified fully, both in chief and in cross examination, respecting the conversation which occurred then between himself and the other

members of the board. That this cured the error is denied on the authority of *Reynolds v. Tucker*, 6 Ohio St. 516, 67 Am. Dec. 353, and it is urged that the holding in that case rules the case at bar in favor of the plaintiff. We think it does not. In the case cited the party objecting, and whose objection was sustained, subsequently offered to go into the inquiry with the same witness, which was declined by the other party, and the testimony was not given. In the present case the inquiry was fully pursued by both parties, and the plaintiff had the benefit of the testimony. It is not necessary to overrule the case of *Reynolds v. Tucker*, but the principle should not be extended. This holding we believe to be in consonance with the universal practice throughout the state.

It is further insisted that the trial court erred in admitting expert testimony on the part of defendants to show that death might result to a woman in childbirth from blood poisoning by negligent treatment on the part of the physician who had shortly before been attending other patients affected by blood poison and other infectious diseases, there having been no testimony given tending to show that plaintiff had treated such cases of blood poison, etc., nor that he communicated such disease to his patients. This point would be well taken if the defense had been justification, for then the defendants, to maintain the issue, would have been required to introduce testimony to prove the truth of the libelous words. But, as the defense was simply that defendants had reason to believe the charge true, and did so believe, it was not incumbent upon them to show its actual truth, but they were properly permitted to prove, if they could, that they believed the charge true, and that, if that belief had been well grounded, the serious consequences charged would have been the natural result. Whether this would have been competent evidence at common law we need not inquire, inasmuch as our Rev. Stat. 1892, § 5094, specifically provides that "in every case the defendant may prove any mitigating circumstances to reduce the amount of damages." The evidence tended to show good faith and the absence of malice, and thus to mitigate damages, and was, therefore, competent, without first making proof of the truth of the charge.

Testimony having been given on the part of defendants by Dr. Reamy that a physician having due regard to the health and life of his patient should not attend and treat an obstetrical case while attending upon a case of diphtheria unless imperative necessity demanded it, another attendant not being obtainable, the plaintiff in rebuttal sought to show by Dr. Barnhill that a physician might

have due regard to the health and life of an obstetric patient by treating her while attending a case of diphtheria by properly disinfecting himself, and that such practice is eminently proper, and is considered good practice. The testimony was excluded. This testimony tended to rebut that given by Dr. Reamy, and its exclusion was error.

3. The charge. In the main the charge is a clear and correct statement of law as applied to the theory of the case adopted and followed by the learned trial judge. But we think that the theory was wrong, and will endeavor to point out some of the errors appearing.

The preamble charges a degree of carelessness on the part of the physician referred to amounting almost to criminal negligence. To say the least, it was calculated to injure the physician in his profession by tending to prevent his obtaining employment, and thus to deprive him of the emoluments which pertain to his calling. No argument can be needed to show that the act charged as done by the physician, if believed by the community to be true, worked substantial harm. The preamble, therefore, was libelous *per se*. Folkard's *Starkie, Slander & Libel*, § 68; Townshend, *Slander & Libel*, § 182; 18 Am. & Eng. Enc. Law, pp. 866, 942; *Pratt v. Pioneer-Press Co.* 35 Minn. 251, 28 N. W. 708; *Hayner v. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303. Under the general rule of the common law that one shall have a remedy for every injury, the plaintiff here should have a remedy for the injury done him, unless there are other rules of law, or some controlling considerations of public policy, which take the case out of the rule. The contention is that the preamble was issued under the performance of a public duty, and, hence, was privileged. The American rule, as held in *Smith v. Howard*, 28 Iowa, 51; *Hoar v. Wood*, 3 Met. 193, and *McLaughlin v. Cowley*, 127 Mass. 316, is that, in order to be privileged, the statement must be pertinent and material to the matter in hand. To be pertinent and material, it must tend to prove or disprove the point to be established, and have substantial importance or influence in producing the proper result. In other words, the statement must be necessary to a full presentation, and in that sense essential to the accomplishment of the object sought. Now, the result to be reached in the present instance was the order providing for the conduct of physicians in the village. To reach this result, however imminent the duty of the board to pass and publish a proper resolution to correct the evil which it was assumed existed, it could not be at all important to charge negligence on the part of any physician. Not being essen-

tial, or even important, that the board should undertake to fix the blame on any particular person, it follows that the preamble was not a privileged communication, and that those who passed and published it assumed the responsibility as individuals, and could not shield themselves by merely showing that they acted as members of the board, and that the order itself was a proper one. Whether or not the occasion gives the privilege is a question of law for the court, for, unless there is a privileged occasion, the publication of defamatory matter is legally malicious, it being a case of a wrongful act intentionally done, without just cause or excuse; that is, in the absence of a justifiable occasion for the publication, malice is but an inference of law, and should not be left as a question of fact for the jury. Folkard's *Starkie, Slander & Libel*, § 674; *Bromage v. Prosser*, 4 Barn. & C. 247. And, the main legal question in the case turning, as it did, upon a proper construction of the entire publication in connection with the pleadings, it was the duty of the trial court to construe the publication, and give the correct rule to the jury. It follows that the burden assumed by the plaintiff under the pleadings was simply to show the publication by defendants (which in fact was not denied in the proof), and that the plaintiff was the physician referred to, and understood by the community to be such physician. On such showing he was entitled to recover at least such compensatory damages as were attributable to the publication. It was error, therefore, for the court to submit to the jury the question whether or not the preamble was libelous, and whether or not it was privileged.

Respecting damages, the court, after defining compensatory and exemplary damages, said to the jury: "To find exemplary or smart-money damages you must find that all the defendants against whom you may find a verdict, if you do find a verdict, had actual malice as I have defined it to you. That, of course, does not affect the question of compensatory damages, but simply those that would be found upon actual malice." If by this it was intended to instruct the jury that, if they found that plaintiff was entitled to recover, they might find, if the proof justified it, actual malice on the part of some, and hence award exemplary damages against them and compensatory damages only against the remainder, the expression is not clear. On the other hand, if it was intended—as we think it was—to instruct that in no event could compensatory damages be awarded against some and exemplary damages against others, then we think the instruction incorrect. Perhaps

the question is not without difficulty, but it would appear practicable to allow a recovery of an amount against all as compensatory damages, and a further amount against some as exemplary damages (and such verdict would be just if the evidence warranted it), and it would not seem impracticable to so shape the verdict as to bring about this result.

Further along the court said to the jury: "You may, depending upon how you find the facts, return a verdict if the plaintiff has made out his case against one or part or all of them,—in other words, against whom you find plaintiff has made out his case,—and your verdict would be, as to the others: 'No cause of action;' or if you find that the plaintiff has not made out his case under the rules that I have given you, your duty would be to return a verdict of 'no cause of action' as to all defendants." This instruction was faulty, because the rules before given the jury, or some of the essential ones, were faulty, as hereinbefore shown. The plaintiff was entitled to a direct charge to the effect that, if the plaintiff had, by a preponderance of the evidence, sustained his claim that he was the physician intended by the preamble, and that the preamble was published by defendants as charged, he was entitled to recover.

In the concluding paragraph the court said to the jury this: "Evidence has been allowed to go to you, gentlemen, touching the financial standing of certain of the defendants. That evidence goes to you, not for the purpose of affecting your verdict, but simply for the purpose of showing you the standing of the defendants in the community in which they live, that you may consider that fact, along with the other proofs in the case, as to what effect the statements of any of these parties may have had upon the plaintiff." The phrase, "not for the purpose of affecting your verdict," was at least unfortunate. If the evidence was not in any wise intended to affect the verdict, it should not have been received. It was, however, competent for just what the court appears to have had in mind, viz., as bearing upon the influence the defendants may have had in the community, and the importance which the people of the community would naturally attach to their utterances.

Upon the whole record we conclude that the plaintiff did not have a fair trial. *The judgments of both courts will be reversed, and the cause remanded for further proceedings according to law.*

Burket, Ch. J., and Davis, Shauck, Price, and Crew, JJ., concur.

UTAH SUPREME COURT.

E. M. LOVE, *Respt.*,

v.

Ed J. LIDDLE, *Appt.*

(.....Utah.....)

The jurisdiction of justices of the peace cannot be regulated by a classification of the cities in which they reside, so as to make it different in different places, where they are constitutional officers, and the Constitution prohibits special laws regulating their jurisdiction or duties, and a general law has been passed applicable to all justices within the state; and the fact that it further provides that the legislature may restrict their jurisdiction is immaterial.

(April 18, 1903.)

A PPEAL by defendant from a judgment of the District Court for Salt Lake County in favor of plaintiff in an action brought to

NOTE.—As to the constitutional protection of courts against legislative changes, see also, in this series, *State ex rel. Kinsworthy v. Martin*, 28 L. R. A. 153; *Alkman v. Edwards*, 30 L. R. A. 149; *Pueblo County v. Smith*, 33 L. R. A. 466; *Johnson v. State*, 38 L. R. A. 373; *People ex rel. Public Charities v. Cullen*, 44 L. R. A. 420; and *McCulley v. State*, 46 L. R. A. 567. 42 L. R. A.

enforce payment of a promissory note. *Affirmed.*

The facts are stated in the opinion.

Messrs. Charles W. Jones and Charles W. Boyd for appellant.

Messrs. A. A. Duncan and J. E. Frick, for respondent:

Justices of the peace in this state are precinct officers, and the justices within cities of the first class are not, and cannot be, made exceptions to this rule. The attempt, therefore, to classify justices of the peace by classifying cities is, and always must be, held to be and remain abortive. Moreover, the Constitution has classified the courts of this state, so far as the courts created by the Constitution are concerned, by adopting § 1 of art. 8. The courts there created and enumerated cannot be again classified without constitutional warrant therefor.

State ex rel. Smyth v. Magney, 52 Neb. 508, 72 N. W. 1006; *Moore v. State*, 63 Neb. 345, 88 N. W. 514.

Proper classification must embrace all, and exclude none whose condition and wants render such legislation equally necessary or appropriate to them as a class.

State ex rel. Randolph v. Wood, 50 N. J. L. 175, 15 Atl. 271. Sutherland, Stat. Constr. § 127; *State ex rel. Atty. Gen. v. Boyd*, 19 Nev. 43, 5 Pac. 735; *Hallock v. Hollingshead*, 49 N. J. L. 64, 6 Atl. 433; *Cooley*, Const. Lim. 6th ed. 482, note 2; *Jackson County v. State*, 155 Ind. 604, 58 N. E. 1037.

Bartch, J., delivered the opinion of the court:

This action originated before a justice of the peace in the precinct of Salt Lake City. The allegations and prayer of the complaint are as follows: "That on the 23d day of January, 1899, the defendant, for value received, made his certain promissory note in writing, whereby he promised to pay plaintiff, or order, at Salt Lake City, Utah, the sum of \$30 on or before February 6, 1899. That plaintiff is the owner and holder of said note, which is due and unpaid, except as to the sum of \$5 paid February 9, 1899, and \$5 paid February 23, 1899, and the defendant, though often requested, has failed and neglected to pay the balance due thereon. Wherefore, plaintiff demands judgment against the defendant for the sum of \$20.00, together with interest and costs of suit." The defendant demurred on the ground that the court had no jurisdiction of the subject-matter of the action, "it appearing on the face of the complaint that the amount sued for is more than \$10." The demurrer was overruled, and the defendant refusing to answer, and electing to stand on his demurrer, judgment was entered in favor of the plaintiff for \$26.50 and costs. This appeal is from the judgment, and the trial judge having certified that the case involved the constitutionality of chapter 106, p. 108, Sess. Laws, 1901, it is properly before us for consideration.

The only question to be determined is the validity of chapter 106. If it is valid, the judgment must be reversed; if invalid, the judgment must be affirmed.

The appellant contends that the legislature had power to enact the law, and that the demurrer ought to have been sustained. The respondent insists that the enactment is in conflict with the Constitution, and is void. The act is entitled "An Act Relating to Justices of the Peace in Cities of the First Class, and Defining Their Jurisdiction, and Limiting the Application of This Act to Justices of the Peace Hereafter Elected."

Section 1 reads: "In cities of the first class of this state, every justice of the peace shall reside in, and shall hold office in, the city for which he is elected."

Section 2: "(1) In actions arising on contract for the recovery of money only if 62 L. R. A.

the sum claimed is less than \$10. (2) In actions to recover the possession of personal property when the value of such property is less than \$10. (3) To hold inquests on the bodies of such persons as are supposed to have died by unlawful means within cities of the first class as is now provided by law for justices of the peace."

Section 3: "Justices of the peace in cities of the first class shall have criminal jurisdiction, or jurisdiction as committing magistrates."

Section 4 provides that the rules of practice and the procedure in these courts shall be the same as before justices of the peace without such cities, and it provides likewise as to appeals.

Section 5 provides that the act shall not affect the jurisdiction of the present justices of the peace in cities of the first class, nor their term of office.

As will be observed, the act is limited in its application to courts of justices of the peace in cities of the first class, and does not affect such courts held outside such cities. It restricts the jurisdiction of such courts held in cities to cases where the amount involved is less than \$10, while everywhere else in the state the same class of courts have jurisdiction of all cases where the amount involved is less than \$300. Rev. Stat. 1898, § 688. In this state all justices of the peace belong to the same class of officers,—that is, they constitute one class. § 1, art. 8, Const. In the cities of the first class, as elsewhere in the commonwealth, they are, under our laws, precinct officers. Rev. Stat. 1898, § 544, Session Laws 1901, p. 109, chap. 107.

The question, then, is, Has the legislature the power to enact a law which will apply to a part, but not to all, of these officers and courts? Justices' courts are creatures of the Constitution, and we must look to that instrument to ascertain and determine whether or not the legislature transcended its power in the premises.

Section 1 of article 8 provides: "The judicial power of the state shall be vested in the senate sitting as a court of impeachment, in a supreme court, in district courts, in justices of the peace, and such other courts inferior to the supreme court as may be established by law."

Here are enumerated the several kinds or classes of tribunals in which the judicial power of the state is vested, and, as will be noticed, justices of the peace constitute one class, as distinct as either of the others. Justices of the peace being thus a distinct class, made so by the fundamental law, can the legislature, as in this instance, enact a law not applicable to all the members of

the class, but specially to those designated in the act? In other words, Has the legislature power to pass a special law which is intended to affect some of the justices of the peace, but not all of them? This question is answered by § 26 of article 6 of the Constitution, which, so far as material here, reads: "The legislature is prohibited from enacting any private or special laws in the following cases: . . . (4) Regulating the jurisdiction and duties of justices of the peace. . . . (6) Regulating the practice of courts of justice. . . . (18) . . . In all cases where a general law can be applicable, no special law shall be enacted." These provisions expressly prohibit the enactment of any special law to regulate the jurisdiction and duties of justices of the peace or the practice of courts of justice, and the command is that, where a general law is applicable, "no special law shall be enacted."

The enactment in question, by express provision, applies only to a limited number of justices' courts, and affects the practice of only such limited number, and yet there appears to be no reason why a general law restricting the jurisdiction could not be made alike applicable to all of such courts. The Constitution, in § 8, art. 8, expressly provides: "The jurisdiction of justices of the peace shall be as now provided by law, but the legislature may restrict the same." This confers the power upon the legislature to restrict the jurisdiction of such courts by a law general in its application, but it does not confer power to prescribe jurisdiction, for justices' courts of particular localities, different from that exercised by courts of the same grade or class in the state at large. No doubt, the jurisdiction exercised by justices of the peace under the general law may be restricted by legislative authority, but, when that is done, every justice must have the same jurisdiction, the same power, and the same duties as every other justice in the state. Any enactment changing the jurisdiction, power, or duties of justices of the peace, which does not affect all alike, or transcends the constitutional limits, is an infringement upon the fundamental law, and void. Nor can the legislature so classify the justices of the peace, by classifying cities, as to avoid either the mandates or inhibitions of the organic law. As we have seen, the courts of this state are classified or enumerated in § 1 of article 8 of the Constitution, and therefore no other classification, in the absence of constitutional warrant therefor, can be made, which will either increase or diminish legislative power in this regard. 62 L. R. A.

There is no legislative authority to change the classification of courts made by the Constitution, nor to prescribe a jurisdiction for one tribunal different from that of another of the same class. *State ex rel. Smyth v. Magney*, 52 Neb. 508, 72 N. W. 1006; *Moore v. State*, 63 Neb. 345, 88 N. W. 514. Nor is the fact that a justice of the peace of a city of the first class is elected within and for a precinct whose territorial boundaries are coextensive with the city material. All such justices are, nevertheless, precinct officers, and not merely city officers. Chapter 107, p. 109, Sess. Laws 1901. The justices' courts within such cities, same as those of all other localities of the state, are creatures of the Constitution, and the constitutional inhibition against special laws regulating their jurisdiction, power, and duties is imperative.

In *Sutherland*, Stat. Constr. § 127, the author, speaking of special and local laws, says: "When prohibited, they are severally objectionable for not extending to the whole subject to which their provisions would be equally applicable, and thus permitting a diversity of laws relating to the same subject. The object of the prohibition of special or local laws is to prevent this diversity. Each subject as to which such laws are prohibited is by such inhibition designated as a subject of only general legislation which shall have a uniform operation. Generality in scope and uniformity of operation are both essential. A law which embraces a whole subject would still be special if not framed to have a uniform operation."

The question whether a general law, restricting the jurisdiction of justices of the peace, could be applied to all of them, had already, before the passage of the act in controversy, been decided in a practical way by the legislature, in the enactment of chapter 4, p. 234, of the Revised Statutes of 1898, where the jurisdiction, powers, and duties of such justices were prescribed. That was a general law, and applied to and constituted the rule of practice of every justice of the peace within the state. Such being the case, it could not be modified by a special law, upon the same subject, affecting only justices of the peace within cities of the first class. The special enactment falls within the inhibition of the Constitution, and is void and ineffective.

The statute in controversy being invalid, the judgment herein must be affirmed, with costs. It is so ordered.

Baskin, Ch. J., and McCarty, J., concur.

Anna MUNZ, Admr., etc., of Charles Meyer,
Deceased, Appt.,
v.

STANDARD LIFE & ACCIDENT INSURANCE COMPANY of Detroit, Michigan,
Resp't.

(.....Utah.....)

1. Failure to comply with a requirement for immediate notice to the insurer of the death of one insured against accident, and for proofs of death within two months, does not absolve the insurer from liability on the policy, in case the beneficiary, who resides some distance from the place of the accident, does not learn of it, or of the policy, until more than the required time has elapsed since the accident, if the requirements are complied with within a reasonable time after the facts are ascertained.
2. Conditions subsequent in an accident policy, as to notice and proof of death within a certain time, do not, in the absence of express legislation to that effect, apply to the legal representatives of the insured to whom the insurer has agreed to pay the indemnity in the event of death.

(April 20, 1903.)

APPEAL by plaintiff from a judgment of the District Court for Salt Lake County in favor of defendant in an action brought to recover the amount alleged to be due on an accident-insurance policy. *Reversed.*

The facts are stated in the opinion.

Messrs. J. H. Ryckman and M. E. Wilson, for appellant:

The performance of the condition was impossible, by reason of the fact that the death of the insured was for a long time unknown to the plaintiff,—the only person who had an interest in the performance of this condition; and for the further reason that the existence of the policy and a knowledge of its terms were never known to this plaintiff until February 15th, 1901. A compliance with that condition within two months from date on which the plaintiff became aware of any policy of insurance or any condition on her part to be performed is sufficient under the law.

Brown v. Fraternal Acci. Ins. Co. 18 Utah, 265, 55 Pac. 63; *Solomon v. Continental F. Ins. Co.* 160 N. Y. 595, 46 L. R. A. 683, 55 N. E. 279; *McElroy v. John Hancock Mut. L. Ins. Co.* 88 Md. 137, 41 Atl. 112; *Konrad v. Union Casualty & Surety Co.* 49 La. Ann. 636, 21 So. 721; *Kentzler v. Ameri-*

can Mut. Acci. Asso. 88 Wis. 589, 60 N. W. 1002; *Trippe v. Provident Fund Soc.* 3 Misc. 445, 23 N. Y. Supp. 173, Affirmed in 140 N. Y. 23, 22 L. R. A. 432, 35 N. E. 316; *Manufacturers' Acci. Indemnity Co. v. Fletcher*, 5 Ohio C. C. 633; *McFarland v. United States Mut. Acci. Asso.* 124 Mo. 204, 27 S. W. 436; *Phillips v. United States Benev. Soc.* 120 Mich. 142, 79 N. W. 1; *Provident L. Ins. & Invest. Co. v. Baum*, 29 Ind. 236; *Globe Acci. Ins. Co. v. Gerisch*, 163 Ill. 625, 45 N. E. 563.

Mr. E. A. Silberstein, for respondent:

The alleged impossibility of complying with the provision of the policy, by reason of ignorance of the death of the insured and of the existence of the policy, is not a sufficient excuse in law.

Brown v. Fraternal Acci. Asso. 18 Utah, 265, 55 Pac. 63; *Gamble v. Accident Assur. Asso.* Ir. Rep. 4 C. L. 204; *Owen v. Farmers' Joint-Stock Ins. Co.* 57 Barb. 518; *Carpenter v. Centennial Mut. Life Asso.* 68 Iowa, 453, 56 Am. Rep. 855, 27 N. W. 456; *School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; 2 Biddle, Ins. 985, 992; *Patton v. Employers' Liability Assur. Corp.* Ir. L. R. 20 C. L. 93; 1 Beach, Ins. §§ 300, 301; 4 Joyce, Ins. § 3277; *Evans v. United States L. Ins. Co.* 64 N. Y. 304; *Worthington v. Charter Oak L. Ins. Co.* 41 Conn. 401, 19 Am. Rep. 495; *Howell v. Knickerbocker L. Ins. Co.* 44 N. Y. 277, 4 Am. Rep. 675; *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 551, 37 Am. Rep. 594; *Continental Ins. Co. v. Daly*, 33 Kan. 606, 7 Pac. 158; *Klein v. New York L. Ins. Co.* 104 U. S. 91, 26 L. ed. 663; *Jackson v. Traer*, 64 Iowa, 483, 52 Am. Rep. 449, 20 N. W. 764; *White v. Home Mut. Ins. Co.* 128 Cal. 131, 60 Pac. 666; *Travelers' Ins. Co. v. Myers*, 62 Ohio St. 529, 49 L. R. A. 760, 57 N. E. 458; *Morrison v. London F. Ins. Co.* 6 Manitoba L. R. 225.

Such a construction should be placed upon the word "immediate" as not to fritter away the substantial rights of the parties, nullify contracts, and promote frauds. The word "immediate" in this connection is construed to mean such time as is reasonably necessary for doing the thing.

Richardson v. End, 43 Wis. 318; *Foster v. Fidelity & C. Co.* 99 Wis. 447, 40 L. R. A. 833, 75 N. W. 69.

It means as soon as possible, with due diligence.

Ostrander, Fire Ins. p. 519, note; 2 Biddle, Ins. 992; *Baker v. German F. Ins. Co.*

NOTE.—For other cases in this series as to what constitutes sufficient compliance with condition in policy as to immediate notice of death or injury, see *Trippe v. Provident Fund Soc.* 22 L. R. A. 432; *Anoka Lumber Co. v. Fidelity & C. Co.* 30 L. R. A. 689; *Foster v. Fidelity & C. Co.* 40 L. R. A. 833; *Travelers' Ins. Co. v. Myers*, 49 L. R. A. 760.

As to immediate notice of loss, see *Ermentrout v. Girard F. & M. Ins. Co.* 30 L. R. A. 346, and *Solomon v. Continental F. Ins. Co.* 46 L. R. A. 682.

124 Ind. 490, 24 N. E. 1041; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278, 49 Am. Dec. 74; *Konrad v. Union Casualty & Surety Co.* 49 La. Ann. 636, 21 So. 721.

Where the facts are undisputed, it is a question of law for the court whether the notice given was "immediate."

Pickel v. Phenix Ins. Co. 119 Ind. 291, 21 N. E. 898; *Foster v. Fidelity & C. Co.* 99 Wis. 447, 40 L. R. A. 833, 75 N. W. 69; *Railway Pass. Assur. Co. v. Burwell*, 44 Ind. 460; *Mellen v. Hamilton F. Ins. Co.* 17 N. Y. 609; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278, 49 Am. Dec. 74; *Baker v. German F. Ins. Co.* 124 Ind. 490, 24 N. E. 1041; *North America Ins. Co. v. Brim*, 111 Ind. 281, 12 N. E. 315; *McFarland v. United States Mut. Acci. Asso.* 124 Mo. 204, 27 S. W. 436; *Bennett v. Lycoming County Mut. Ins. Co.* 67 N. Y. 274; *Springfield F. & M. Ins. Co. v. Brown*, 128 Pa. 392, 18 Atl. 396; *Bacon, Ben. Soc.* § 405; 2 Beach, Ins. § 1212.

It would not be unjust or unconscionable to sustain a defense predicated on a delay of but one day in giving notice, when the time for action was fixed by the policy.

Roehmer v. Knickerbocker L. Ins. Co. 63 N. Y. 161; *Allemania Ins. Co. v. Little*, 20 Ill. App. 431; *Peabody v. Satterlee*, 166 N. Y. 174, 52 L. R. A. 956, 59 N. E. 818.

A delay of eleven days without a reasonable excuse is fatal to recovery.

Trask v. State F. & M. Ins. Co. 29 Pa. 198, 72 Am. Dec. 622; *Railway Pass. Assur. Co. v. Burwell*, 44 Ind. 460; *Roumagne v. Mechanics' F. Ins. Co.* 13 N. J. L. 113; *Cornell v. Milwaukee Mut. F. Ins. Co.* 18 Wis. 388; *Pickel v. Phenix Ins. Co.* 119 Ind. 291, 21 N. E. 898; *Ermentrout v. Girard F. & M. Ins. Co.* 63 Minn. 305, 30 L. R. A. 346, 65 N. W. 635; *Broun v. London Assur. Corp.* 40 Hun. 101; *Whitehurst v. North Carolina Mut. Ins. Co.* 52 N. C. (7 Jones, L.) 435, 78 Am. Dec. 246; *Foster v. Fidelity & C. Co.* 99 Wis. 447, 40 L. R. A. 833, 75 N. W. 69; *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356, 31 N. E. 31; *Peabody v. Satterlee*, 166 N. Y. 174, 52 L. R. A. 956, 59 N. E. 818; *Parsons v. Queen Ins. Co.* 43 U. C. Q. B. 271, 4 Ont. App. Rep. 103; *La Force v. Williams City F. Ins. Co.* 43 Mo. App. 518; *Weed v. Hamburg-Bremen F. Ins. Co.* 133 N. Y. 394, 31 N. E. 231; *Inman v. Western F. Ins. Co.* 12 Wend. 452; *Edwards v. Lycoming County Mut. Ins. Co.* 75 Pa. 378.

Parties may, by agreement, limit the time within which suit must be brought.

Hong Sling v. Royal Ins. Co. 8 Utah, 135, 30 Pac. 308; 2 May, Ins. 4th ed. § 465; 1 Beach, Ins. § 298; *German F. Ins. Co. v. Bullene*, 51 Kan. 764, 33 Pac. 467; *State Ins. Co. v. Stoffels*, 48 Kan. 205, 29 Pac. 479; *Oakland Home Ins. Co. v. Allen*, 1 Kan. App. 62 L. R. A.

108, 40 Pac. 928; *State Ins. Co. v. Meesman*, 2 Wash. 459, 27 Pac. 77.

Bartch, J., delivered the opinion of the court:

This action was brought to recover the amount claimed to be due on an accident insurance policy issued by the defendant company to Charles Meyer, the deceased, whose estate the plaintiff was appointed to administer.

The facts, as set out in the amended complaint, are that Charles Meyer was insured in the defendant company, by an accident policy, for \$500, issued on or about May 16, 1899; that on June 29, 1900, Meyer was accidentally and instantly killed at or near Kemmerer, Wyoming; that deceased was unmarried, and left surviving him no friends or relatives, except the plaintiff, his cousin, who was then, and ever since has been, a resident of Salt Lake City, Utah; that said town of Kemmerer is 234 miles from Salt Lake City; that plaintiff learned of the death of Meyer for the first time in October 1, 1900; that, by reason of plaintiff being in poor circumstances financially, she was unable to have his body disinterred and brought, with his personal effects, to Salt Lake City; that on or about February 15, 1901, plaintiff procured the personal effects, including said insurance policy, prior to which date the existence of said policy was not known to her; that on February 23, 1901, she gave notice to the defendant of said Meyer's death, and made demand for payment of said policy, which demand was refused by defendant, because notice had not been sent to defendant, and no proof of death had been made, within two months after the death; that as soon as plaintiff was able to procure legal assistance to that end, to wit, May 1, 1901, she procured and sent defendant due proofs; and that thereupon payment of the policy was again refused, because the proofs were not made within the specified time. It is then alleged that Meyer duly conformed and complied with all the provisions of the policy; that the policy was in force and effect at the time of his death; that she was duly appointed administratrix of his estate in May, 1901, by the district court of Salt Lake county. Judgment was demanded in the sum of \$500. To this amended complaint the defendant demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, the plaintiff failing to amend her complaint within ten days, as ordered by the court, judgment was entered for the defendant, and the plaintiff has appealed to this court.

The appellant contends that the complaint

states a good cause of action, and that the court erred in sustaining the demurrer.

The defense is based upon the ground that there was neither notice of the fatal accident given, nor proof of death furnished to the company, within the time limited by the policy. The policy, so far as material here, provides: "Immediate written notice shall be given to the company at Detroit, Michigan, of any accident and injury or sickness for which claim is made, with full particulars thereof, and full name and address of the insured. Direct and positive proof of death . . . must also be furnished to said company, at Detroit, Michigan, within two months from the time of death . . ., else all claims based thereon shall be forfeited." If, under all circumstances, these provisions must be literally complied with, then the defense in this case is well founded, for it is not controverted that no immediate notice of the accident was given, and that no proof of death was made within two months of the death. The provisions are such as are usually contained in insurance policies, and if they were to be rigidly enforced, no matter how unusual or peculiar the circumstances of a particular case, then, indeed, they would prove a pitfall or snare to the unwary. They are intended, however, for no such purpose. They constitute conditions subsequent, and, as said in *Brown v. Fraternal Acci. Asso.* 18 Utah, 265, 55 Pac. 63, by this court: "Doubtless the purpose of such conditions in a policy is to afford the insurer an opportunity within a reasonable time after the occurrence to inquire into the cause of the accident, and ascertain the surrounding facts and circumstances while fresh in the memory of witnesses, so as to determine whether or not liability under the contract exists. The condition in the policy, requiring notice to be given within a specified time, with full particulars of the accident, operates upon the contract of insurance only after the fact of the accident. It is a condition subsequent, and must therefore receive a reasonable and liberal construction in favor of the beneficiary under the contract."

In the case at bar the beneficiary was not aware of the death of the insured until about three months after it occurred, was distant 234 miles from the place of the accident and death, and was not aware of the existence of the policy until over seven months after the fatal occurrence. Being thus ignorant of these things, how could she comply literally with the terms of the policy as to notice and proof? How could she give "full particulars" of an accident the occurrence of which was not within her knowledge, or the "full name and address of the insured" when

she knew nothing of the insurance? We cannot assume that the parties to the insurance contract intended such absurdities. The contracting parties doubtless intended that notice and proof should be furnished at the earliest practicable time after the happening of an accident and injury for which liability would be claimed, so that the real facts of the case could be ascertained by the insurer before time had effaced them from the memory of witnesses. The word "immediate," under such circumstances as are disclosed in this record, cannot be construed as excluding all intervening time between the occurrence of the death and the giving of notice. It does not, by any fair construction of the policy, mean instantly, but "immediate notice" means notice within a reasonable time, under all the circumstances of each particular case, and no doubt, ordinarily, unless there are circumstances excusing delay, the notice should be given at once. It would, however, be both an unreasonable and unfair interpretation to hold that, as used in the policy, the word "immediate" required the doing of a thing impossible for the beneficiary to do. Such provisions must receive reasonable construction in favor of the beneficiary.

May, in his work on Insurance, vol. 2, § 462, says: "If the notice be required to be 'forthwith,' or 'as soon as possible,' or 'immediately,' it will meet the requirement if given with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay, of which the jury are ordinarily to be the judges. To give the word a literal interpretation would in most cases strip the insured of all hope of indemnity, and policies of insurance would become practically engines of fraud."

In *Kentzler v. American Mut. Acci. Asso.* 88 Wis. 589, 60 N. W. 1002, it was said: "In case of an injury or disability not resulting in death, such notice affords the association an opportunity to ascertain the exact condition of the person and apply the most effectual remedy. But in case of death there can be no remedy, and the only object of the notice is to secure evidence of identity. What is meant by giving notice 'immediately after the accident occurs?' Does it mean, in the language of Webster: 'In an immediate manner; without intervention of anything; . . . without interval of time; without delay; instantly?' If the contract is to be thus literally construed, compliance by the beneficiary would seldom be possible. But courts, looking at the substance of contracts and statutes, have, during the last two centuries, repeatedly declared that 'the word "immediately," although in strictness it excludes all mean

times, yet, to make good the deeds and intents of parties, it shall be construed such convenient time as is reasonably requisite for doing the thing.'"

So, in *Solomon v. Continental F. Ins. Co.* 160 N. Y. 595, 46 L. R. A. 682, 55 N. E. 279, where the plaintiff did not obtain the policy until about fifty days after the fire, and was not aware of its contents, it was said: "Whether, under all the circumstances, immediate notice was given within the meaning of the policy, when fairly construed, was the question to be determined in this case. The word 'immediate,' like 'forthwith,' does not mean instantly, but immediate notice is notice within a reasonable time. In determining what was a reasonable time, it was necessary for the referee to take into consideration the situation of the plaintiff and all the circumstances by which he was surrounded. If they justify him in finding that the plaintiff used due diligence in discovering the policy, in ascertaining what it required, and in preparing and serving the notice of loss, then the referee was justified in determining that the notice was sufficient under the provisions of the policy." *McFarland v. United States Mut. Acci. Asso.* 124 Mo. 204, 27 S. W. 436; *Konrad v. Union Casualty & Surety Co.* 49 La. Ann. 636, 21 So. 721; *Richardson v. End.* 43 Wis. 316.

In this case there is no question that all the conditions of the policy were complied with by the deceased up to the time of his death. Those were conditions precedent for the purpose of continuing the policy in force and effect, and to them a more strict rule of construction is applicable. But where precedent conditions were all performed, courts are not inclined, by a very harsh and technical construction, to deprive the beneficiary of the benefit of a liability, because of a failure to do an impossible thing which was never in the minds or contemplation of the contracting parties. Forfeitures are not favored in law, and will not be aided by interpretation.

Such a defense as the one herein is purely technical. The risk of the insurer was neither increased nor in any way jeopardized by the failure of the beneficiary to comply literally with conditions of which she had no knowledge. The defendant received the consideration for the indemnity as provided in the contract, and it has no cause to complain if the harsh and technical meaning which it now seeks to place upon the conditions as to notice and proof of loss be rejected. The construction thus put upon the conditions in question secures to the defendant every advantage and benefit to which it is entitled, and which was intended by the provisions of the policy. In such a case, and under such 62 L. R. A.

circumstances, the beneficiary is not required to do what amounts to an impossibility, but must perform the conditions subsequent within a reasonable time after obtaining knowledge of the existence of the policy, or after such knowledge could, by the exercise of due diligence, have been obtained. Up to the time of the knowledge of the accident and discovery of the policy, such a beneficiary is not in default, and if after that he gives notice of the accident and proof of the death within a reasonable time, or within the time limited in the policy, it will be a compliance with the intention and requirements of his contract. Before that time it is impossible for him to furnish proof of the particulars and circumstances surrounding the accident, required by the policy, and to hold that, because of the failure to do so, his rights under the contract were forfeited, would be alike unfair and unjust.

In *Woodmen Acci. Asso. v. Pratt*, 62 Neb. 673, 55 L. R. A. 291, 87 N. W. 546, it was said: "When a time is fixed in a policy of accident insurance for the giving of notice of an accident and injury resulting therefrom for which indemnity is claimed, with the particulars thereof, which is reasonable in its character, this will be regarded as a condition precedent to be complied with before recovery can be had; but when, because of circumstances and conditions surrounding the transaction, obstacles or causes exist preventing and rendering impossible the performance of the act within the time stipulated, the act may be performed thereafter, and the beneficiary will be excused for the failure, if done within a reasonable time, or within the time stipulated after the obstacle or cause preventing prior compliance ceases to exist; the question of the sufficiency of the excuse offered, and the reasonableness of the time in which the act is performed, to be determined according to the nature and circumstances of each individual case, the beneficiary in all cases being required to act with due diligence and without laches on his part."

So, in *McElroy v. John Hancock Mut. L. Ins. Co.* 88 Md. 137, 41 Atl. 112, referring to the conditions of a policy requiring notice and proof within a time limited, the court said: "It is perfectly clear that the rule was made for the ordinary cases where the existence of the policy and the death of the insured are known, or might or should be known, in time to comply with the rule. It cannot reasonably be supposed that the holder of the policy could be required to give proof of a fact of which he was himself ignorant. To decide that one was not duly diligent, and that he lost his right as beneficiary because he did not give notice of a pol-

icy of which he knew nothing, would be more strict and exigent than in our opinion the language of the policy requires. There was timely notice given after the fact of insurance came to the knowledge of the plaintiff. This delay in finding the policy was not strange and unexceptional. On the contrary, it appears to have been entirely consistent with good faith."

In *Trippe v. Provident Fund Soc.* 140 N. Y. 23, 22 L. R. A. 432, 35 N. E. 316, it was observed: "The plaintiff was the widow of the deceased, and the beneficiary named in the certificate. She was the only party interested in the enforcement of the contract and who could give the notice, and she could not give it, within the meaning of the condition, until she had knowledge of the facts which she was bound to communicate. To hold that the plaintiff was bound to give notice of the death of her husband, with full particulars, before she had any knowledge of the facts, would be to require her, by a technical and literal construction, to do an impossible thing, which was not within the intention of the parties when the contract was made." *Phillips v. United States Benev. Soc.* 120 Mich. 142, 79 N. W. 1; *Insurance Companies v. Boykin*, 12 Wall. 433, 20 L. ed. 442; *McNally v. Phenix Ins. Co.* 137 N. Y. 389, 33 N. E. 475; *Carpenter v. German American Ins. Co.* 135 N. Y. 298, 31 N. E. 1015; *Globe Acci. Ins. Co. v. Gerisch*, 163 Ill. 625, 45 N. E. 563.

That the beneficiary in this case acted with due diligence after the discovery of the policy, we think is clear from the facts alleged in the complaint, which, for the purposes of this decision, must be assumed to have been admitted to be true by the filing of the de-

murrer. The notice of the accident and proof of death, with the particulars required, appear to have been given and furnished within a reasonable time after she obtained the policy and learned that she was entitled to the benefit. As the policy, in the event of death, was payable to the insured's estate, executors, or administrators, it became necessary for her to be appointed administratrix before she could proceed in a lawful manner, and this necessarily caused some delay. Considering the facts and circumstances, however, we cannot say that, under our laws, she was guilty of laches in securing her appointment as administratrix, or in furnishing the company the necessary proofs, or in instituting this suit. Where such a policy contains an agreement on the part of the insurer that, in the event of the death of the insured, the indemnity shall be paid to his legal representatives, the conditions subsequent as to notice and proof within a certain time must not, in the absence of express language to that effect, be held to apply to them. If they act without unreasonable delay, it is sufficient. *Globe Acci. Ins. Co. v. Gerisch*, 163 Ill. 625, 45 N. E. 563; *Provident L. Ins. & Invest. Co. v. Baum*, 29 Ind. 236. We are of the opinion that the complaint states a cause of action, and that the demurrer was erroneously sustained.

The judgment must therefore be reversed, with costs, and the cause remanded, with directions to the court below to overrule the demurrer and proceed in accordance herewith.

It is so ordered.

Baskin, Ch. J., and McCarty, J., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

George H. TOMPKINS

v.

PACIFIC MUTUAL LIFE INSURANCE COMPANY, *Plff. in Err.*

(.....W. Va.....)

*1. Only a right of examination, as to an injured person entitled to a weekly indemnity under an accident insurance policy, is conferred upon the company issuing the policy, by the following clause contained therein: "Any medical adviser of the company shall be allowed to examine the person or body of the insured in respect to any in-

jury or cause of death in such manner and at such times as he may require."

2. The relation of master and servant subsists between the company and its medical adviser in the exercise of such right of examination, and the company must answer for injuries resulting from the negligence or misconduct of its agent in the premises.

3. Though the insured is not bound to submit to such examination, and may refuse at the risk of loss of his indemnity, or of litigation on account of his refusal, he may submit to it without losing his right to exact care and skill in its exercise; and it is no defense to his action that he consented to examination in a particular manner, if he did so in pursuance of a request or demand that it be so made.

*Headnotes by POFFENBARGER, J.

NOTE.—For a case in this series holding that a physician acting for defendant in making a physical examination of plaintiff in an action for personal injuries is an independent contractor, and not a servant or agent, so as to 62 L. R. A.

charge defendant with liability for his acts, see *Pearl v. West End Street R. Co.* 49 L. R. A. 826, with note on obeying or disobeying physician as affecting remedy of injured person against one who injured him.

4. Between the physician and the insured, in such case, the law governing the relations of physician and patient does not apply.
5. Where the injury of the insured is a sprain of the foot, requiring a plaster cast or similar appliance to hold the injured ligaments in place until they heal or regain strength, and the agent, in making the examination, removes, and fails to replace, such appliance, and injury results therefrom, he is guilty of negligence for which his principal must answer in damages.
6. The court properly refuses an instruction to the effect that the jury, in passing upon the testimony of a party, may take into consideration his situation and interest in the result of the verdict and all the circumstances surrounding him, and give to it only such weight as they may deem it fairly entitled to, when a witness against him is deeply interested in a moral sense, and no such direction as to his testimony is included.

(May 2, 1903.)

ERROR to the Circuit Court for Cabell County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by negligence for which defendant was responsible. *Affirmed.*

The facts are stated in the opinion.

Messrs. Simms & Enslow, for plaintiff in error:

The injury complained of is not that Dr. Hughes, as medical adviser, was guilty of malpractice, but that the agent of the company, in removing the plaster cast from the injured foot, with knowledge of all of the facts connected with it, was negligent, and from such negligence the injury occurred.

Rhoades v. Chesapeake & O. R. Co. 49 W. Va. 494, 55 L. R. A. 170, 39 S. E. 209.

Messrs. Harvey, Wiatt, & Switzer for defendant in error.

Poffenbarger, J., delivered the opinion of the court:

On the 30th day of September, 1898, George H. Tompkins, a resident of Clifton Forge, Virginia, instituted an action in the circuit court of the United States in the district of West Virginia against the Pacific Mutual Life Insurance Company, a California corporation doing business in West Virginia, for the recovery of damages for an alleged wrong, on an alleged cause of action accruing to him in October, 1897, in which action he recovered a judgment, which was afterwards reversed by the United States circuit court of appeals, and the action directed by said court to be dismissed for want of jurisdiction, which was accordingly done by the said circuit court. Within one year after the dismissal aforesaid, to wit, on the 3d day of November, 1900, said Tompkins instituted 62 L. R. A.

this suit in the circuit court of Cabell county for the same cause of action, alleging in his declaration the prosecution and dismissal of said former action, and that this action was brought within one year after said dismissal. To the declaration, and each count thereof, the defendant demurred, after having had oyer of the writ and return, which demurrer was overruled, and thereupon a plea of not guilty was entered. The defendant pleaded also the statute of limitations, and the plaintiff was permitted to file his replication in writing to said plea, setting up the pendency of said former suit for the same cause of action, its dismissal for want of jurisdiction, and the commencement of this suit within one year thereafter. Trial was had, and a verdict rendered for the plaintiff, assessing his damages at \$2,000, and, after overruling a motion to set aside the verdict, judgment was rendered accordingly.

Said replication was filed under § 19 of chapter 104 of the Code of 1899, which reads as follows: "If any action, commenced within due time, in the name of or against one or more plaintiffs or defendants, abate as to one of them by the return of no inhabitant, or by his or her death or marriage; or if, in an action commenced within due time, judgment (or other and further proceedings) for the plaintiffs should be arrested or reversed, on a ground which does not preclude a new action for the same cause; or if there be occasion to bring a new suit by reason of the said cause having been dismissed for want of security for costs, or by reason of any other cause, which could not be plead in bar of an action, of the loss or destruction of any of the papers or records in a former suit which was in due time, —in every such case, notwithstanding the expiration of the time within which a new action or suit must otherwise have been brought, the same may be brought within one year after such abatement, dismissal, or other cause, or after such arrest or reversal of judgment, or such loss or destruction, but not after."

In support of its contention that the court erred in permitting said replication to be filed, the plaintiff in error relies upon two Virginia decisions and one Tennessee decision, and the defendant in error relies upon a decision of the Supreme Court of the United States construing the Tennessee statute, and an Ohio decision construing a similar section of the Ohio Code. The first Virginia case is *Gray v. Berryman*, 4 Munf. 181. The Virginia statute construed in that case provided that, if judgment for the plaintiff be reversed by error, or judgment be given against the plaintiff upon matter alleged in arrest of judgment, that he take nothing by his plaint,

writ, or bill, a new action might be commenced within one year after such reversal or judgment against the plaintiff. The other case is that of *Manuel v. Norfolk & W. R. Co.* 99 Va. 188, 37 S. E. 957, construing the present Virginia statute, which provides that if an action commenced in due time abate by the return of no inhabitant or by the death or marriage of the defendant, or if, in such action, judgment for the plaintiff be arrested or reversed upon a ground which does not preclude a new action for the same cause, or the plaintiff shall proceed in the wrong form or bring the wrong form of action, and judgment be rendered against him solely upon that ground, a new action may be brought within one year after such reversal or judgment. In the first of said two Virginia cases a suit in equity had been brought and dismissed for want of jurisdiction, and it was held that an action at law for the same cause of action thereafter commenced was not within the exception. In the second, the plaintiff had taken a nonsuit, and thereafter instituted another action for the same injury, and it was held that that case was not within the exception to the statute of limitations.

The Tennessee statute reads as follows: "If the action is commenced within the time limited, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is rendered in favor of the plaintiff and is arrested or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may from time to time commence a new action within one year after the reversal or arrest." [Tenn. Code 1884, § 3449.] The supreme court of Tennessee, in *Sweet v. Electric Light Co.* 97 Tenn. 252, 36 S. W. 1090, held that a suit commenced in a court having no jurisdiction, and dismissed for want thereof, was a nullity, and that as, in such case, no action had been commenced within the meaning of the statute, such proceeding did not prevent the running of the statute, nor bring the case within the exception. That is the contention of the plaintiff in error, this cause of action having been first set up in a court having no jurisdiction, and there dismissed on that ground, and then sued on in the state court more than one year after the accrual of the right of action, but within one year after the dismissal of the proceeding in the Federal court.

In *Smith v. McNeal*, 109 U. S. 426, 27 L. ed. 986, 3 Sup. Ct. Rep. 319, the Supreme court of the United States construed the same Tennessee statute, and arrived at a conclusion seemingly in conflict with that announced by the Tennessee court. Said case 62 L. R. A.

was decided in 1883, and the Tennessee case of *Sweet v. Electric Light Co.* in 1896, and, strange to say, the Tennessee court did not even notice the former decision of a similar question upon the same statute by the Supreme Court of the United States. There is a distinction between the two cases, however. In *Smith v. McNeal* the dismissal was for want of the allegation of a jurisdictional fact which actually existed, and which, if alleged, would have given jurisdiction. In the Tennessee case the former action had been brought in a court in which jurisdiction could not have been shown in the declaration. The construction given the statute in *Sweet v. Electric Light Co.* may be said to find some countenance in the opinion delivered by Mr. Justice Woods in *Smith v. McNeal*, where it is said: "Cases might be supposed, perhaps, where the want of jurisdiction in the court was so clear that the bringing of a suit therein would show such gross negligence and indifference as to cut the party off from the benefit of the saving statute; as, if an action of ejectment should be brought in a court of admiralty, or a bill in equity should be filed before a justice of the peace."

The latest case bearing upon the question is *Pittsburgh, C. O. & St. L. R. Co. v. Bemis*, 64 Ohio St. 20, 59 N. E. 745, decided in January, 1901, construing the Ohio statute, which reads as follows: "If, in an action commenced, or attempted to be commenced, in due time, a judgment for the plaintiff be reversed, or if the plaintiff fail otherwise than upon the merits, and the time limited for the commencement of such action has, at the date of such reversal or failure, expired, the plaintiff, or, if he die and the cause of action survive, his representatives may commence a new action within one year after such date; and this provision shall apply to any claim asserted in any pleading by a defendant." [Bates's Anno. Stat. § 4991.] There, the status of the case was very much like that of this one. The action had first been brought in the Federal court and dismissed for want of jurisdiction, and then brought in the state court, and it was held that the right of action was within the saving clause of the statute of limitations. The opinion delivered is very exhaustive, and shows that the matter has been thoroughly considered. It analyzes fully the opinions in *Smith v. McNeal* and *Sweet v. Electric Light Co.*, construing the similar Tennessee statute. Among other things, that opinion says: "In no text-book, and in no reported case cited to us save *Sweet v. Electric Light Co.* 97 Tenn. 252, 36 S. W. 1090, is there any statement or intimation that the question of the jurisdiction of the court has any potency

whatever in determining what is, and what is not, an action; and we are convinced that in Ohio, whatever may be the rule elsewhere, there is no authority for the distinction which counsel seek to draw; and we are equally clear that it rests upon no substantial ground."

Our statute seems to be somewhat broader, or, to say the least, more positive and affirmative in the expression of the width of its scope, than any of the other statutes; for it says: "If there be occasion to bring a new suit by reason of the said cause having been dismissed for want of security for costs, or by reason of any other cause, which could not be pleaded in bar of an action," a new action may be brought within one year after the dismissal. It is a highly remedial statute, and ought to be liberally construed for the accomplishment of the purpose for which it was designed, namely, to save one, who has brought his suit within the time limited by law, from loss of his right of action by reason of accident or inadvertence; and it would be a narrow construction of that statute to say that, because a plaintiff had, by mistake, attempted to assert his right in a court having no jurisdiction, he is not entitled to the benefit of it. In this connection, *Laurence v. Winifrede Coal Co.* 48 W. Va. 139, 35 S. E. 925, is relied upon by plaintiff in error. That was a case in which the plaintiff failed, after having brought his suit, to file his declaration within three months, by reason of which his action was dismissed at rules. He claimed the benefit of said § 19 of chapter 104 of the Code of 1899, and it was held that he was within the letter of it, but that he could not claim the benefit of it for the reason that the dismissal was wholly imputable to his voluntary abandonment of the suit. In the opinion of the court, delivered by Judge Brannon, it is said: "He either intentionally abandoned his first suit, or neglected it, which operated in law to discontinue it. It is a voluntary dismissal, or call it a discontinuance, by reason of the plaintiff's nonaction." Here it cannot be said that the plaintiff below had voluntarily dismissed his former action in the Federal court, for he prosecuted it to a final judgment and defended the writ of error in the appellate court, and went out of the court, not by reason of his failure to prosecute, but by force of the strong hand of the court, pronouncing the law against him on the question of jurisdiction. The two cases are not analogous unless we adopt the reasoning of the Tennessee court whereby a distinction is made upon the very narrow and technical grounds which have been declared by another reputable court, upon an apparently

more mature and thorough consideration, to be unsound.

In support of the demand set up in this action, the principles of law imposing upon a master liability for the acts of his agent are relied upon; it being insisted that the injury for which damages are claimed from the defendant is the result of a negligent act of the defendant by its agent. Defendant below (plaintiff in error) insists that the injurious act, if done by its agent, was outside of the scope of his agency or authority. These contentions, upon the peculiar facts involved, present a novel case, and a question rather difficult of solution.

Tompkins, a brakeman on the Chesapeake & Ohio Railway, holding an insurance policy issued by the defendant company, providing, among other things, for the payment of a weekly indemnity of \$10, in case of such injury, by external, violent, and accidental means, as should, independently of all other causes, immediately, continuously, and wholly disable and prevent him from engaging in any work or occupation for wages, stepped on a peach seed at Huntington, West Virginia, on the 2d day of July, 1897, whereby his right foot and ankle were so wrenched and sprained that, after having subsequently made three trips as brakeman, the injury required attention, and his physician placed his foot in a plaster of paris cast to keep it and the muscles and ligaments rigidly in a certain position, upon the theory that the ligaments supporting the lower part of the foot had been badly strained, lacerated, or broken loose, and must be in some way held in place long enough to permit them to heal and regain sufficient strength to support the lower part of the foot. This was done by Dr. George S. Bonner, of Clifton Forge, on or about the 5th day of September, 1897, who says his conclusion, upon his diagnosis, was that the injury was "nothing more than the weakness which usually follows a sprain, and the susceptibility to rheumatism, or something of that sort." On or about the 8th day of October, 1897, said cast was taken off by Dr. James F. Hughes, who was the examining surgeon or medical adviser of the insurance company, and had come to Tompkins' house for the purpose of making an examination of Tompkins in respect to the injury, under a clause in the policy requiring the insured to allow such examination in such manner and at such times as the medical adviser might require. After making the examination, Dr. Hughes left without replacing the cast or putting on another, and the plaintiff's foot soon became worse, and he has partially lost the use of it, although, after the lapse of considerable time, an effort was made to restore it to health and strength by again encasing

it as before, and other treatment. There is sharp conflict as to what occurred between the plaintiff and Dr. Hughes at the time the examination was made; the claim on the part of Tompkins being that the casting was taken off against his protest and by his unwilling submission to the exercise of the company's right of examination as proposed and executed, and on the part of the company that Tompkins consented to the removal of the support and the discontinuance of its use.

This explanation suffices to fairly indicate the nature of the objection made to the declaration, which sets out, in varying language, in its four counts, matter which is substantially covered by the foregoing statement, and alleges the duty of the defendant to use care, skill, and a due regard for the interests and welfare of the plaintiff in the exercise of its right of examination, and its failure so to do, as well as its wrongful and negligent conduct in removing the plaster cast and failing to restore it, and in requiring and causing the plaintiff to let it remain off.

The objection on demurrer, as indicated in the brief filed for plaintiff in error, is that "in various counts in the declaration alleging negligent and unskilful manner of making the examination there is interwoven alleged malpractice, bad medical advice and treatment subsequent to the removal of the cast and examination." The charge is to some extent borne out by the language of the declaration, but that does not make it faulty on demurrer. No recovery would be permitted on that part of the declaration. It must be treated as a surplusage,—irrelevant matter,—not vitiating the declaration, but objectionable on the ground that it encumbers the record. *Utile per inutile non vitiatur.* 4 Minor, Inst. 1264; Stephen, Pl. 424.

Further assignments of error are predicated upon the rulings of the court in giving and refusing instructions and in refusing a new trial. A *résumé* of the evidence is necessary to an intelligent disposition of them.

The testimony of the plaintiff, aside from the particulars of his original injury and treatment of it prior to the removal of the plaster cast, is, in substance, as follows: At first he refused to allow Dr. Hughes to remove the cast until he should consult his physician. Dr. Hughes insisted that it be taken off, and he finally consented. Dr. Hughes represented that the insurance company had sent him there to examine the injury, and, if he was not permitted to do so, the company would not allow him anything. He yielded to this, thinking it best to allow the examination to be made. After the cast was taken off, Dr. Hughes told him he did not see anything the matter with the foot,

and to get up and walk across the floor. He attempted to do so, but could not. Before its removal, he could get around with the aid of a cane. Dr. Hughes told him to go to the window, and that there was nothing the matter with his foot, and in a few days he could throw his cane away. He told him he could not walk to the window and back. Dr. Hughes insisted next morning that he get up and throw away the cane, and go down town. He made the examination on the 3d or 4th of October, and on or about the 8th the foot had become so much worse that plaintiff went to see Dr. Hughes about it, and told him he could not walk on it, and was directed to paint it with a solution of iodine, which was done. As the foot continued to grow worse, he told him to use crutches, and finally that he did not know what to do, as he had never seen a sprain turn out to be so serious. He kept going to Dr. Hughes until about the 25th of the month, when he told Hughes he saw no use in depending upon him further, to which Hughes assented, and then went back to the physician who had first treated him, and who declined to have anything further to do with the case, as the injury had become so serious. Dr. Hughes then advised him to go either to Baltimore to a hospital, or to Dr. McGuire at Richmond. He went to Richmond, and was directed by Dr. McGuire to put a plaster cast back on the foot. On his return, Dr. Hughes was requested to put it on, which he did in an imperfect manner. Then Dr. Bonner was sent for, who procured a suitable bandage, and put it on, and it remained on the foot until in February, 1898. As the foot was then found to be in bad condition, plaintiff went to McGuire's hospital, where he was treated specially and by various methods, which resulted in some improvement; but a perfect cure was not effected, and plaintiff now finds it necessary to wear steel braces to support the foot. Plaintiff had received a letter from the state agent of the defendant company, dated September 7, 1897, requiring him to "call at once upon Dr. Jas. F. Hughes of Clifton Forge, Virginia, surgeon of this company, that he may make an examination and report of your injuries." When Dr. Hughes came, he told the plaintiff he had been sent there by the insurance company both to make an examination of the foot and to give it treatment. When the cast was taken off and the foot examined, he said he thought it was getting along all right, and he could see nothing the matter with it, and plaintiff thought it was getting along all right until he attempted to walk on it. He did not hesitate to make the attempt when told to do so, as he wanted to know how it was; and that plaintiff may have

asked Dr. Hughes what sort of treatment he should give the foot, but does not remember.

Dr. Hughes testifies substantially as follows: He is a physician and surgeon of thirty years' experience, and was then, and had been for thirteen years, a surgeon of the Chesapeake & Ohio Railway Company. Under direction from the defendant company and another insurance company, he went on the 8th day of October, 1897, to see Tompkins, and make an examination, and report his condition to the insurance companies. He had been there before, when Tompkins was absent from home. He found plaintiff sitting in his room with his foot and leg encased in the plaster cast; told him what his business was; explained that he came under orders from the company, and that, as the plaster cast was on the foot, he could only report what he saw. Plaintiff asked him if he thought the cast ought to come off, to which he replied that he did not like to take it off. Plaintiff then asked if he thought it had been on long enough, and after counting up the time, which was four weeks and five days, and some further conversation, plaintiff said he had first sent for witness, but, as he was not at home, he had gotten Dr. Bonner to put the bandage on, and he had not been there for about three weeks, and plaintiff did not like that, and told witness then, that if he saw proper, to take it off, and said: "Hereafter I want you to do my practice and attend to my foot." Dr. Hughes did not say he would do it, but took off the plaster cast, which he did not expect to do when he went there. He saw little or no swelling, but did see a dark red spot on the foot which was very tender, and plaintiff looked at it, and said, "I think I will soon be able to go to work again," and witness said he thought so too. Dr. Hughes suggested to him—just merely suggested—that he did not think it necessary to put the bandage back, and advised him to bathe the foot in hot water two or three times a day, rub it with the points of the fingers, and subject it to passive motion by taking hold of it and working it gently. He did not tell plaintiff to throw away his cane and walk on his foot, but to use his crutches and not put the foot on the ground at first. Dr. Hughes had not then made up his mind to treat the foot, feeling a delicacy about interfering with the case, as plaintiff's regular physician had charge of it. He did not think, from the general appearance of the foot, that the bandage ought to be replaced, or he would have put it on. He was not acting for the company beyond the mere matter of examination, and said nothing to justify a conclusion on the part of plaintiff that he was treating him as the physician of the company. His only duty

was to visit, examine, and report. After the cast was removed, plaintiff called on Dr. Hughes two or three times, and the first time walked into the office with a stick or crutch, at which witness expressed surprise, and told him he ought not to walk on the foot. These visits were for the purpose of consulting him in relation to treatment, but no charge was made for it, as witness was the physician for the railway company, and it was his duty, as such, to treat railway employees, for which he was paid by the railway company. He had made the examination in obedience to a letter from the state agent of the insurance company directing him to do so.

Dr. R. S. Wiley testified that, under direction from the state agent of the defendant company, he called on the plaintiff January 4, 1898, to make a further examination of it, when he found it enveloped in a plaster paris cast, which the plaintiff refused to permit him to remove under advice from Dr. McGuire and his legal adviser; and that plaintiff told him he might remove the cast and make the examination if he would replace it, and put the foot back in the condition in which it was, but he declined to do that. He further testified that on the 6th of February, 1898, under direction of said state agent, he went to make another examination, when he found the cast had been removed, and he did so, finding the foot considerably swollen in the instep and on each side thereof.

When called in rebuttal, the plaintiff denied having made the statements attributed to him by Dr. Hughes.

Several physicians testified in the case as experts, as did also Drs. Bonner, Hunter, McGuire, and Stewart McGuire, who had personal connection with the treatment of the injury. All of them substantially agreed that the treatment first given the injured foot by Dr. Bonner was proper, and that the nature of the injury required the same or similar treatment.

Plaintiff in error excepted to the giving of the following instructions at the instance of the plaintiff below:

"(1) The court instructs the jury that if you believe from the evidence in this case that Dr. J. F. Hughes, as the agent and representative, called upon the plaintiff by reason of the provision in the insurance policy issued by the defendant to the plaintiff, authorizing the defendant to have its surgeon make such examination as he deemed proper, and that said Dr. Hughes, acting under said provision, did make an examination of plaintiff's foot and ankle, and that said Dr. Hughes made such examination, and negligently and improperly failed to replace the plaster cast removed by him, and that such

examination, or failure to replace such cast or a similar support, resulted in an injury to the plaintiff, then you should find for the plaintiff, and assess his damages at what you deem proper under all the circumstances.

"(2) The court instructs the jury that, if you believe from the evidence in this case that the examination required in the insurance policy issued by defendant to plaintiff comprehended and included, by the practice of reasonably skilled surgeons, such an examination as would leave the injury to plaintiff's foot and ankle, and the cast about such injury, in the same condition in which it was found by the defendant's surgeon, Dr. Hughes, who made such examination, and that said Dr. Hughes, as such surgeon, failed to leave said foot and ankle, and such cast and treatment therefor, in the condition he found them, and that by reason of said failure on the part of said surgeon an injury resulted to the plaintiff, then the defendant is liable therefor.

"(3) The court instructs the jury that if they find and believe from the evidence that the defendant, through its agent, acting upon his own judgment, and not at the request or at the instance of the plaintiff, removed the plaster dressing from the plaintiff's foot before the plaintiff had entirely recovered, and, without replacing said dressing, or substitute therefor, directed the plaintiff to use his foot, and that the use of the foot, as directed, without any bandages, support, or dressing, caused the injuries complained of, then the defendant is responsible for all damages sustained by the plaintiff, directly caused by the removal of the dressing and the use of the foot as aforesaid."

The clause of the policy under which the examination was made, and in connection with which the rulings of the court must be considered, reads as follows: "Any medical adviser of the company shall be allowed to examine the person or body of the insured in respect to any injury or cause of death in such manner and at such times as he may require." This confers upon the company a right of examination, and nothing more. It also confines the authority of its agent within the same limit. That right, and the agent's authority, however, extend to the making of the examination "in such manner and at such times" as the agent may require. It confers no right to treat the injury, and the insured was not bound to submit himself to any course of treatment at the hands of any physician that the company might indicate. If he had bound himself to that, the obligation would have carried with it his voluntary submission to the ordinary risk to which the law holds all persons who submit themselves to treatment at the hands of

physicians, and he could make the defendant company liable only upon such grounds as would enable him to recover damages from a physician employed by him. In such case a physician is held to the exercise of such care, skill, and diligence as are ordinarily possessed by the average of the members of the profession in good standing in similar localities, regard also being had to the state of medical science at the time. 22 Am. & Eng. Enc. Law, 2d ed. p. 799; *Kuhn v. Brounfield*, 34 W. Va. 252, 11 L. R. A. 700, 12 S. E. 519; *Lawson v. Conaway*, 37 W. Va. 159, 18 L. R. A. 627, 16 S. E. 564.

This construction of the clause in question, which seems to be rather acquiesced in by counsel for plaintiff in error, undoubtedly creates the relation of master and servant between the defendant company and Dr. Hughes, and applies the principle *respondet superior* between the company and Tompkins. "The term 'servant,' as used in this sense, is not, however, restricted to persons engaged in menial, or even in domestic, service. It is applicable to any relation in which, with reference to the matter out of which an alleged wrong has sprung, the person sought to be charged had the right to control the action of the person doing the alleged wrong; and this right to control appears to be the conclusive test by which to determine whether the relation exists." *Thomp. Neg.* § 578. There was no contractual or other relation which forbade the absolute control of the agent in the exercise of the right of examination, except the power of the insured to refuse to permit it by surrendering his right to the indemnity due him under the policy. This he was not bound to do, the reserved right of examination being a reasonable provision, compliance with which, in the absence of negligence, would result in no detriment to anybody. He was entitled to insist upon the payment of his indemnity, and upon the use of care and skill in the exercise of the right of examination, if the company insisted upon that as a condition precedent, as it was entitled to do.

Having the right to examine in such manner and at such times as it saw fit, the company did no unauthorized act in removing the plaster cast, if its removal was necessary or desirable in making the examination, and not injurious. As to this there is no controversy. Nor does it seem to be disputed that, in the absence of directions or assent to the contrary, on the part of the insured, it was the duty of the company's agent to replace the bandage. Clearly, it was, for by leaving it off the status was changed, and no right to make such change was given by the contract. In a sense, that would have been going entirely beyond a mere examination,

and performing a work in the nature of treatment of the wound. The contention of counsel for defendant in error well illustrates the importance of this restriction. Tompkins had sought medical advice and attention, and secured just the kind of treatment the nature of his injury required, according to the opinions given by the physicians and surgeons who testified in the case, and, had it not been disturbed, he, no doubt, would have fully recovered. Whether he so succeeded by a wise choice in selecting the surgeon, or by mere accident, or whether it was due to the skill of the surgeon or a chance selection of remedy by him, is wholly immaterial. When the company went to him to make the examination, it found a condition—a status—which it had no right to alter, and which it was bound to preserve, at the peril of having to answer for any injury that might result from disregard of duty in that respect, whether foreseen and contemplated as such result or not. It is not a case of breach of contract by nonperformance. It is an act beyond and outside of the contract, working injury; and intent or knowledge is not a material element in such a case. "The law affords a party a remedy by civil action to recover damages for an injury to his person or property, caused either directly or consequentially by the negligence, inadvertence, or want of proper precaution on the part of another, although such injury may have been purely accidental and unintentional. To constitute an available defense in such cases, it must appear that the injury was unavoidable, or the result of some superior agency, without the imputation of any degree of fault to the defendant; but the mere lawfulness of the act from which the injury resulted is no excuse for the negligence, unskillfulness, or reckless incaution of the party." *Tally v. Ayres*, 3 Sneed, 677; *Cate v. Cate*, 44 N. H. 211; *Bruch v. Carter*, 32 N. J. L. 554.

To this view and interpretation of the contract, the plaintiff below adhered in the progress of the trial, and the circuit court, regarding it as sufficiently supported by the terms of the contract, and the evidence introduced by the plaintiff, to call for its submission to the jury, as one theory of the case, which should govern and control them in finding a verdict, if they should find the facts to be as contended for by the plaintiff, accordingly gave the three instructions above quoted, all of which are in perfect accord with that theory, and the law as hereinbefore stated.

The defendant below held to a different theory, which, it must be admitted, is partially, at least, expressed in the following instructions, given as instructions requested 62 L. R. A.

by the defendant below, and modified by the court:

"(1) The court instructs the jury that, if they believe from the evidence that the plaintiff, at the time of the removal of the plaster cast from his foot, requested Dr. J. F. Hughes to treat him for his injury, and that the said Hughes, upon said request and with the consent of the plaintiff, and not at the instance and with the approval of said Hughes, removed said cast, and then gave plaintiff directions how to treat and use his said injured foot, that then the plaintiff is not entitled to recover in this action, and the jury should find for the defendant."

"(3) The court instructs the jury that the principal is not responsible for the acts of its agents outside of the scope of his agency, and that all parties dealing with an agent are bound to know the scope of the agency; and, if the jury believe from the evidence that the authority and power of Dr. J. F. Hughes from the defendant company was limited to an examination of and report upon the injuries sustained by the plaintiff, the plaintiff was bound to ascertain the extent of said Hughes' authority to represent the defendant company, and in so far as, if at all, he permitted any action by, or acted upon any advice of, said Hughes, not embraced in said authority, he cannot, for such advice or action, or for injuries resulting therefrom, recover damages from the defendant."

"(8) The court instructs the jury that, if they believe from the evidence that the injury complained of was the result of treatment by Dr. Hughes at the request of the plaintiff, and not at the instance and upon the advice of said Dr. Hughes, then the plaintiff cannot recover."

The first of these was modified only to the extent of inserting the words "from his foot," the words, "and not at the instance and with the approval of said Hughes," and the words, "and the jury should find for the defendant." The only modification of defendant's instruction No. 3 was the striking off from the end of it the words "but that in such case the right of action by the plaintiff, if any, is against the physician alone." Defendant's instruction No. 8, as requested, was modified by inserting the words, "and not at the instance and upon the advice of said Dr. Hughes, then," before the words, "the plaintiff cannot recover."

Defendant's instruction No. 5 was given, and reads as follows: "The court instructs the jury that, if the directions of the principal to his agent are specific,—to do some specific thing,—and the agent disregards his specific instructions, and goes about doing something else not reasonably within the

scope of the authority given, the principal will not be liable for such acts of the agent, unless they are afterwards ratified by him."

As to the modification of instruction No. 3, there can be no cause for complaint. It remained unchanged, save only that the suggestion that plaintiff might have a right of action against Dr. Hughes was stricken out. In so doing, the court rightfully eliminated an irrelevant and immaterial issue injected, to the benefit of which the defendant was not entitled, and which could have performed no function other than to mislead and confuse the jury.

The other two modifications consisted of the insertion of the clause, "and not at the instance and upon the advice of said Dr. Hughes," and the clause, "and not at the instance and with the approval of said Dr. Hughes," which are, in substance, the same. In order to throw upon the plaintiff the responsibility for the consequences of the removal of, and failure to replace, the plaster cast, was not the defendant bound to show that it had not been removed at the instance of its agent, he having actually taken it off? Plaintiff was bound to consent to its removal, if the agent demanded that it come off, for the contract required him to allow the examination in such manner as the agent required. Mere consent on the part of Tompkins was not enough to relieve the defendant from responsibility. It must have been a consent without a previous or contemporaneous demand for the removal. Consent under such demand or request was within the strict letter of the contract. Had the defendant a right to an instruction exonerating it upon proof of less than it was bound to prove in order to be relieved? Can it complain of the action of the court in adding the omitted element of relief which the defendant was bound to establish? Complete refutation of these propositions is found in the mere statement of them. This point goes to the very root of the controversy. If the cast had been removed solely at the request of Tompkins, he would have no cause of complaint, either on account of its removal, or of the failure to replace it. It would have been an act of his own volition. But the company had the right to take it off, and plaintiff was bound to accede to its demand, or, at least, could do so without forfeiting his right to have the examination made with requisite care and skill. Plainly, the position of the defendant in error in the court below was that Tompkins had himself, independently of the clause in the insurance policy, and without any reference thereto, employed Dr. Hughes, or requested him, to remove the plaster cast. If the evidence established that fact, then Dr. Hughes would have been the

agent of Tompkins in performing that work, or, more accurately speaking, he would have been an independent contractor, employed by Tompkins. That is the gist of the argument in this court. First, it is insisted that under the doctrine laid down in *Kuhn v. Brownfield*, 34 W. Va. 252, 11 L. R. A. 700, 12 S. E. 519, and *Lawson v. Conway*, 37 W. Va. 159, 18 L. R. A. 627, 16 S. E. 564, governing the relation and duty of the physician to his patient, the defendant is not liable, under the evidence in the case. Next, the principle enunciated in *Pearl v. West End Street R. Co.* 176 Mass. 177, 49 L. R. A. 826, 57 N. E. 339, is invoked. That case holds that a physician who, at the solicitation of a street railway, examined a person who, claiming to have been injured by the negligence of the company, had sued it, and in making such examination caused the plaintiff to try to stand on the alleged injured leg, in doing which he fell, and afterwards became afflicted with hysterical trouble, as an alleged result of the examination and fall, was not an agent or servant of the railway company, but was an independent contractor, for whose negligence the railway company was not responsible.

Passing, for the present, the question whether the present case assimilates itself to the Massachusetts case, and assuming that Dr. Hughes was not an independent contractor, unless it appears that the removal of the cast was not in pursuance of his request or demand that it be taken off, the inquiry is whether the question as to whose instance it was at which the casting was removed was fairly submitted to the jury by the instructions given for both plaintiff and defendant. If so, the court did not err in giving the instructions requested by the plaintiff, nor in modifying, and giving as modified, the instructions requested by the defendant. There can be no doubt that the question was so submitted, nor that if instructions Nos. 1 and 8, asked for by the defendant, had been given without such modification, a wholly different and improper question would have been submitted, namely, whether Tompkins consented, at the instance and upon the demand of the company, and not whether he directed the removal of the cast without such request.

Ten other instructions, asked for by the defendant, were refused; the whole number requested having been fourteen.

Instruction No. 2 so refused asked that the jury be told that if, before the examination, the question of removing the cast was submitted to the plaintiff for decision, and he asked for and received the advice of the agent, then the physician became his agent, and was not the agent of the company. If

was bad because it completely ignores the evidence relating to the practically admitted fact that a virtual demand had previously been made for the removal of the bandage.

Instruction No. 6 was on the subject of agency, and the extent to which an agent can bind his principal. The court was not bound to give it, because its subject-matter is fully covered by instruction No. 3, which was given.

Instruction No. 7 states the law relating to the degree of care and skill due from physicians to their patients. It embodied law wholly inapplicable to the case. What Tompkins' rights were as against Dr. Hughes is not a proper inquiry in this case, as has been shown, and its submission would have tended to confuse and mislead.

Instruction No. 9 presented a mingling and confounding of the law embodied in No. 7 with the law of agency, and would have been clearly misleading.

Instruction No. 10 was to the effect that the plaintiff was not bound to allow the removal of the cast, though demanded, and that in consenting thereto he exercised a choice, took the risk, and so cannot complain of the consequences. The construction given the contract entirely shuts out this contention.

Instructions Nos. 12 and 13 are to the effect that the treatment or the giving of advice by Dr. Hughes was outside of his agency, and no recovery can be had for injury resulting therefrom. Their subject-matter is substantially embodied in instruction No. 3, which the court was not bound to repeat. That instruction distinctly told the jury that, if the plaintiff had acted upon any advice of Dr. Hughes not embraced in his authority, he could not, for such advice or action, or for injuries resulting therefrom, recover damages from the defendant. No. 3 said, if the jury believed that the agent's authority was limited to examination, he could not recover for treatment or advice. No. 12 said the same thing in slightly different language. Defendant cannot complain of its failure to ask the court to tell the jury, as matter of law, that such advice or treatment was beyond the scope of the agent's authority. No. 13 was actually bad because its last clause embodied the principle of No. 7.

By instruction No. 14 it was proposed to inform the jury that, if Dr. Hughes took the cast off, either at plaintiff's request or by his consent, and made the examination without then and there injuring plaintiff, he was not entitled to recover. For a reason several times repeated, this instruction was bad. It ignored a previous request by the defendant. It introduces, however, another element, namely, that, if the mere examination did

not injure, no recovery could be had. That was a ground entirely too narrow, and wholly at variance with the contention of both sides. It was not pretended by anybody that the examination itself did any injury, but that injury resulted from leaving off the plaster cast after the examination. Hence a submission of that question could have performed no function other than to lead to a confusion and distraction of the minds of the jury from the real question in the case.

Instruction No. 11 proposed the submission of a question somewhat different from that presented by the instructions already passed upon. It was that if Dr. Hughes, as agent of the defendant, had given the plaintiff advice and instructions such as a surgeon or physician would sanction, and that the plaintiff negligently failed to observe such instructions and advice, and that his negligence and disobedience in that respect had directly contributed to his injuries, he could not recover, though the jury might believe that want of skill on the part of Dr. Hughes also contributed to the injury. The instruction was properly refused because it does not state the law. Such negligence is no bar to the action, but may be set up in mitigation of the damages. This instruction did not say that the jury should reduce the *quantum* of damages which the plaintiff would have been entitled to recover but for such negligence on his part, as the defendant was entitled to have the jury instructed. It proposed that the court tell the jury he could not recover at all if he had been guilty of such negligence. See 8 Am. & Eng. Enc. Law, 2d ed. p. 692.

Instruction No. 4 presents a question very different from any other suggested by the other instructions. It reads as follows: "The court instructs the jury that, while the law makes the plaintiff a competent witness in his case, yet the jury have a right to take into consideration his situation and interest in the result of your verdict, and all the circumstances which surround him, and give to his testimony only such weight as, in your judgment, it is fairly entitled to, and in view of the interest of the plaintiff." Under some circumstances this instruction might be proper, if broad enough to be free from the objection of giving too much prominence to the fact to which it relates. But, in view of the evidence in this cause, the instruction is open to that objection. No other witness had any pecuniary interest, perhaps, in the result of the trial, but Dr. Hughes, upon whose evidence and that of the plaintiff the vital question of fact in the case turned, had an interest, in this: That, if any negligence should be fixed upon his company, the result would be injurious to his principal, resulting from his negligence or overzealous-

ness, which would clearly affect him in a moral sense at least. As the plaintiff was not the only witness interested, it would have been improper to instruct the jury to consider his interest in the controversy without directing attention to the interest of the witness on the other side of the case, upon whose testimony the defendant must win or lose. In *Phenix Ins. Co. v. La Pointe*, 118 Ill. 384, 8 N. E. 353, just such an instruction as this was held bad upon the same ground.

As the case of *Pearl v. West End Street R. Co.* 176 Mass. 177, 49 L. R. A. 826, 57 N. E. 339, is relied upon as an authority controlling this case, a distinction between them is to be noted. In the Massachusetts case the court directed a verdict for the defendant. Just what the evidence was does not appear. In the opinion it is said: "In this case the doctor was informing himself according to the suggestions of his own judgment, in order to advise, and perhaps to testify for, the defendant. We must assume, in the absence of other evidence than his profession and his purpose, that what he should do and how he should do it was left wholly to him." In another place the court says: "The doctor's request that he should try standing on his left leg was not medical advice or direction upon a matter as to which the plaintiff had put himself into the doctor's hands. On the contrary, it came from one who avowedly was in an adverse interest, and who had no authority of any kind." From the construction hereinbefore given to the contract, and from the evidence set out, it is equally clear that the two cases are not similar. There was no evidence tending to show that the plaintiff was under any obligation, by contract or otherwise, to submit himself to the examination made by the physician, nor that the physician had any right to examine him. All that was done was voluntary on the part of the plaintiff in the Massachusetts case, and not in submission to any duty he owed to the defendant.

Another case relied upon is *O'Brien v. Cu-nard S. S. Co.* 154 Mass. 272, 13 L. R. A. 329, 28 N. E. 266, holding, upon the grounds that the laws required the vaccination of immigrants, and that a shipowner who provides a competent surgeon, whom the passengers may employ or not, as they choose, is not liable for his negligence, that a foreign steamship company is liable in an action for assault and battery, predicated upon the action of the ship's surgeon in vaccinating an immigrant steerage passenger, who made no objection to the operation. The principle of that case is manifestly distinct from the one governing the case under consideration. If the passenger was under any duty to submit to vaccination, it was a duty imposed by law. Moreover, it required a submission to treat-

ment and surgical operation, not mere examination. If the law did not impose a duty, the court held that the evidence was such as to show that the plaintiff had voluntarily submitted to the operation, and of course took the ordinary risk of injury attendant upon such operations, even when the surgeon exercised the ordinary care and skill peculiar to his profession.

But one question remains, and that is whether the court, in overruling a motion for a new trial, erred. That depends upon whether the verdict is against the clear weight of evidence, as there is no error in the rulings of the court upon the trial. Only two witnesses testify as to the facts upon which the crucial question in the case turns. They are Dr. Hughes and the plaintiff. One swears positively that the plaintiff, without any solicitation or demand that the cast be taken off, directed it to be removed. The other swears equally positively that he yielded to the demand of the company's agent. Therefore, it is simply a question as to which statement the jury ought to have accepted. Under such circumstances, there is not even a shadow of ground for saying that the verdict is against the clear preponderance of the evidence. To reverse the judgment on this ground, the court would simply be compelled to put itself in the place of the jury, and say that it ought to have found the contrary of what it did find, notwithstanding the fact that the evidence clearly warrants a finding either way on the question submitted.

There is no error in the judgment, and it must be affirmed.

Sarah F. YOUNG

v.

C. SEHON

and

J. P. R. B. SMITH *et al.*, *Pliffs. in Err.*

(.....W. Va.....)

*1. Where a non-negotiable note bears on its back the signatures of the promisee and another person in such manner as would make them first and second indorsers, respectively, if the note

*Headnotes by POFFENBARGER, J.

NOTE.—As to admissibility of parol evidence to explain indorsement of promissory note, see also, in this series, *Kingsland v. Koeppel*, 13 L. R. A. 649, and cases in note thereto; also *Spencer v. Allerton*, 13 L. R. A. 806.

As to admissibility of extrinsic evidence to show who is liable as maker of note, see *Keldan v. Winegar*, 20 L. R. A. 705, and note; *Bulkeley v. House*, 21 L. R. A. 247; *Shuey v. Adair*, 39 L. R. A. 473; and *Hoffman v. Habighorst*, 53 L. R. A. 808.

were negotiable, the parties signing are not deemed to have thereby made a complete and specific contract, analogous to the contract of commercial indorsement, making them liable as guarantors in the order of their signatures; and parol evidence is admissible to show the relation which they bear to one who asserts a liability against them on such note.

2. When such paper does not represent an existing debt, but is made for the purpose of obtaining on it a loan of money for one or all of the parties to it, a person who makes such loan on the faith of it and takes it may, in the absence of an agreement to the contrary, of which he has notice, treat those whose names are on the back of it as copromisors with him who signed on its face, or as guarantors, at his election.

(April 11, 1903.)

ERROR to the Circuit Court for Mason County to review a judgment in favor of plaintiff in an action brought to enforce payment of a promissory note. *Affirmed.*

The facts are stated in the opinion.

Mr. John W. English, for Smith, plaintiff in error:

Smith and Camden by placing their names on this note became either guarantors or assignors, with Sehon, the maker.

14 Enc. Pl. & Pr. p. 451; *Thomas v. Linn*, 40 W. Va. 122, 20 S. E. 878; *Quarrier v. Quarrier*, 36 W. Va. 310, 15 S. E. 154; *Bank of Huntington v. Hysell*, 22 W. Va. 142; *Thompson v. Govan*, 9 Gratt. 695; *Goff v. Miller*, 41 W. Va. 683, 24 S. E. 643; *Smoot v. McGraw*, 48 W. Va. 147, 35 S. E. 914; *Freeman's Bank v. Ruckman*, 16 Gratt. 130; *Broun v. Hull*, 33 Gratt. 23; *Welsh v. Ebersole*, 75 Va. 658; *Arenis v. Com.* 18 Gratt. 769; 14 Am. & Eng. Enc. Law, 2d ed. p. 1153; *McGuire v. Newkirk*, 6 Ark. 142; *Myer v. Reedy*, 115 N. C. 538, 20 S. E. 521; *Whiting v. Stacy*, 15 Gray, 270; *Peay v. Morrison*, 10 Gratt. 155.

Neither Smith nor Camden could be proceeded against as original promisors in this action.

Huntington v. Harvey, 4 Conn. 124; 2 Randolph, Com. Paper, § 658; *Kelsey v. McLaughlin*, 76 Ind. 379; *Cochran v. Strong*, 44 Ga. 636; *First Nat. Bank v. Gay*, 71 Mo. 627; *Morrison v. Lovell*, 4 W. Va. 346; *Broun v. Hull*, 33 Gratt. 23; *Thompson v. Govan*, 9 Gratt. 695; 2 Rob. New Pr. p. 457; *Dean v. Hall*, 17 Wend. 215; *Thomas v. Linn*, 40 W. Va. 122, 20 S. E. 878.

On petition for rehearing.

Messrs. John W. English and Rankin Wiley, for plaintiffs in error:

A promissory note for money, payable at an unincorporated bank in this state, is not a negotiable note, and the maker and indorser of such a note cannot be sued jointly.

Broun v. Hull, 33 Gratt. 23; *Freeman's* 62 L. R. A.

Bank v. Ruckman, 16 Gratt. 130; *Bank of Huntington v. Hysell*, 22 W. Va. 142.

In the absence of an express agreement to the contrary, the assignment of a bond or non-negotiable note imports a guarantee that the assignee shall receive the full amount of the bond or note assigned, if he fails to collect the same after the exercise of due diligence.

Thomas v. Linn, 40 W. Va. 122, 20 S. E. 878; *Merchants' Nat. Bank v. Spates*, 41 W. Va. 27, 23 S. E. 681; *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197.

The indorser of non-negotiable paper cannot be sued jointly with the maker.

First Nat. Bank v. Gay, 71 Mo. 627; *Cochran v. Strong*, 44 Ga. 636; *Campbell v. Farmers' Bank*, 10 Bush, 152; *Story v. Lamb*, 52 Mich. 528, 18 N. W. 248; *Castle v. Candee*, 16 Conn. 223; *Welton v. Scott*, 4 Conn. 527.

Messrs. John U. Myers and Charles E. Hogg, for appellee:

Smith and Camden by placing their names on the back of the note became joint promisors with Sehon, with the rights of common sureties.

This being non-negotiable paper, neither Smith nor Camden could be treated as an indorser. They did not, by signing their names, contract the obligation of assignors:

(1) Because they did not have, or claim to have, any ownership whatever in the note; (2) there was no assignee to whom the note was assigned or transferred.

Merchants' Nat. Bank v. Spates, 41 W. Va. 27, 23 S. E. 681; *Welsh v. Ebersole*, 75 Va. 651; *Mackie v. Davis*, 2 Wash. (Va.) 219, 1 Am. Dec. 482.

The party by indorsing his name on the instrument intended to assume some obligation.

Childs v. Wyman, 44 Me. 433, 69 Am. Dec. 111; *Good v. Martin*, 95 U. S. 96, 24 L. ed. 343; *Evan v. Brooks-Watterfield Co.* 55 Ohio St. 604, 35 L. R. A. 786, 45 N. E. 1094; *Union Bank v. Willis*, 8 Met. 504; 41 Am. Dec. 541; *Bright v. Carpenter*, 9 Ohio, 139, 34 Am. Dec. 432.

Where a stranger places his name on the back of a note at or before the time of its execution and before delivery he is held to be a joint maker with the rights of a common surety.

Seymour v. Mickey, 15 Ohio St. 515; *Robinson v. Abell*, 17 Ohio, 36; *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197; *Burton v. Hansford*, 10 W. Va. 470, 27 Am. Rep. 571; *Miller v. Clendenin*, 42 W. Va. 416, 26 S. E. 512; *Roanoke Grocery & Mill Co. v. Watkins*, 41 W. Va. 789, 24 S. E. 612; *Orrick v. Colston*, 7 Gratt. 189; *Powell v. Com.* 11 Gratt. 822; *Welsh v. Ebersole*, 75 Va. 651; *Kearnes v. Montgomery*, 4 W. Va. 29; *Good*

v. Martin, 95 U. S. 95, 24 L. ed. 343; *Stevens v. Parsons*, 80 Me. 351, 14 Atl. 741; *Douglas v. Waddle*, 1 Ohio, 413, 13 Am. Dec. 630; *Lawson, Rights, Rem. & Pr.* § 1575; *Andreus v. Congar* (C. C. N. D. Ill.) 20 Am. Law Reg. N. S. 331; *Tiedeman, Com. Paper*, §§ 270, 272.

Neither Smith nor Camden can be held as guarantor.

Purviance v. Jones, 120 Ind. 162, 21 N. E. 1099; *Scobey v. Walker*, 114 Ind. 254, 15 N. E. 674; 1 Dan. Neg. Inst. § 63.

A note has no legal inception until it is delivered to someone as evidence of a subsisting debt.

Catlin v. Gunter, 11 N. Y. 368, 62 Am. Dec. 113.

The maker of a note which he never delivered cannot be held liable thereon, even if in the hands of a bona fide holder.

Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497; *Cline v. Guthrie*, 42 Ind. 227, 13 Am. Rep. 357; *Chipman v. Tucker*, 38 Wis. 43, 20 Am. Rep. 1; 1 Dan. Neg. Inst. 3d ed. § 63; *Clark v. Boyd*, 2 Ohio, 56; *Clark v. Sigourney*, 17 Conn. 511; *Bromage v. Lloyd*, 1 Exch. 32; *Second Nat. Bank v. Howe*, 40 Minn. 390, 42 N. W. 200; *Tufts v. Shepherd*, 49 Me. 312; *Macy v. Kendall*, 33 Mo. 164; *Smith v. Wyckoff*, 3 Sandf. Ch. 77.

Until negotiated, the defendants could withdraw from and rescind their engagements upon it.

1 Dan. Neg. Inst. § 191; *Downes v. Richardson*, 5 Barn. & Ald. 674; *Whitworth v. Adams*, 5 Rand. (Va.) 333; 2 Am. & Eng. Enc. Law, p. 365; *May v. Boisseau*, 8 Leigh, 184; *Dogan v. Dubois*, 2 Rich. Eq. 85.

Poffenbarger, J., delivered the opinion of the court:

J. N. Camden and J. P. R. B. Smith complain on a writ of error of a judgment rendered against them in the circuit court of Mason county, and in favor of Sarah F. Young, on a non-negotiable promissory note for \$1,000, payable one year after date, to the order of said Smith, dated December 12, 1893, and signed on the face thereof by C. Sehon and on the back thereof first by J. P. R. B. Smith and then by J. N. Camden. The trial was by the court in lieu of a jury, and the oral evidence consisted of the testimony of said Smith and James L. Knight. The former testified that the note had been mailed to him from Huntington by Sehon, fully made out, with the request that he indorse it, and write a letter to Camden, asking him to indorse it, which was done. Upon the return of the note by Camden, Smith took it, and went to Knight for the purpose of obtaining the money on it for Sehon. Knight testified that he had in his hands, for the purpose of

loaning it, \$850, belonging to Mrs. Young, the plaintiff, to which he added \$150 of his own money, took the note, and delivered to Smith his check for \$1,000, payable to Sehon, which was sent to him by Smith; and that afterwards, on the repayment by Mrs. Young of the \$150, he delivered the note to her. The action was assumpsit against Sehon, which was sent to him by Smith; and Camden as original promisors with Sehon for his accommodation, and to enable him to obtain upon the note said loan. Plaintiffs in error plead nonassumpsit, and Sehon interposed a special plea, setting up his discharge in bankruptcy, and judgment was rendered against the plaintiffs in error only.

Against this judgment it is urged by the attorney for Smith that plaintiffs in error, by placing their names on the back of the note, became guarantors, and could not be sued jointly with the principal debtor, the contract of guaranty being collateral, and binding the guarantor only in the event of the failure of the party owing the debt to pay it and the exercise of due diligence on the part of the holder to collect from him. For Camden it is contended that he and Smith became indorsers or guarantors in the order in which their names are signed on the back of the note. In the absence of any parol evidence, the note indicates that it was made by Sehon to Smith, by whom it was assigned to Camden. Was parol evidence admissible to show the relation of the parties to the note? "Whatever diversities of interpretation may be found in the authorities, where either a blank indorsement or a full indorsement is made by a third party on the back of the note payable to the payee or order, or to the payee or bearer, as to whether he is to be deemed an absolute promisor or maker or guarantor or indorser, there is one principle upon the subject almost universally admitted by them all, and that is that the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties; and in most instances it is conceded that the intention of the parties may be made out by parol proof of the facts and circumstances which took place at the time of the transaction." Mr. Justice Clifford, in *Rey v. Simpson*, 22 How. 341, 349, 16 L. ed. 260, 263. In the syllabus of that case it is held that the weight of authority is in harmony with the principle that parol proof of the circumstances under which such indorsement was made is admissible. In 4 Am. & Eng. Enc. Law, 2d ed. 488, it is said that, "in all the states it would seem, however, that between the immediate parties evidence is admissible to show the actual time of indorsement." There can be no doubt that parol evidence was admitted for that purpose in *Kearnes v. Montgomery*, 4

W. Va. 29; *Burton v. Hansford*, 10 W. Va. 470, 27 Am. Rep. 571; *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197; *Thomas v. Linn*, 40 W. Va. 122, 20 S. E. 878; *Goff v. Miller*, 41 W. Va. 683, 24 S. E. 643; *Roanoke Grocery & Mill, Co. v. Watkins*, 41 W. Va. 787, 24 S. E. 612; and *Miller v. Clendenin*, 42 W. Va. 416, 26 S. E. 512. The report of the case in *Bank of Huntington v. Hysell*, 22 W. Va. 142, indicates that no parol evidence was offered in that case. In *Quarrier v. Quarrier*, 36 W. Va. 310, 15 S. E. 154, the parol evidence offered to establish facts fixing upon one of the parties to the note liability as an original promisor was excluded because of the incompetency of the witness to testify against the alleged copromisor, he being dead, and the transactions to which the witness proposed to testify having been personal between them. Such is the rule in Virginia also. *Hopkins v. Richardson*, 9 Gratt. 485; *Welsh v. Ebersole*, 75 Va. 651. This doctrine is so well settled that it is useless to cite authority upon it, but the following may be consulted as leading cases on the subject, all holding that parol evidence is admissible for such purpose: *Good v. Martin*, 95 U. S. 90 24 L. ed. 341; *Cavazos v. Trevino*, 6 Wall. 773, 18 L. ed. 813; *Jackson ex dem. Hopkins v. Leek*, 12 Wend. 105; *Essex Co. v. Edmunds*, 12 Gray, 273, 71 Am. Dec. 758; *Hall v. Cazenove*, 4 East, 477; *Cooper v. Robinson*, 10 Mees. & W. 694. Moreover, it is well settled by the decisions of this court, as well as by those of the courts generally, that any agreement between the parties to a note bearing irregular indorsements as to the extent of their liability on the note may be shown by parol evidence, and will be enforced as to all who are parties to the agreement. *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197; *Miller v. Clendenin*, 42 W. Va. 416, 26 S. E. 512; *Burton v. Hansford*, 10 W. Va. 470, 27 Am. Rep. 571; *Watson v. Hurt*, 6 Gratt. 633; *Roanoke Grocery & Mill. Co. v. Watkins*, 41 W. Va. 787, 24 S. E. 612.

Before attempting to ascertain the law applicable to this case, it is proper to state that the facts upon which this judgment is predicated differ somewhat from those of other cases which have been decided by this court, in which the maker and indorsers have all been held liable as copromisors. In those cases the indorsements were made before the notes were indorsed by the payees. Here the note itself imports, and the evidence shows, that the payee indorsed first. In the absence of parol evidence showing a different agreement or facts from which the law would raise a different obligation, the undertaking on the part of Smith and Camden would be collateral, and not joint with Schon. *Quarrier v. Quarrier*, 36 W. Va. 310, 15 S. E. 154. 62 L. R. A.

In *Burton v. Hansford*, *Miller v. Clendenin*, *Long v. Campbell*, and *Roanoke Grocery & Mill. Co. v. Watkins*, in all of which the indorsers were held to be copromisors, the third parties indorsed before the payees did so. In most, if not all, of them, the payees became the holders of the notes for value, and did not indorse at all. In each of these cases, the paper itself disclosed the irregularity of the indorsements on the back. Being in the hands of the payee as holder for value, and without his indorsement on the back of it, the theory of successive indorsements or assignments corresponding to the positions of the names on the back of it was negated by mere inspection of the instrument; and upon a showing by parol evidence that the indorsements were made before delivery the law holds that the indorser is prima facie an original promisor or guarantor, as the payee may elect, on the legal presumption that one who indorses, at the time it is made, a note not made payable to him, thereby indicates an intention to bind himself for the payment of it in some form, and that, if in such case he has failed to indicate in what form he intends to bind himself, it is fair to presume that he intended to be bound in any manner that the payee might elect. The necessity for the admission of parol evidence where the instrument itself shows the irregularity of the indorsements is apparent. Here, however, the positions of the names on the paper indicate that Schon executed his note to Smith, and that Smith assigned it to Camden, and Mrs. Young comes forward claiming to have acquired it for a valuable consideration. If she had shown that she had given Camden the money on it, without more, his undertaking would have been collateral.

No irregularity of indorsement being disclosed by the paper itself, the question is whether such irregularity may be shown by parol evidence, so as to let in further evidence of that kind to show the intention of the parties. While this is not affirmed in the case of *Quarrier v. Quarrier*, 36 W. Va. 310, 15 S. E. 154, the opinion of the court intimates in the following language that it may be done: "If these be the facts, Quarrier might be liable for the note as joint promisor or guarantor, according to the time of his signing, or the understanding between the parties." In *Whitehouse v. Hanson*, 42 N. H. 9, Bell, Ch. J., said: "It is a presumption of law that the parties to a promissory note stand to each other in the relation to which the signatures appear. The signers on the face of the paper are taken to be joint principals, unless some are designated as sureties; and the signers on the back to be indorsers, in the order in which the names are written, if nothing in the terms of the in-

dorsements indicates the contrary. . . . In the case of a bona fide holder of such a note without notice, this presumption is conclusive. . . . But, generally, this presumption is not conclusive as to others, but is merely a prima facie presumption, which stands till the contrary is proved." For the assertion that the presumption is conclusive as to a bona fide holder without notice, he cites *Grafton Bank v. Kent*, 4 N. H. 221, 17 Am. Dec. 414, and *Nichols v. Parsons*, 6 N. H. 30, 23 Am. Dec. 706. Both of these cases hold that the presumption in favor of such holder against agreements and equities among the makers and indorsers, of which the holder had no notice, and which, if enforced, would be prejudicial to him, is conclusive. *Whitehouse v. Hanson* presented the same question and it was disposed of in the same way. Hence, there is no ground for an inference that the language quoted means that a holder cannot show by parol evidence the actual nature of the transaction, as to consideration, time, and intent, to the extent of making the parties liable to him in a manner different from that indicated by the mere positions of the names on the paper.

Speaking of the operation upon negotiable instruments of the rule against the admissibility of parol evidence to vary the terms of a written contract, Daniel, Neg. Inst. § 720, says: "The language of the rule implies its limitation, for it does not extend to exclude evidence offered to show want or failure of consideration, or to impeach the original or present validity of the indorsement on the ground of fraud. There are three classes of cases in which evidence for this purpose is admissible, and it will be seen that it does not contradict or vary the contract imported by the indorsement, but impeaches it as a valid indorsement to the extent claimed by the indorsee. Thus, firstly, it may be shown that the indorsement was without consideration—as, for instance, that it was for the indorsee's accommodation, or merely to transfer the legal title to the indorsee, he being in fact the owner of the paper; or that it was indorsed for collection, where the form of indorsement does not show that fact, or that it was indorsed merely to perfect an arrangement between the maker and indorsee. And where several and successive indorsers agreed to be liable as joint indorsers and cosureties, an extension of this principle would admit the facts to be shown, as they reveal the extent and nature of the consideration." Section 707 of the same work says: "There is no doubt that, if a note be made payable to the order of the payee, and is indorsed by him, that his liability will be that of an indorser, and not that of a maker. If subsequent to his name there appears the name of another person indorsed upon it,

such person cannot be regarded in any other light than as indorser, and no parol evidence will be admissible, as against a bona fide holder without notice, to show that he intended to bind himself in a different character. This view of the law rests upon the fact that there is no ambiguity in the position of his name, and none in his relation to subsequent parties to the instrument. Upon its face the instrument evidences that he intended to bind himself as an indorser, for it purports to have been regularly transferred to him by the payee's indorsement, and by him transferred, by his own indorsement, to the indorsee. And unless he has indicated an intention to become liable as a surety or guarantor by some expression to that effect, he will very clearly be bound as an indorser, and be entitled to require demand and notice as a condition precedent to his determinate liability. The form of the contract must at least prima facie determine its construction." Then § 707b says: "If a party not the payee at the inception of the note puts his name on the back of it, and the payee afterward indorse it over such party's name, the latter will then be second indorser, and his liability cannot be varied by parol evidence. And the like result is reached if the payee's name be left blank, and the holder of the note, in negotiating it, fills it up with the name of the party who has signed his name on the back." On the subject of irregular indorsements, such as were found in the cases of *Burton v. Hansford*, *Long v. Campbell*, *Miller v. Clendenih*, and *Roanoke Grocery & Mill. Co. v. Watkins*, the same author says, at §§ 709, 710, and 711: "When a note is made payable to the order of the payee, and the name of another appears indorsed in blank upon it, and was then indorsed before the note was delivered to or indorsed by the payee, a very different question, and one upon which the authorities are very much at issue, arises. In such cases such person does not appear upon the face of the paper to have held and to have transferred the title, but rather to have placed his name upon its back to add strength and credit to it, and thus render it more easy of circulation; and the inquiry is presented whether he intended to bind himself for its payment as a joint maker or surety, as a guarantor, or only as an indorser, whose liability can only be fixed by due demand and notice. If the note be not negotiable, it is plain that such party can not be regarded as an indorser, for the simple reason that there is no such thing as an 'indorsement,' in its strict and proper commercial sense, of any other than negotiable paper." "When the note is negotiable, the question is by no means capable of such easy and satisfactory solution; but, whatever diversities of interpretation may be found in

the authorities on the subject, they very generally concur, though not with entire unanimity, that, as between the immediate parties, the interpretation ought to be in every case such as will carry their intention into effect, and that their intention may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. If the person who placed his name on the back of the note before the payee intended at the time to be bound to the payee only as a guarantor of the maker, he shall not be deemed to be a joint promisor or an absolute promisor to the payee. If he intended to bind himself as a surety or joint maker of the note, he will not be permitted to claim afterward that he was only a guarantor. And, if he intended to be bound only as an indorser, the better opinion is that this also may be shown as between him and the payee." "The ground upon which parol proof of intention and agreement in such cases is admitted is that the position of the name upon the paper is one of ambiguity in itself—that it is not a complete contract, as is the case of an indorsement by the payee, which imports a distinct and certain liability, but rather evidence of authority to write over it the contract that was entered into; and that parol proof merely discloses and brings to light the terms of the unwritten contract that was made between the parties." An exception is admitted by Mr. Daniel at § 703, where he says that, "when several persons indorse a bill or negotiable note in succession, the legal effect is to subject them as to each other in the order they indorse. The indorsement imports a several and successive, and not a joint, obligation, whether the indorsements be made for accommodation or for value received, unless there be an agreement *alunde* different from that evidenced by the indorsements. When the successive indorsements are for accommodation of other parties, the indorsers for accommodation may make an agreement to be jointly and equally bound, but whoever asserts such an agreement must prove it. In cases, therefore, in which no such agreement is proved, the indorsers are not bound to contribution amongst themselves, but each and all are liable to those who succeed them." On this proposition he cites *Hogue v. Davis*, 8 Gratt. 4; *Farmers' Bank v. Beirne*, 1 Gratt. 265, 42 Am. Dec. 551; *Farmers' Bank v. Vanmeter*, 4 Rand (Va.) 553; *Chalmers v. M'Murdo*, 5 Munf. 252, 7 Am. Dec. 684, and numerous other cases which bear out fully the text. A contrary doctrine is asserted in *Stovall v. Border Grange Bank*, 78 Va. 194, but the declaration is *obiter*.

While the rule excluding parol evidence to show liability of indorsers different in extent or character from that indicated by the position of their names is well supported by decisions of the courts of New York, Illinois, Minnesota, North Carolina, Indiana, Massachusetts, Missouri, Texas, Tennessee, and Rhode Island, there is a vast amount of authority against it. Randolph on Commercial Paper, at § 834, says: "This show of intention seems, however, to conflict with the fact that such signature is generally made for the further assurance of the payee, whereas his position as indorser is naturally after that of the payee or first holder, and tends to negative all idea of liability to the payee;" and then says the view is "approved as 'the New York rule' by Judge Daniel." At § 833, Randolph, Com. Paper, cites a long list of cases holding that, where the paper discloses no ambiguity on its face, parol evidence of the time of the indorsement and the consideration may be introduced. One of these—*Sturtevant v. Randall*, 53 Me. 149—holds that "the contract implied, from one's placing his name in blank upon the back of a negotiable promissory note is not a written contract so far complete in itself as to exclude parol evidence to show his connection with such note. As between the original parties to such contract, or those having their rights, parol evidence is admissible to prove the circumstances which will determine its character." In the opinion, Barrows, J., says: "From a series of decisions in Massachusetts and this state . . . it may be deduced as settled law that, when one not the payee of a negotiable promissory note indorses it in blank at its inception, the legal presumption arising from the act is that it was done for the same consideration with the written contract on the face of the note, and the person thus indorsing will be holden as a surety and an original promisor. If the same act is done at some subsequent time, but without a previous indorsement by the payee, then there is no such presumption as to the consideration, and the person thus indorsing will be held, if there was in fact a consideration for his contract, as a guarantor. If the same blank indorsement is made after an indorsement by the payee, then the person making it is to be regarded as a subsequent indorser; and, in the absence of date or proof, it is presumed that the indorsement was made at the inception. Now, that these presumptions have not been considered, as between all the parties to negotiable paper, to belong to that class of legal presumptions which admit of no opposing evidence, is manifest from the tenor of the reasoning in many of the cases above referred to." Then, after quoting from two Massachusetts cases, he says: "But, aside from numerous *dicta* of similar import, it is too plain to need elucidation that in such cases parol evidence must be resorted to, in

tions of their names is well supported by decisions of the courts of New York, Illinois, Minnesota, North Carolina, Indiana, Massachusetts, Missouri, Texas, Tennessee, and Rhode Island, there is a vast amount of authority against it. Randolph on Commercial Paper, at § 834, says: "This show of intention seems, however, to conflict with the fact that such signature is generally made for the further assurance of the payee, whereas his position as indorser is naturally after that of the payee or first holder, and tends to negative all idea of liability to the payee;" and then says the view is "approved as 'the New York rule' by Judge Daniel." At § 833, Randolph, Com. Paper, cites a long list of cases holding that, where the paper discloses no ambiguity on its face, parol evidence of the time of the indorsement and the consideration may be introduced. One of these—*Sturtevant v. Randall*, 53 Me. 149—holds that "the contract implied, from one's placing his name in blank upon the back of a negotiable promissory note is not a written contract so far complete in itself as to exclude parol evidence to show his connection with such note. As between the original parties to such contract, or those having their rights, parol evidence is admissible to prove the circumstances which will determine its character." In the opinion, Barrows, J., says: "From a series of decisions in Massachusetts and this state . . . it may be deduced as settled law that, when one not the payee of a negotiable promissory note indorses it in blank at its inception, the legal presumption arising from the act is that it was done for the same consideration with the written contract on the face of the note, and the person thus indorsing will be holden as a surety and an original promisor. If the same act is done at some subsequent time, but without a previous indorsement by the payee, then there is no such presumption as to the consideration, and the person thus indorsing will be held, if there was in fact a consideration for his contract, as a guarantor. If the same blank indorsement is made after an indorsement by the payee, then the person making it is to be regarded as a subsequent indorser; and, in the absence of date or proof, it is presumed that the indorsement was made at the inception. Now, that these presumptions have not been considered, as between all the parties to negotiable paper, to belong to that class of legal presumptions which admit of no opposing evidence, is manifest from the tenor of the reasoning in many of the cases above referred to." Then, after quoting from two Massachusetts cases, he says: "But, aside from numerous *dicta* of similar import, it is too plain to need elucidation that in such cases parol evidence must be resorted to, in

the absence of anything in writing, to determine what the contract actually was,—whether that of an original promisor, guarantor, or indorser to transfer the title,—and that this is no infringement of the wholesome rule that parol evidence shall never be received to vary or contradict a written contract.”

Another case affirming with equal strength the like doctrine is *National Bank v. Dorset Marble Co.* 61 Vt. 106, 2 L. R. A. 428, 17 Atl. 42, decided in 1888. Rowell, J., delivering the opinion of the court, said: “But in this state no distinction has ever been made in this behalf between regular and irregular indorsements in blank of third persons, but they have alike been held *prima facie* to impose the obligation of maker. In most, if not all, of the cases before *Sylvester v. Downer*, 20 Vt. 355, 49 Am. Dec. 786, the indorsements were irregular, which brings the cases in line with a great majority of the cases in other jurisdictions. But in *Sylvester v. Downer* the defendant's indorsement was regular; that is, his name was written in blank under the names of the payees. This seems to be so from the case, but we have a copy of the note before us, which shows it to be so. Downer was sued as sole maker of the note, and, although it is true that the evidence tended to show, and the jury found that he intended to assume an unconditional obligation to pay the note according to its tenor, yet the court adverted to that fact only as putting at rest all pretense that it was not understood that he assumed the obligation his signature imported, and said: On being produced, the note shows the name of the defendant indorsed upon it, and also the names of the payees. This, according to the decisions of this court, repeatedly made, imposes upon the defendant the obligation of maker, with this difference: That, his undertaking being in blank, as between him and the parties to it, it is susceptible of being controlled by oral evidence of the real obligation intended to be assumed at the time of signing.” See also *Ballard v. Burton*, 64 Vt. 387, 16 L. R. A. 664, 24 Atl. 769, decided in 1892.

Chaddock v. Vanness, 35 N. J. L. 517, 10 Am. Rep. 256, asserts with emphasis the doctrine of the Maine and Vermont courts. Depue, J., said: “The inadmissibility of parol evidence to vary the legal import of commercial paper is forcibly advocated by Professor Parsons. 2 Parsons, Notes & Bills, 520. He maintains that its competency is limited to exceptional cases. Id. 23. The exceptional cases are those in which the evidence tends to establish a defect in the consideration, or the instrument is informal, and therefore no commercial contract is created by the indorsement *per se*. It is upon the principle of 62 L. R. A.

this exception that the evidence received by the court in this case was properly admitted. The defendant is not named in the note as payee. The first indorsement of a note by a person not the payee *per se* creates no implied or commercial contract whatever, although the party may be subjected to the liability of a second indorser if the payee should afterwards indorse the note, and it should come to the hands of a bona fide holder before maturity. *Crozer v. Chambers*, 20 N. J. L. 256. As between the parties, a liability can arise only from the facts and circumstances which occurred at the time of the transaction. Whether any contract was made, and what the character of the contract is, must be determined by the intentions of the parties as ascertained by parol evidence of the circumstances under which the indorsement was made. Parol evidence offered for that purpose is not objectionable on account of a tendency to vary a written contract, when no contract arises except upon such evidence.” See also *Hayden v. Weldon*, 43 N. J. L. 128, 39 Am. Rep. 551. But *Johnson v. Ramsey*, 43 N. J. L. 279, 39 Am. Rep. 580, holds that “an accommodation indorser cannot set up, in a suit against him by his indorsee, that there was an agreement between them at the time of putting their names on the paper that such indorsement should constitute a joint, and not a successive, liability.” So, in *Foley v. Emerald & P. Brewing Co.* 61 N. J. L. 428, 39 Atl. 650, a payee who had indorsed a note for the accommodation of the maker before it was delivered to the holder was held to be a commercial indorser, just as the paper indicated.

Cecil v. Mix, 6 Ind. 478, opened wide the door for parol evidence, but the supreme court of that state long ago adopted the New York rule. *Vore v. Hurst*, 13 Ind. 551, 74 Am. Dec. 268; *Roberts v. Masters*, 40 Ind. 463. So, in Minnesota, it was once held that “parol evidence is admissible to prove in what capacity a party writes his name on the back of a note,—whether as indorser, guarantor, or surety,—when the controversy is between the original parties, or to determine the mutual liability of the indorser, when there are several.” *Pierse v. Irvine*, 1 Minn. 369, Gil. 272. But in *Coon v. Pruden*, 25 Minn. 105, the court held that “a member of a firm made a promissory note payable to the order of the firm. . . . Held, that the relation of the firm to the note is that of indorser, and cannot be varied by parol, and that a demand upon the maker is necessary to charge the firm.”

Counsel for defendants in error cite certain Ohio cases which they claim sustain their position. Among them is *Douglas v. Waddle*, 1 Ohio, 413, 13 Am. Dec. 630, holding upon evidence of mere local usage, admitted,

that accommodation indorsers of a promissory note are cosureties, among whom contribution may be enforced. This was narrowed and virtually overruled in *Williams v. Bosson*, 11 Ohio, 62, but it affirms the admissibility of parol evidence. Another is *Robinson v. Abell*, 17 Ohio, 38, holding, upon a note executed by John W. Abell to Wm. Robinson against Palmer, as a joint maker, that there could be no recovery against Palmer as maker without proof that the indorsement was made at the time of the execution of the note. This asserts the admissibility of parol evidence; but the court virtually certifies in its decision that the irregularity of the indorsement was apparent without the aid of extrinsic evidence, and that would let in parol evidence anywhere. In the syllabus Palmer is described as a stranger to the note. Another is *Ewan v. Brooks-Waterfield Co.* 55 Ohio St. 596, 35 L. R. A. 786, 45 N. E. 1094, holding that the indorsement of the maker's name on the back of a promissory note payable to his own order, and its delivery in that form to another for value, are essential parts of the execution of the note, and that the person so making, indorsing, and delivering for value is liable as a maker. But the court held that the irregularity of the indorsement was disclosed by the note itself. Williams, Ch. J., said: "The note, being payable to the order of the maker, was incomplete in its execution until indorsed by him and delivered to another for value. . . . There is here no room for any inference that the note had been previously transferred by the maker to the company, and thereafter indorsed by it in order to transfer the title." Another is *Seymour v. Mickey*, 15 Ohio St. 515, in which it was permitted to be shown by parol evidence in a suit upon a note bearing regular indorsements that an indorser signed his name on the back of the note at the time of its execution for the purpose of giving the payees additional security for the payment of the note, and had refused to sign it as a joint maker, whereupon he was held to be liable as an indorser, and entitled to demand and notice. This case does not appear to have ever been expressly overruled, although in *Cummings v. Kent*, 44 Ohio St. 92, 4 N. E. 710, 58 Am. Rep. 796, it has since been held that "evidence of a parol agreement, prior to or contemporaneous with the drawing and delivery of a bill of exchange, that the drawer is not to be liable as such, is inadmissible." The proof offered was that there was a parol agreement that the drawer was not to be liable as such.

Enough has been said to clearly show that, if the case were governed by the rules applicable to negotiable paper, there is respectable authority for deciding the case either way, 62 L. R. A.

But the weight of authority would undoubtedly make it impossible to hold the plaintiffs in error liable as joint makers of the note in the present status of the case. But the note is not negotiable, and the inquiry now is whether a different rule applies, and, if so, what that rule is. Section 1 of Daniel on Negotiable Instruments draws a very clear distinction between the two classes of paper, in the third clause of which it is said: "By the common law an instrument under seal imports a consideration by virtue of the solemn ceremony of its execution, and no other non-negotiable instrument does. A bill of exchange, however, by the usages of merchants, also prima facie imports a consideration; and now by statute promissory notes of a certain kind are placed on the same footing. As between immediate parties, the true state of the case may be shown, and the presumption of consideration rebutted. But when a bill of exchange or negotiable note has passed to a bona fide holder for value, and before maturity, no want or failure of consideration can be shown. Its defects perish with its transfer; while, if the instrument be not a bill of exchange or negotiable note, they adhere to it in whosoever hands it may go." In the first clause of said section he shows that a negotiable instrument is a *res*, a thing of value, title to which may be held and transferred; and that, when it goes into the hands of a bona fide holder without notice of any defect, he may hold it against the world, while in the case of a non-negotiable instrument the true owner may identify it, and reclaim it from anybody who may hold it as an innocent purchaser from one who has stolen it or otherwise come into possession of it wrongfully.

Edwards, Bills & Notes, at § 326, says: "There is, however, a manifest distinction between those cases in which the party has made a valid and explicit contract, as where a person writes his name on the back of a negotiable note, and that class of cases where the contract cannot be carried into effect as an indorsement, according to mercantile usage, as where a person indorses his name on the back of a note that is not negotiable. In respect to the former, the contract is to be enforced according to its legal effect, under principles that are well established, and presumed to be within the knowledge of the parties; while in respect to the latter courts endeavor to prevent the utter failure of the contract by giving it effect in some other way, as by allowing the holder to overwrite the indorser's name with the real contract implied by law, or recover against him as a maker or guarantor of the note." Section 391 of the same book says: "Where a person puts his name, in blank, on the back of a promissory note, he may be held liable as

maker or guarantor, when there is an agreement to that effect, and when he cannot be charged as an indorser, as in the case of a non-negotiable note. But where the payee seeks to charge the indorser of a non-negotiable note, who indorsed the same before delivery, with the payment thereof, he must allege that the defendant indorsed with intent to become liable as guarantor or maker. This is allowed in order to prevent an entire failure of the contract, on the principle, *ut res magis valeat quam pereat*.

2 Parsons, Notes & Bills, 125 says: "In those states where the rule is adopted that a third person indorsing paper in blank before the delivery of it to the payee is liable as an indorser only it is not applied in case the paper be not negotiable, inasmuch as a legal indorsement can only be made on negotiable paper; but the indorser in such cases is held liable as a maker or guarantor."

These authorities clearly show that the rule against the admission of parol evidence to show the consideration, the relation of the parties, and the circumstances attending the execution of the paper, to the end that the true intent may be ascertained and effectuated, has no application in the case of non-negotiable paper. This being true, the rule of liability pronounced by the law must be the same in this case as it is in the cases of irregular indorsements decided by this court, and to which reference has been made. In those cases it has been decided that the holder of the paper may treat the parties thereto either as makers or as guarantors, according to his own election, however, their names may stand upon the paper. To this it may be objected that the rule excluding parol evidence when the names upon the paper are signed regularly and in succession rests upon the ground that it operates to vary or contradict the terms of a written contract, and that this paper imports a debt due from Sehon to Smith, transferred by Smith to Camden, and that Mrs. Young stands in the attitude of assignee of Camden, and that, therefore, she must hold Smith and Camden as guarantors of the debt due from Sehon only and was bound to the

exercise of diligence to collect that debt. This contention is not without the semblance of reason, to say the least, but it has just been shown that the indorsements of such note are not regarded as importing a complete contract, and that evidence is admissible to show the intention of the parties. Edwards, Bills & Notes, § 391. In some instances it has been held that the indorser is to be treated as a guarantor, and not as a maker; but the rule applied by this court in the cases in which parol evidence has been admitted entitles the holder of the paper to elect whether he will treat them as makers or guarantors. If there had been an agreement between Sehon on the one side and Smith and Camden on the other that the latter should be guarantors, or that Smith was to be guarantor as to Sehon, and Camden guarantor as to both Smith and Sehon, such agreement would be unavailing as against Mrs. Young, unless she had notice of it. *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197; *Burton v. Hansford*, 10 W. Va. 481, 27 Am. Rep. 571; *Watson v. Hurt*, 6 Gratt. 633. There is no evidence that there was such an agreement, unless the note itself is evidence of it. It cannot be, for it is not commercial paper, and is not regarded in law as imposing liabilities or contracts, according to the order of indorsement. Smith testified in the case, and did not say there was such an agreement. Camden did not come forward to testify. The evidence shows circumstances from which it is clear that this note was drawn up in the form in which it is for the purpose of procuring money from somebody for the benefit of Sehon, and that the names of Smith and Camden were affixed to it with the intent to give it credit and strength with the person who should accept it and furnish the money upon it. That clearly makes them liable as joint promisors. Defendant in error had the right of election to hold them as original promisors or as guarantors.

For these reasons, *the judgment must be affirmed.*

Petition for rehearing denied.

GEORGIA SUPREME COURT.

CENTRAL OF GEORGIA RAILWAY COMPANY, *Plff. in Err.*,

v.

Isaac MOTES.

(.....Ga.....)

*1. Whether a regulation adopted and

*Headnotes by SIMMONS, Ch. J.

sought to be enforced by a carrier of passengers is or is not reasonable is a question of law, and not one of fact for determination by a jury.

2. In the absence of any duty devolving upon a railway company to provide at its stations a place wherein its patrons may sleep while awaiting the arrival or departure of trains, a regulation forbidding passengers

NOTE.—As to right of carrier to make reasonable regulations as to depots and baggage rooms, see also, in this series, *Smith v. Chamberlain*. 62 L. R. A.

19 L. R. A. 710; *Phillips v. Southern R. Co.* 45 L. R. A. 163; *Goldberg v. Ahnapee & W. R. Co.* 47 L. R. A. 221.

from going to sleep in its waiting rooms, or lying down on the benches therein, is not, in a legal sense, unreasonable.

3. A passenger who displays a persistent determination to disregard such a regulation, and by his wrongful conduct so exasperates a servant of the company as to unfit him from properly performing the duty he owes his master with respect to his treatment of its patrons, cannot justly complain that the company's servant lost his temper and resorted to unnecessary force in compelling an observance of the regulation on the part of the passenger.

(April 8, 1903.)

ERROR to the Macon City Court to review a judgment in favor of plaintiff in an action brought to recover damages for an assault alleged to have been committed on plaintiff by defendant's employee. *Reversed.*

The facts are stated in the opinion.

Messrs. Hall & Wimberly, J. E. Hall, and R. D. Feagin for plaintiff in error.

Messrs. H. A. Mathews and Guerry & Hall for defendant in error.

Simmons, Ch. J., delivered the opinion of the court:

An action sounding in tort was brought by Isaac Motes against the Central of Georgia Railway Company to recover damages for an assault alleged to have been committed upon him by an employee of the company.

On the trial of the case, the plaintiff was introduced as a witness in his own behalf, and testified substantially as follows: About the 5th of January, 1901, he purchased at Griffin a ticket entitling him to be carried over the line of the defendant's road from that point to Ft. Valley. He took passage upon an afternoon train which ran as far as Macon, an intervening station, and arrived there about 7 o'clock. He was asleep when the train "rolled into the depot, and . . . was not aroused until all the passengers were off," when "the conductor, or porter, or some official came through and waked" him up. He then got off on the left-hand side of that train, and inquired of a man wearing the uniform of a porter what train he should take in order to reach his destination. Being directed to a train on the right-hand side of that he had left, he boarded the former; but, after it had proceeded some distance from the depot, he learned it was not "the right train to Ft. Valley," and thereupon "got off the train and walked back." On his return to the station he made inquiry at the ticket office concerning the train he should have taken, and was informed it had left, and he would be compelled to wait for the next train passing through Ft. Valley, which would not leave Macon until early in the morning of the following day. He then "pro-

ceeded to the waiting room," and as he "was tired and sleepy from the fatigue of the day, . . . laid down across the benches and went to sleep." Shortly afterwards, the official in charge of the waiting room came and waked the plaintiff, telling him "that was not a hotel; that the benches were made to sit on." As soon as this official went out of the room, the plaintiff "laid back down in a reclining position," not "in the same position" he had before assumed, but in one which admitted of his resting upon his elbow and allowing his feet to hang off the seat. "It was not but a short while before the" official just mentioned came back into the room, pulled the plaintiff up, and told him he would send him to a hotel; that he "could not sleep there." In reply the plaintiff said he "did not care to go to a hotel." This official again left, whereupon the plaintiff "slipped back on the seat, where [he] could lay [his] head on the back of the seat." He "did not lay down that time," but put his "head on the back of the seat" and closed his eyes. "In a few minutes [he] was disturbed again by the same" official, who "pulled [him] out of [his] seat and jerked [him] around a little." Plaintiff had his coat buttoned up. The official pulled it open, "jerking off some buttons," and threatened to carry plaintiff to the "courthouse" and lock him up. After shaking him, and while still having hold of him, the official demanded that the plaintiff show his ticket, and compelled him to exhibit it before he was turned loose. The official "did not make any apology for his conduct," when shown plaintiff's ticket, but remarked that he "didn't have any business there anyway," as he "should have gone on the train" which he had missed. Plaintiff was not further molested in any way, and left Macon on the morning train for Ft. Valley. His coat was not injured, save that the top button was torn off. "The other buttons came unfastened," as the company official took hold of the plaintiff's coat where it came together at the collar. He "was not drinking that night," but was merely drowsy and sleepy. He was pulled up out of his seat the last time he was disturbed; "was not to say sound asleep at the time, [but] was in a dozing manner." Was pulled to his feet, though not carried off further than a few feet. The benches in the waiting room were placed back to back, and were provided with small arms, so arranged as to divide the benches into seats. "The sitting-down places were entirely separated from each other all the way across," and the seats were "large enough for a person to sit on."

During the course of the plaintiff's examination while on the witness stand, he stated

that he did not remember having made any remarks to the official in charge when the latter first aroused him from his slumbers and told him he could not sleep in that room as it was not a hotel, and the benches were made to sit on; though, the witness said, he "might have made some remark." He admitted he paid no regard to what this official said as to how he should conduct himself, and immediately lay "down in a reclining position to rest, after he went out, [and,] as a matter of fact," did again go to sleep. Upon being again awakened and told he would be sent to a hotel, he replied he "didn't care to go to a hotel; that [he] would spend the night there." The railroad official doubtless understood him to mean by this remark that he did not intend to observe any regulation of the company with respect to the right of passengers to regard its waiting room as a lodging house, for it affirmatively appears from the testimony of another witness, whom the plaintiff himself introduced, that in point of fact he did make an offensive reply to the company's official when first approached by him and told he must not sleep in the waiting room. In this connection, this witness testified: "I just noticed the officer shake the young man awake and tell him that he must not sleep in the waiting room; that, if he wanted to sleep, he had better go to the hotel. The young man replied that he would sleep if he felt like it." According to the account given by this witness, "the officer went out of the room and returned in . . . about twenty or thirty minutes, and walked to where the young man was sitting, and jerked him out of his seat and tore the buttons from his coat," taking hold of him rudely and using him "pretty rough." The witness further undertook to assert that the plaintiff had not lain down on the benches at any time previously, and was sitting quietly in his seat asleep when thus rudely aroused,—“leaning on his hand, sitting in the seat.” Witness “saw the officer approach the young man twice” only. The second time, “the officer jerked the young man from his seat to the floor, or to his feet, and said that he had told him not to sleep in there, and that he would see he did not do so.” Witness was himself “asleep part of the time that night in the waiting room, and was not disturbed by the officer at all;” but neither he nor anyone else present was, he said “stretched on the benches asleep,” and the “young man never laid down.” Not only as to this last statement, but in other respects, the testimony of this witness differed essentially from what the plaintiff admitted was the truth with regard to what actually occurred.

The only other witness who testified on the 62 L. R. A.

trial was the company's official who had charge of the waiting rooms on the occasion under investigation. He explained that there were “three waiting rooms at the depot: ‘A colored waiting room; a general waiting room; and a private waiting room for ladies,’ which was a small room opening into the general waiting room. Ladies usually sat in this small room when unaccompanied by gentlemen, though the general waiting room was provided for the accommodation of both sexes. While there were “no printed regulations for the government of the waiting rooms at the Union Depot,” there were verbal ones with regard to lying down on the benches, and as to sleeping in the general waiting room; and the witness had been a number of times instructed not to permit a violation of these regulations. It was his duty to preserve order in and about the depot, and his “jurisdiction embraced the waiting room” set apart for ladies and gentlemen, to which the plaintiff went. He was first seen by the witness somewhere between 8 and 9 o'clock, and was then in this waiting room, sitting by the stove with several others. “The next time [witness] went in there, he was lying down on the seat. He had moved down to the end of the seat then, and had his head on” one of the arms, and was “stretched out full length on the bench.” Witness “went to him and tried to get him to get up then, and told him to sit up, but he didn't do it. He just let his foot down off the seat and lay there.” A train was backing into the car shed at the time, and witness had to leave to attend to other duties. When he returned to the waiting room, plaintiff was still lying there, and witness “asked him again to get up and sit up,” saying “that was not any place to sleep; that if he wanted to sleep he must go and get a room.” Plaintiff said he would, if witness would pay for it; but this the latter declined to do, and “insisted on his getting up and sitting up, and he would not do it. He would not make any move to do it, and [witness] caught hold of his coat right there, in order to pull him into a sitting position, not to pull him off the seat. A button broke off. He got up then and picked the button off the floor and stood up in the floor, and then was the time [witness] asked for his ticket, and he said he had it.” Witness asked to see it, but plaintiff replied he “never had any business to see it until train time,” and that “when he [plaintiff] started through the gate he would let” witness see it. Witness told him he would have to show his ticket or get out; “that he would not stay there unless he did let [witness] see it. He finally offered it,” though he held on to one end of it, and witness “saw enough to see where it was to

and from." Nothing further was said, save that witness "told him he had no business there; that his train was gone, and if he came from Griffin he ought to have gone on the Albany train right on to Ft. Valley." Witness approached the plaintiff only twice. "He was lying full length on the bench both times. . . . He was lying with his body over the arm the second time, with his head on the arm of the seat, and he was occupying two seats then." Witness asked for his ticket, in order to ascertain whether or not he was a passenger, whether "he was going anywhere or not," and whether "he had any right to the building or not. Passengers are not allowed to lie across benches; it does not matter how many tickets they have." Witness "did not see anyone else in the waiting room lying across the benches asleep. There were cards hung on the back of each train in that shed at that time for the guidance of the people, showing what train it was, and where it went to. That was true in every instance at that time." Plaintiff "explained how he got left."

1. The trial judge refused to give in charge to the jury the following written request: "If you believe from the evidence that the plaintiff, Isaac Motes, after being informed by the officer of the defendant company who was in charge of the white waiting room that he could not sleep across the benches in such waiting room, or could not lie across said benches for any purpose, and if you believe from the evidence that Motes persisted in lying across said benches, after having been informed by the officer in charge that he had no right to do so, then I charge you that the officer in charge had the right to use such force towards Motes as was necessary to enforce the regulation." As will be noted, this request to charge was based upon the assumption that, as matter of law, the regulations adopted by the company with respect to lying across benches and sleeping in its waiting room were reasonable. His honor did instruct the jury in general terms that the "defendant's agent was authorized in law to use such force as was necessary in enforcing reasonable regulations of the company," and further told the jury that it was for them to determine whether or not, in point of fact, the particular regulations adopted by the defendant company were, under all the circumstances, reasonable and proper. Apparently the jury found they were not. The question is therefore presented whether it was or was not within the province of the jury to determine this all-important matter. We think not. "A railroad company has an implied authority (which is necessarily almost absolute) to make and enforce all reasonable rules and regulations for the con-

trol of its trains and the persons thereon, of persons using its stations and grounds, and of those transacting business with it, in order to provide for the safety of its passengers and employees, and to protect itself from imposition and wrong." 1 Elliott, Railroads, § 199. "To this end," carriers of passengers "may regulate the purchase of tickets, the time and manner of procuring and paying for the same, and the time and manner of surrendering them; the manner and time of entering and leaving the cars; and the conduct of the passengers while upon the cars or at stations waiting for trains, as that they shall not be boisterous or disorderly. . . . Rules and regulations in regard to separate cars for ladies and their escorts" have been upheld as reasonable, as have also rules "prohibiting disorderly conduct on the cars." And it is the right of common carriers to "exclude from their carriages and premises such persons as refuse to comply with their reasonable regulations." Id. § 200. "The reasonableness of such regulations and of the manner of their enforcement in a given case has been held by some of the courts to be a question of fact for the jury. But it would seem that this must be a question of law for the court to decide, if any fixed and permanent regulations are to be established, and the better authority holds it to be such; since one jury in a given case might pronounce the rule reasonable, while another jury in another case might decide the same rule to be unreasonable. . . . There are doubtless many cases in which the reasonableness of the rule depends, in the particular instance, upon disputed facts or circumstances, and, where this is true, it may, perhaps, be called a mixed question of law and fact; but, when the facts are undisputed, we think it is clear, both upon principle and according to the weight of authority, that the question is one of law for the court." Id. § 202. Says no less an authority than Judge Thompson: "Whether a certain rule of a railway corporation be reasonable, and therefore valid, is a question of law for the court,—the general rule being that the reasonableness of the by-laws, rules, and regulations of corporations, whether private or municipal, is to be decided as a question of law, and that such a by-law, rule, or regulation, if unreasonable, is to be held void as matter of law; and it is improper to submit the question of the reasonableness of such a by-law, ordinance, or regulation to the decision of a jury." 1 Thompson, Trials, § 1057. This subject came under discussion in the case of *Southern R. Co. v. Watson*, 110 Ga. 682, 690, 36 S. E. 209, wherein the question arose as to whether or not a carrier of passengers

could lawfully undertake to limit the time in which a railroad ticket should be used. In this connection, Mr. Justice Little, who delivered the opinion of the court, said: "All the authorities which support the doctrine that a railroad company may by rules and regulations limit the time in which a ticket can be used for passage concur in the view that such regulation must be reasonable, and whether or not a regulation of this character is or is not reasonable is a question to be determined by the court. On this subject, the rule, as we understand it, is that, where the facts are not disputed, the reasonableness of a regulation of a common carrier affecting the transportation of passengers is one of law for the court, and not of fact for the jury." See also the cases cited on page 690, 110 Ga., and page 213, 36 S. E.

2. We shall not at this time undertake to do more than determine whether or not, as regards a waiting room in a city such as Macon, where weary travelers may, if they wish, procure suitable accommodations for rest and comfort, regulations forbidding the use by passengers of benches as beds, or any other attempted transformation of a railroad waiting room into a lodging house, tend to deprive passengers of inalienable rights, or are for any other reason to be regarded as despotic and unreasonable. It is pertinent here to remark that there was no evidence introduced on the trial touching any rule promulgated by the railroad commission of this state with respect to the duty of a common carrier to furnish lodgings to such of its patrons as find it convenient to present themselves at the carrier's depot during the night, there to remain until the scheduled departure several hours later of a morning train. Nor have we been cited to any common-law or statutory rule which imposes upon a railway company any such duty towards such patrons, or to one holding a ticket, who, through his own fault or misfortune, has missed an evening train. Accordingly we shall endeavor to decide on principle whether such a duty does or does not, as a general thing, exist.

It seems reasonable to assert that a railway company could not be considered unreasonable if it adopted a regulation whereby a passenger was not admitted to its waiting room until an hour or so before the departure on schedule time, of a train the passenger desired to take. Nor would it appear more unreasonable for the carrier to actually keep its waiting room open all night for the accommodation of its patrons, permitting them to enter it at any time they chose, on condition that they would not abuse the privilege thus accorded them by undertaking to wrest from the carrier a night's sleep to

which they were not entitled. Many good reasons might be suggested why the carrier would be unwilling to extend an unqualified invitation to enter at will and stay as long as desirable. For instance, passengers expecting to take a particular train might, if permitted to indulge in inopportune sleep, miss the train, and be left complaining on the carrier's hands, instead of making a timely and orderly departure and giving place to other passengers entitled to enter its waiting rooms and partake of the accommodations it afforded. Again, the carrier could have a laudable ambition to so conduct its waiting room that passengers of culture and refinement might be spared the disgust of witnessing the uncouth and unseemly behavior of a different class of travelers, whose sense of decency fails to suggest to them the impropriety of sprawling over or upon benches or seats, designed for a purpose other than that of affording an opportunity to retire for the night in a grotesque, if not offensive, attitude of repose. The reasonableness of a regulation adopted by a carrier of passengers with respect to the use to be made of its premises is not to be arbitrarily determined by applying the test whether or not such regulation would be reasonable if adopted by a carrier of live stock. The circumstances of time and place are to be given due consideration. On the Western frontier, years ago, the reasonableness of attempting to regulate the "shooting out" of station lights by waiting passengers might have been seriously questioned by at least some members of the traveling public. To-day there is doubtless a growing sentiment in all parts of the country against converting into a smoking apartment a general waiting room provided for the accommodation of both sexes, as well as against treating with contempt the invitation held out by the station house "sand box" or cuspidor, and other minor infractions of the laws of etiquette which obtain in polite society. The evolution which has taken place along this line cannot properly be ignored by the courts, for carriers of passengers are to be encouraged, rather than disheartened, when they manifest a disposition to improve conditions, which have become almost intolerable. To furnish adequate and comfortable accommodations to the traveling public is an exacting and serious business, not mere vain and expensive trifling. A prospective traveler who purchases a railroad ticket with a view to going on a journey does not thereby acquire a right to demand of the carrier that he be allowed to enter its waiting room eight hours or so before the train he expects to take is due, and there go to sleep as a matter of course.

To miss his train will not change his status from a waiting passenger into a guest entitled to demand a place wherein to sleep until the next train bound for his destination arrives, or transform the carrier into an inn-keeper or proprietor of a lodging house. Indeed, he would stand upon no better footing than would a patron of a public eating house who, after missing his supper through his own tardiness, might, simply because he was the holder of a meal ticket, unreasonably claim the privilege of occupying a chair at table in the room where meals were served, and there passing his time in sleep until the arrival of the breakfast hour. Accordingly, we hold, without hesitation, that a railway company may with propriety insist that such of its patrons as contemplate taking a morning train shall, if they desire to refresh themselves by slumber during the intervening night, find quarters other than its waiting rooms.

3. According to the version given by the plaintiff himself touching what occurred prior to the time he was assaulted by the station agent, a finding against the defendant company was wholly unauthorized. Notwithstanding the plaintiff was expressly notified of the above mentioned regulations of the company governing its waiting room, he manifested a persistent determination to pay no regard to the same, and displayed a disposition to irritate and move to anger the official whose duty it was to enforce them. After being twice told by that official that passengers were not permitted to sleep in the waiting room, the plaintiff confesses he waited until the official again left the room, and then "slipped back on the seat," where he could lay his head on the back of it, closed his eyes and dropped off into slumber. While he says he "did not lay down that time," it is evident that he knew the official would protest, if present, against his thus assuming an undignified and sprawling attitude, which enabled him to use the back of the seat as a pillow, and resume his nap at the point where it had been interrupted. He did not undertake to assume this position until the officer again left the room, nor in good faith try to observe the rule against using the benches for a purpose other than that for which they were provided. From the beginning to the end of his altercation with this official, the plaintiff spoke and acted in a manner well calculated to bring down upon himself the harsh treatment he finally suffered at the hands of the company's agent. Should it, in good conscience, be held respon-

62 L. R. A.

sible therefor? The reply to this inquiry is to be found in the report of the case of *Peavy v. Georgia R. & Bkg. Co.* 81 Ga. 485, 8 S. E. 70, wherein it was pertinently remarked that "it is unjust to a master wrongfully to unfit his servant for exercising the care and prudence which are essential in guarding the master's interest and performing the servant's duty." The doctrine laid down in that case was subsequently recognized and applied in *City Electric R. Co. v. Shropshire*, 101 Ga. 33, 28 S. E. 508, and in the cases cited on page 35, 101 Ga., and page 508, 28 S. E. In *Georgia R. & Bkg. Co. v. Hopkins*, 108 Ga. 324, 33 S. E. 965, the plaintiff sought to recover damages because of an assault which the company's night watchman committed upon him while he was at a station waiting for a train; but, it appearing that the plaintiff had himself been guilty of grossly improper conduct, and had exasperated the company's agent by the use of offensive and insulting language to and of him, this court held the company was not liable for the consequences of such assault, even though the agent may not have been fully excusable, and the battery inflicted was entirely disproportionate to the insult given. In the present case no physical injury was inflicted upon the plaintiff. His feelings were hurt: that is all. His sole grievance is that the company's official used unnecessary force in undertaking to discharge his duties. By persistent disregard of the company's regulations, it is clear that the plaintiff forfeited his right to longer remain in its waiting room, and might very properly have been ejected therefrom. Being himself in the wrong, he is not in a position to justly complain that, instead of being forcibly ejected from the room, he was wrongfully treated with unnecessary harshness by the official in charge, and then permitted to remain therein, since the plaintiff by his own misconduct so exasperated that official as to unfit him for performing in an irreproachable and conservative manner the duties assigned to him by his master. This being the view we take of the case, we shall not specifically deal with other points made in the motion for a new trial, touching the propriety of charging the jury as to the law with regard to the recovery of punitive damages, etc. In our opinion, the plaintiff was entitled to no damages at all.

Judgment reversed.

All the Justices concur, except **Lumpkin**, P. J., absent on account of sickness.

OREGON SUPREME COURT.

APEX TRANSPORTATION COMPANY,
Respt.,
 v.
T. A. GARBADE, Appt.

(32 Or. 582.)

1. Neither due process of law, nor the equal protection of the law, is denied by the granting of a nonsuit, instead of submitting the case to the jury, where the facts are practically admitted.
2. A decision by a state supreme court that the granting of a nonsuit, instead of submitting the case to the jury, where the facts are admitted, does not deprive the plaintiff of due process of law, does not raise a Federal question which will entitle him to a writ of error from the Supreme Court of the United States.
3. A Federal question raised for the first time on motion for rehearing comes too late as a foundation for taking the case to the Supreme Court of the United States.

(September 14, 1898.)

NOTE.—What adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts.

- I. Scope of note, 513.
- II. Introduction, 514.
- III. Nature of decisions reviewable.
 - a. Finality of determination, 515.
 - b. Adjudication must be that of the highest state court, 518.
 - c. When adjudication is rendered in a suit.
- IV. The nature of the controversy essential to this jurisdiction.
 - a. In general, 519.
 - b. Validity of Federal law, 521.
 - c. Questions respecting Federal authority, 521.
 - d. Repugnancy of state statutes or authority to Federal law.
 1. State authority, 525.
 2. State statutes generally, 528.
 3. State legislation impairing contract obligations, 527.
 - e. Rights and immunities claimed under Federal law.
 1. In general, 529.
 2. Full faith and credit, 529.
 3. Former jeopardy, 530.
 4. Commerce, 530.
 5. Due process of law, 530.
 6. Equal protection of the laws, 531.
 7. Treaty rights, 532.
 8. Land titles, 532.
 9. Title to office, 534.
 10. Mining claims, 534.
 11. Bankruptcy, 535.
 12. National banks, 536.
 13. Citizenship, 537.
 14. Indians, 537.
 15. Contracts, 537.
 16. Vested water rights, 537.

APPPLICATION by respondent for a writ of error to the Supreme Court of the United States after reversal of a judgment of the Circuit Court for Multnomah County in its favor in a proceeding to condemn a right of way for a skidroad. *Denied.*

The plaintiff brought an action to condemn a right of way over certain land belonging to defendant. The right was controverted on the ground that the use for which the land sought was required was not a public, but a private, use. This question was raised by motion for a nonsuit, and also by a request for an instruction to the jury. The case was submitted to the jury, and an award of \$350 damages made to defendant. He appealed to the supreme court, and it decided that the purpose for which the land was sought was private, and not public, and that a nonsuit should have been granted. 32 Or. 582.

Further facts appear in the opinion.

Messrs. George W. P. Joseph and Frank Schlagel for appellant.

IV. e.—continued.

17. Legal tender, 537.
18. Exemption from taxation, 537.
19. Customs and internal revenue, 538.
20. Removal of causes, 538.
21. Navigation, 538.
22. Civil rights, 538.
23. Patents for inventions, 538.
24. Slavery, 539.
25. Limitation of actions, 539.
26. Miscellaneous, 539.
- f. Questions of local or general law are not Federal.
 1. In general, 540.
 2. Practice and procedure, 541.
 3. Validity of state legislation under state Constitution, 542.
 4. Statutory construction, 542.
 5. Questions of fact, 543.

V. Conclusion, 543.

I. Scope of note.

The object of this note is to point out the nature of the adjudications of state courts which are reviewable in the Supreme Court of the United States on writ of error to those courts, and of the controversy essential to confer this jurisdiction, and usually denominated a "Federal question." Further questions with respect to the scope of this appellate jurisdiction over state courts, and the manner and effect of its exercise, are reserved for future notes in this series. It has also seemed best to defer for future discussion questions as to the sufficiency of the presentation of the Federal contention to the state court, and the necessity and requisite character of the decision thereon by such court, and merely to consider in this connection whether the controversy, if properly presented and decided, was in its nature such as to confer this jurisdiction.

Messrs. Dolph, Mallory, & Simon and George, Gregory, & Duniway for respondent.

Wolverton, Ch. J., delivered the opinion of the court:

This is an application for the issuance of a writ of error to the Supreme Court of the United States in the above cause. The petition states that in the trial of said cause there "was drawn in question an authority exercised under the state of Oregon by the supreme court of the state of Oregon, on the ground that the same was repugnant to the 14th Amendment to the Constitution of the United States, and the decision was in favor of the validity of such authority so exercised under said state; also a right, title,

privilege, and immunity was claimed under the 14th Amendment to the Constitution of the United States, and the decision was against the title, right, privilege, and immunity specially claimed under the 14th Amendment to the Constitution of the United States." The assignments of error comprehend the two phases of the 14th Amendment of the Federal Constitution, viz., that no state shall deprive any person of property without due process of law, and shall not deny any person the equal protection of the law. But, in so far as the latter condition concerns the matter in hand, it is not strenuously urged that it is available as furnishing grounds for granting the writ. The latter clause simply means, as stated in *Missouri v. Lewis*, 101 U. S. 22,

II. Introduction.

Congress at its first session made provision for the review of the judgments of state courts in the Supreme Court of the United States, and the provisions of this original statute (§ 25 of the judiciary act of September 24, 1789) are, except for certain changes, not necessary here to be noticed, substantially those of the present enactment (U. S. Rev. Stat. § 709 [U. S. Comp. Stat. 1901, p. 575]), which, as amended by the act of February 18, 1875, striking out the words represented by stars in the following quotation reads as follows: "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority,—may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. . . . The Supreme Court may . . . reverse, modify, or affirm the judgment or decree of such state court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

The manifest inconsistency of permitting the extent of the sovereignty of the Federal government to be determined by an independent and possibly hostile tribunal, together with the want of harmony which the decisions of thirteen courts in as many different states would be likely to produce, furnish abundant reason for investing the Supreme Court of the United States with this power to override the judgments of state courts in cases involving

conflicts between Federal and state authority.

"It was essential to its very existence as a government," said Mr. Chief Justice Taney in *Ableman v. Booth*, 21 How. 509, 13 L. ed. 171, "that it (the Federal government) should have the power of establishing courts of justice altogether independent of state power, to carry into effect its own laws; and that a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a state court or a court of the United States, should be finally and conclusively decided."

"All the enumerated cases of Federal cognizance," says Chancellor Kent in commenting on the original statute conferring this jurisdiction, "are those which touch the safety, peace, and sovereignty of the nation, or which presume that state attachments, state prejudices, state jealousies, and state interests might sometimes obstruct or control the regular administration of justice. The appellate power in all these cases is founded on the clearest principles of policy and wisdom, and is deemed requisite to fulfil effectually the great and beneficent ends of the Constitution. It is likewise necessary in order to preserve uniformity of decision throughout the United States upon all subjects within the purview of the Constitution; and the mischiefs of opposite constructions and contradictory decisions in the different states on all these points of general concern would be deplorable." 1 Kent, Com. *320.

The few decisions which have denied this power to the Supreme Court of the United States are based on such a strict construction of the judiciary article of the Federal Constitution as limits the appellate jurisdiction therein provided for to appeals from the inferior tribunals of the Federal judicial system. But such occasional protests against the appellate jurisdiction of the highest Federal court over state courts have been entirely unavailing to counterbalance the constant exercise of this jurisdiction with the general acquiescence of the state courts, and it does not now seem probable that any state court would venture to deny the constitutionality of U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575), which, as has been noted, is a substantial re-enactment of § 25 of the original judiciary act of 1789. Virginia, Wisconsin, and Georgia at first refused to yield obedience to the mandate of the Supreme Court of the United States, on the theory

sub nom. Bowman v. Lewis, 25 L. ed. 989, "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances," and has relation more especially to legislative, rather than judicial, action. *Marchant v. Pennsylvania R. Co.* 163 U. S. 380, 388, 38 L. ed. 751, 756, 14 Sup. Ct. Rep. 894. If, however, it be considered applicable to judicial action, it does not appear in the application, or anywhere throughout the course of the trial and disposition of the cause, wherein the plaintiff has been denied the equal protection of any law accorded to another under like circumstances. This disposes of all but the first assignment,—

that Congress was given no power by the Federal Constitution to invest the Supreme Court of the United States with appellate jurisdiction over state courts. *Hunter v. Martin*, 4 Munf. 1; *Ableman v. Booth*, 11 Wis. 498 (decision by divided court); *Padelford v. Savannah*, 14 Ga. 438. The same view was taken in *Johnson v. Gordon*, 4 Cal. 368, and *Stunt v. Ohio*, 3 Ohio Dec. Reprint, 362, and received, perhaps, its strongest and most forcible exposition in Mr. Chief Justice Bartley's dissenting opinion in *Piqua Bank v. Knoup*, 6 Ohio St. 342.

But, in addition to the constant unchallenged exercise of this jurisdiction by the Supreme Court of the United States, the existence of such power has been squarely upheld in a number of cases. *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97; *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Piqua Bank v. Knoup*, 6 Ohio St. 342; *Ableman v. Booth*, 21 How. 509, 16 L. ed. 171. See also, as sustaining such power, the opinion of Dixon, Ch. J., in *Ableman v. Booth*, 11 Wis. 498, *supra*, with note. Indeed, so long ago as in 1858, a majority of the supreme court of California, in *Ferris v. Coover*, 11 Cal. 175, in overruling *Johnson v. Gordon*, 4 Cal. 368, *supra*, regarded the constitutionality of § 25 of the judiciary act as no longer open to question.

A state court may recognize the existence of this power in the cases enumerated by Congress, and at the same time, where it deems the particular case to be clearly outside the scope of such jurisdiction, refuse obedience to the mandate of the Federal court. And, as the only remedy in such case is for that court to proceed to a final decision in the cause, and award execution, Mr. Justice Thompson was of the opinion, in *Holmes v. Jennison*, 14 Pet. 540, 10 L. ed. 579, that the revising power of the Federal Supreme Court over state courts was not intended to be applied to any case where the former court could not execute its judgment. None of his associates seem to have shared his opinion, and the court in a later case, speaking through Mr. Chief Justice Fuller, held that it could not decline the exercise of its appellate jurisdiction over the judgment of state courts upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state as revised by the Federal court. *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 860, 13 Sup. Ct. Rep. 3.
62 L. R. A.

that the plaintiff has been deprived of his property without due process of law.

The right to the writ of error, in so far as it concerns the present controversy, can only be claimed "where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity." U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575). The court's exercise of its authority is the subject of complaint, and it is claimed that such exercise was repugnant to the 14th Amendment in the particular suggested. It is decided by *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, that a state

III. Nature of decisions reviewable.

a. Finality of determination.

Only a final adjudication of a state court can be brought into the Supreme Court of the United States. *Goodenough Horseshoe Mfg. Co. v. Rhode Island Horseshoe Co.* 154 U. S. 635, Appx., and 24 L. ed. 368, 14 Sup. Ct. Rep. 1180.

All judgments and decrees which determine the particular cause are "final" within the meaning of the 25th section of the judiciary act of 1789. Therefore, a judgment of the highest court of a state reversing an order restraining action under a municipal ordinance challenged as in violation of the Federal Constitution, on the ground that the ordinance was not repugnant to that Constitution, is final for the purposes of review by writ of error from the Supreme Court of the United States. *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481.

So, where a state court reverses a judgment in favor of one defendant on the ground that he was not entitled to the exemption which he claimed under the bankrupt act, and affirms a judgment against his codefendants as his sureties on the ground that they were not entitled to the benefit of his discharge, both judgments are final, and may be brought to the Supreme Court of the United States by writ of error. *O'Dowd v. Russell*, 14 Wall. 402, 20 L. ed. 857.

The refusal of the highest court of a state to obey the mandate of the Supreme Court of the United States, on the ground that so much of the 25th section of the judiciary act of 1789 as extended the appellate jurisdiction of that court over the judgments of state courts is unconstitutional, is reviewable in the Supreme Court of the United States as a final judgment. *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97.

A judgment of the highest state court denying a writ of mandamus to compel a state official to receive interest coupons for taxes without a deduction from their face value of the amount of a tax levied on the bonds is final for the purpose of review by the Supreme Court of the United States. *Hartman v. Greenhow*, 102 U. S. 872, 26 L. ed. 271.

The refusal by the highest court of a state to discharge a defendant on habeas corpus is likewise a final judgment for this purpose. *Holmes v. Jennison*, 14 Pet. 540, 10 L. ed. 579.

A judgment of the highest court of a state which merely affirms an interlocutory order of

may not by any of its agencies disregard the provisions of that amendment, and that the court may, by its rulings in submitting a case to the jury, so far disregard the rules of law governing the rights of property as to violate the spirit and intent of the amendment. It cannot be claimed by plaintiff that its property is being taken without just compensation, as it is seeking to condemn, and not to prevent condemnation; but it is suggested that by taking the case from the jury the plaintiff has been deprived of the right of trial by that tribunal, and therefore has been deprived of due process of law. The right of trial by jury is guaranteed by the 7th Amendment, and the objection is probably not well assigned as being in violation of the 14th

Amendment; but, conceding that it is, the plaintiff has not presented a case entitling it to the writ. Mr. Justice Harlan, in *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825, says: "Errors in the mere administration of the statute, not involving jurisdiction of the subject and of the parties, could not justify this court, in its re-examination of the judgment of the state court upon writ of error, to hold that the state had deprived, or was about to deprive, the plaintiffs of their property without due process of law." This doctrine was reaffirmed by the same learned justice in *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581. In the latter case it was said that "many matters may occur in the progress of such

a lower court is not a final judgment which may be reviewed in the Supreme Court of the United States, however apparently decisive of the merits. *Meagher v. Minnesota Thresher Mfg. Co.* 145 U. S. 608, 36 L. ed. 834, 12 Sup. Ct. Rep. 870.

Thus, a judgment of a state court affirming, with costs, an order of an inferior court which overruled a demurrer with leave to answer is not subject to review in the Supreme Court of the United States. *Ibid.*

So, a judgment of the supreme court of a state which affirms a decision of a lower court overruling a demurrer, and thereby remands the cause to the court below for a hearing on the merits, cannot be reviewed in the Supreme Court of the United States. *Werner v. Charleston*, 151 U. S. 300, 38 L. ed. 192, 14 Sup. Ct. Rep. 356.

Nor is a decision of the state court which affirmed an order of an inferior court overruling a motion to quash an execution subject to such review. *Loeber v. Schroeder*, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934.

A decree of the highest court of a state which affirms a decree of a lower court dissolving a temporary injunction is not final for this purpose. *Verden v. Coleman*, 18 How. 86, 15 L. ed. 272.

So, there is a want of this requisite finality in a decree of the highest court of a state which merely affirms the interlocutory decree of an inferior court refusing an injunction, and remands the case. *Reddall v. Bryan*, 24 How. 420, 16 L. ed. 740.

And a decree of a state court affirming an order of an inferior court refusing to dissolve a preliminary injunction is not final, and cannot be reviewed by the Supreme Court of the United States. *Gibbons v. Ogden*, 6 Wheat. 448, 5 L. ed. 302.

A judgment of the highest court of a state which merely affirmed an order of an inferior court refusing a new trial is not a final judgment which can be reviewed in the Supreme Court of the United States. *Beaure v. Noyes*, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; *National L. Ins. Co. v. Scheffer*, 131 U. S. 203, Appx., and 28 L. ed. 1110.

Where the highest state court regards a judgment of an inferior court for the condemnation of land without estimating the compensation so far final as to justify an appeal from it, the Supreme Court of the United States will 62 L. R. A.

not decline to review the judgment of affirmance in the highest state court, on the theory that there is no final judgment. *Wheeling & B. Bridge Co. v. Wheeling Bridge Co.* 138 U. S. 287, 34 L. ed. 967, 11 Sup. Ct. Rep. 301.

A decree of the highest court of a state dissolving a preliminary injunction which had been granted by a lower court is not final for the purpose of review in the Supreme Court of the United States. *Moses v. Mobile*, 15 Wall. 387, 21 L. ed. 170.

Nor can the decision of the highest court of a state ordering a lower state court to discharge a rule for contempt be so reviewed. *Newport Light Co. v. Newport*, 151 U. S. 527, 38 L. ed. 259, 14 Sup. Ct. Rep. 429.

A judgment of the highest court of a state which reversed the decision of the court below and awarded a new trial is not final for the purpose of review in the Supreme Court of the United States. *Tracy v. Holcombe*, 24 How. 426, 16 L. ed. 742; *Houston v. Moore*, 3 Wheat. 433, 4 L. ed. 428; *Rankin v. Tennessee*, 11 Wall. 380, 20 L. ed. 175; *Johnson v. Keith*, 117 U. S. 199, 29 L. ed. 888, 6 Sup. Ct. Rep. 669.

And this was said, in *Hart v. Burnett*, 20 Cal. 169, to be true although such judgment fully determined certain questions of law which would control the lower court in its further action.

The Supreme Court of the United States has no jurisdiction to review a judgment of the highest court of the state in a cause reserved for its decision, dismissing a petition for the removal of the cause to a Federal court, and remanding the cause for further proceedings, as such judgment, though disposing of one of the questions involved, is not a final judgment in the suit itself. *Kimball v. Evans*, 93 U. S. 320, 23 L. ed. 920.

The controlling principle on which these decisions are based is that a judgment or decree, to be final for the purpose of a review by the Supreme Court of the United States on writ of error to a state court must terminate the litigation between the parties on the merits of the case; so that, if there should be an affirmance in the Federal court, the court below would have nothing to do but to execute the judgment or decree it had already rendered. It has, therefore, been uniformly held that a judgment of a state court which reverses a judgment of an inferior court, and remands the cause for further proceedings, is not a final judgment

cases that do not necessarily involve in any substantial sense the Federal right alleged to have been denied, and in respect to such matters that which is done or omitted to be done by the state court constitutes only error in the administration of the law, under which the proceedings were instituted." Such, to my mind, is clearly the situation of the present controversy. This court, in directing a nonsuit, but followed the constant practice prevalent here and in other state and national courts; and, if there was error committed, it constitutes but an error in the administration of the law under which plaintiff has sought to condemn a right of way across the premises of the defendant. The court declared, as it had done in the former and recent case of *Bridal Veil*

Lumbering Co. v. Johnson, 30 Or. 205, 34 L. R. A. 368, 46 Pac. 790, that the necessity and expediency of taking private property for public use is a legislative question, but whether the proposed use is in fact public is always a judicial question, to be declared by the courts. The facts were practically admitted, and the court simply applied the established rule, and took from the jury a matter of which they were precluded from taking cognizance.

But there is another impediment to granting the writ. The Federal question was not opportunely raised. It was taken for the first time in this court on motion for rehearing (which was decided orally), and this comes too late. *Texas & P. R. Co. v. Southern P. Co.* 137 U. S. 48, 34 L. ed. 614, 11

which can be reviewed by the Supreme Court of the United States. *McComb v. Knox County*, 91 U. S. 1, 23 L. ed. 185; *Moore v. Robbins*, 18 Wall. 588, 21 L. ed. 758; *St. Clair County v. Lovington*, 18 Wall. 628, 21 L. ed. 813; *Zeller v. Switzer*, 91 U. S. 487, 23 L. ed. 366; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; *Cincinnati Street R. Co. v. Snell*, 179 U. S. 395, 45 L. ed. 248, 21 Sup. Ct. Rep. 205; *Great Western Teleg. Co. v. Burnham*, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850; *Brown v. Baxter*, 146 U. S. 619, *sub nom.* *Brown v. Marlon Nat. Bank*, 36 L. ed. 1106, 13 Sup. Ct. Rep. 260; *Winn v. Jackson*, 12 Wheat. 135, 6 L. ed. 577; *Pepper v. Dunlap*, 5 How. 51, 12 L. ed. 46; *Parcels v. Johnson*, 20 Wall. 653, 22 L. ed. 410; *Davis v. Crouch*, 94 U. S. 514, 24 L. ed. 281; *Rice v. Sanger*, 144 U. S. 197, 36 L. ed. 408, 12 Sup. Ct. Rep. 684; *Haseltine v. Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49.

So, a decree of the highest court of a state which affirms a decree of an intermediate appellate court which had remanded the case to a lower court for further judicial proceedings in conformity with its opinion is not reviewable in the Supreme Court of the United States as a final judgment. *Union Mut. L. Ins. Co. v. Kirchoff*, 160 U. S. 374, 40 L. ed. 481, 16 Sup. Ct. Rep. 318.

If, by any direction of the highest court of a state, the entire cause is determined, the decision constitutes a final judgment for the purpose of review by the Supreme Court of the United States.

Hence, a judgment of the highest state court which reversed a judgment of an inferior court granting a preliminary injunction, and remanded the cause to the lower court with instructions to dismiss the complaint, is subject to review in the Supreme Court of the United States. *Tippecanoe County v. Lucas*, 93 U. S. 108, 23 L. ed. 822.

So, a judgment of the highest court of a state which reverses the judgment of an inferior state court with directions to enter judgment upon the findings for the plaintiff, as prayed for in his complaint, is final for the purpose of a writ of error from the Supreme Court of the United States. *Mower v. Fletcher*, 114 U. S. 127, 20 L. ed. 117, 5 Sup. Ct. Rep. 799.

And a judgment of the highest court of a state which reverses and modifies the judgment 62 L. R. A.

of an inferior court, but does not permit further proceedings in that court if consent be given to the modification directed as to the amount of damages, is a final judgment in a suit within the meaning of U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575), where the required consent is given. *Atherton v. Fowler*, 91 U. S. 143, 23 L. ed. 265.

But the reversal of a judgment with direction to sustain a demurrer is not a final judgment on which a writ of error will lie to a state court from the Supreme Court of the United States if the lower court has power to make a new case by amendment of the pleadings. *Clark v. Kansas City*, 172 U. S. 334, 43 L. ed. 407, 19 Sup. Ct. Rep. 207.

"The settled rule," said Mr. Justice Brown in *California Nat. Bank v. Stateler*, 171 U. S. 447, 43 L. ed. 233, 19 Sup. Ct. Rep. 6, "is that, if a superior court makes a decree fixing the liability and rights of the parties, and refers the case to a master or subordinate court for a judicial purpose, such, for instance, as a statement of account upon which a further decree is to be entered, the decree is not final."

Hence, a judgment of the highest court of the state directing an inferior court to enter an order turning over to petitioner a certain sum of money and all stock and securities received by him from defendants after making reasonable allowance for costs, disbursements, and attorneys' fees, as contemplated by law, is not final for the purpose of review in the Supreme Court of the United States. *Ibid.*

And a judgment of the highest court of a state reversing the judgment of an inferior court and remanding the case to that court with directions to appoint an appraiser to assess inheritance taxes is not final for the purpose of review in the Supreme Court of the United States. *Drake v. Kochersperger*, 170 U. S. 303, 42 L. ed. 1040, 18 Sup. Ct. Rep. 942.

The refusal by the highest court of Virginia to entertain an appeal from a final decree of an inferior state court is so far the equivalent of a judgment of affirmance as to amount to a final judgment which may be reviewed by writ of error from the Supreme Court of the United States to the highest state court. *Richmond, F. & P. R. Co. v. Louisa R. Co.* 13 How. 71, 14 L. ed. 55. And it is immaterial that such refusal is in the form of a ruling on an application for a writ of supersedeas which was denied on the ground that the judgment of the

Sup. Ct. Rep. 10. As presented in the trial court and at the hearing in this court, the questions involved were those of general law only, and not in any manner based or made dependent upon the Constitution or laws of the United States. In order to present a case for Federal cognizance, it is necessary that some right under the Constitution or laws or treaties of the United States must be claimed in the state court, and the decision must be against the right. Neither of these conditions is disclosed by the rec-

ord, and hence it cannot be truthfully certified that there was a Federal question presented, resulting in an adverse ruling. *Brooks v. Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443.

For these reasons the *application for the writ is denied*. If there was any doubt, I should be disposed to follow the usual practice, and resolve it in favor of a full and complete hearing in the tribunal of last resort. I am authorized to say that my associates concur in these views.

lower court was plainly right. *Williams v. Bruffy*, 102 U. S. 248, 26 L. ed. 185. The court said: "Whenever the highest court of a state by any form of decision affirms or denies the validity of a judgment of an inferior court over which it, by law, can exercise appellate authority, the jurisdiction of this court to review such decision, if it involve a Federal question, will, upon a proper proceeding, attach. It cannot make any difference whether, after an examination of the record of the court below, such decision be expressed by refusing a writ of error or supersedeas or by dismissing a writ previously allowed." See also cases cited *infra*, III. b, holding that in such case the judgment of the inferior state court is that of the highest court of the state in which a decision could be had, and is reviewable as such in the Supreme Court of the United States.

A judgment of the highest state court, which is simply a direction to transfer the possession of a railroad in the hands of a receiver to the comptroller general of the state, subject to such orders as the lower court shall deem necessary for the protection of the rights of the parties in the principal suit, is not a final judgment in the cause which can be reviewed by the Supreme Court of the United States. *Hand v. Hagood*, 131 U. S. 181, Appx., and 26 L. ed. 301.

A judgment of the highest court of a state is none the less final for the purposes of review by the Supreme Court of the United States because it was rendered upon an equal division of opinion among the judges. *Hartman v. Greenhow*, 102 U. S. 672, 26 L. ed. 271; *Lessieur v. Price*, 12 How. 59, 13 L. ed. 893.

b. Adjudication must be that of the highest state court.

A writ of error from the Supreme Court of the United States to review a judgment of a state court cannot be maintained where that court is not the highest court of the state in which a decision in the suit could be had. *Mullen v. Western Union Beef Co.* 173 U. S. 116, 43 L. ed. 635, 19 Sup. Ct. Rep. 404; *Fisher v. Perkins*, 122 U. S. 522, 30 L. ed. 1192, 7 Sup. Ct. Rep. 1227.

An error does not lie from the Supreme Court of the United States to review a final judgment of an inferior state court, though rendered as a necessary result of a decision by the highest court of the state, which had reversed a prior judgment of the inferior court, overruling a demurrer, and remanded the case for further proceedings according to law, as such judgment is that of the inferior court, and is reviewable in the higher state courts. *McComb v. Knox County*, 91 U. S. 1, 23 L. ed. 185; *Great Western Teleg. Co. v. Burnham*, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850. See also cases 62 L. R. A.

cited *supra*, III. a, on the question as to what is a final adjudication.

And this is no less true because, if an appeal had been taken from the final judgment of the inferior court to the highest court of the state, that court, according to its uniform course of decision, would have affirmed the judgment upon the nonfederal ground that its decision upon the first appeal was conclusive. *Great Western Teleg. Co. v. Burnham*, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850.

But a writ of error lies from the Supreme Court of the United States to an inferior state court where that is, by reason of the amount involved, the highest court of the state to which the suit can be carried. *The Moses Taylor*, 4 Wall. 411, 18 L. ed. 397.

And the judgment of an inferior state court is that of the highest state court in which a decision in the suit could be had where the highest state court has dismissed a writ of error or appeal for want of jurisdiction. *Lane v. Wallace*, 131 U. S. 219, Appx., and 26 L. ed. 703; *Callan v. Bransford*, 139 U. S. 197, 35 L. ed. 144, 11 Sup. Ct. Rep. 519.

Or where leave to take the case to a higher court has been applied for and denied. *Miller v. Joseph*, 17 Wall. 655, 21 L. ed. 741; *Gregory v. McVeigh*, 23 Wall. 294, 23 L. ed. 156; *Clark v. Pennsylvania*, 128 U. S. 395, 32 L. ed. 487, 9 Sup. Ct. Rep. 113; *Bergemann v. Backer*, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727; *Stanley v. Schwalby*, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *Missouri, K. & T. R. Co. v. Elliott*, 184 U. S. 530, 46 L. ed. 678, 22 Sup. Ct. Rep. 446. See, however, cases cited *supra*, III. a, holding that such denial of leave to appeal is the equivalent of a judgment of affirmance, and is such a final judgment of the highest court of the state as may be the basis of a writ of error to that court.

And a judgment of the superior court of the city of New York affirming a decision at a special term of the court of common pleas for the city and county of New York is a judgment of the highest court of a state in which a decision can be had, within the meaning of § 25 of the judiciary act of 1780, where the court of appeals has dismissed an appeal therefrom for want of jurisdiction, although the case might have been carried up to that court had an appeal been taken from the special term to the general term of the court of common pleas. *Kanouse v. Martin*, 15 How. 198, 14 L. ed. 660.

Where an appeal to a higher state court could be allowed, an application for such allowance must have been asked for and refused, or the Supreme Court of the United States cannot take jurisdiction. *Fisher v. Perkins*, 122 U. S. 522, 30 L. ed. 1192, 7 Sup. Ct. Rep. 1227; *Mullen v.*

Western Union Beef Co. 173 U. S. 116, 43 L. ed. 635, 19 Sup. Ct. Rep. 404.

Where, in accordance with the state practice, after verdict and before judgment in the inferior state court certain exceptions were sent up to the highest state court for its opinion, and a rescript was sent down overruling them, whereupon final judgment was entered by the lower court upon the verdict, that court was the highest court of the state in which a decision of the suit could be had. *McGuire v. Massachusetts*, 8 Wall. 382, 18 L. ed. 164.

A judgment of conviction in the superior court of Massachusetts, under which the convict is by law imprisoned and punished before a hearing, can be had in the highest state court on his exceptions, was deemed, in *Bryan v. Bates*, 12 Allen, 201, wherein was discussed the operation of a writ of error from the Supreme Court of the United States as a supersedeas, so far to dispose of the case that it must be considered a final judgment of the highest court in which a decision can be had, within the meaning of § 25 of the judiciary act of 1789.

An order of a judge of a state court at chambers remanding a prisoner in a habeas corpus proceeding cannot be regarded as a decision of a highest state "court," within U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575). *McKnight v. James*, 155 U. S. 685, 39 L. ed. 310, 15 Sup. Ct. Rep. 248. The court said: "If it be true that, under the laws of Ohio, the final order of a circuit judge at chambers be the judgment or decree of a circuit court, then it is undoubtedly reviewable by the supreme court of Ohio, which is the highest tribunal of Ohio, and is expressly given jurisdiction by statute to review the judgments and orders of the circuit court. But if this order be not a judgment or decree of a court, then it is not reviewable here, because this court, under § 709 (U. S. Comp. Stat. 1901, p. 575), is given authority to review only the judgment and decree of the highest court of the state. In other words, the order cannot be the order of a judge to defeat the jurisdiction in error of the supreme court of Ohio, and at the same time an order of a court to confer jurisdiction upon this court to issue a writ of error."

Nor does a so-called court order made by one of the judges of an inferior state court upon a return to a writ of habeas corpus granted by such judge and returnable before him, which recites "Writ dismissed; prisoner remanded," constitute a final judgment or decree in a suit in the highest court of a state in which a decision can be had which may be reviewed on writ of error from the Supreme Court of the United States to a state court. *Clarke v. McDade*, 165 U. S. 168, 41 L. ed. 673, 17 Sup. Ct. Rep. 284. Nor is an adjudication of insolvency in proceedings before one of the judges of an inferior state court such a judgment as is provided for in U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575), *supra*. See also cases cited *supra*, III. a, respecting the essential finality of determination.

The superior court of Rhode Island was none the less the "highest court" for the purpose of review by the Supreme Court of the United States on writ of error under the judiciary act of 1789, § 25, because the legislature was by statute invested with power to re-examine the proceedings, and, if it thought proper, to order a new trial. *Olney v. Arnold*, 3 Dall. 308, 1 L. ed. 614.

62 L. R. A.

c. When adjudication is rendered in a suit.

The term "suit," as used in the 25th section of the judiciary act, is understood to apply to any proceeding in a court of justice in which an individual pursues that remedy which the law affords him. It includes a proceeding to review an order granting a writ of prohibition to restrain action under a municipal ordinance challenged as repugnant to the Federal Constitution. *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481.

It also includes a proceeding for mandamus. *American Exp. Co. v. Michigan*, 177 U. S. 404, 44 L. ed. 823, 20 Sup. Ct. Rep. 595; *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 8.

And it is of no consequence, as respects the jurisdiction of the Supreme Court of the United States to review a judgment in such a proceeding, that it was rendered in an original proceeding in the highest court of a state, and not in a case pending before that court on appeal. *Hartman v. Greenhow*, 102 U. S. 672, 26 L. ed. 271.

A proceeding by habeas corpus is a suit within the meaning of the 25th section of the judiciary act. *Holmes v. Jennison*, 14 Pet. 540, 10 L. ed. 579.

And an order of the highest court of the state having jurisdiction, dismissing a writ of habeas corpus and remanding the petitioner to the custody of the sheriff for contempt of court, is reviewable by the Supreme Court of the United States on writ of error if it involves a Federal question. *Tinsley v. Anderson*, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805.

The jurisdiction of the Supreme Court of the United States to review the final judgments of state courts extends to judgments rendered in criminal prosecutions as well as those rendered in civil suits. *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449; *Twitcheil v. Pennsylvania*, 7 Wall. 321, 19 L. ed. 223.

A state judgment rendered on a voluntary submission without compulsory process or compulsory proceedings of any kind against the defendant is rendered in a "suit" within the meaning of the 25th section of the judiciary act. *Aldrich v. Etna Ins. Co.* 8 Wall. 491, 19 L. ed. 473.

IV. The nature of the controversy essential to this jurisdiction.

a. In general.

The term "Federal question" is constantly used herein to designate the controversy essential to confer the jurisdiction under discussion upon the Supreme Court of the United States. This term has been so frequently used by the court itself in this connection, and is so convenient, that the obvious objection that such a use of these words is not strictly accurate may be disregarded.

It may, with some show of reason, be said that, no matter how lacking in merit the Federal contention may be, the Supreme Court of the United States cannot logically, for that reason alone, decline to entertain jurisdiction of a writ of error to a state court. But the court is committed to the doctrine that a real, and not a fictitious, Federal question is essential to the exercise of this jurisdiction. *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *New Orleans v. New Orleans*

Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Millingar v. Hartupee, 6 Wall. 256, 18 L. ed. 829; Caldwell v. Texas, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; St. Louis, C. G. & Ft. S. R. Co. v. Missouri, 156 U. S. 478, 39 L. ed. 502, 15 Sup. Ct. Rep. 443; Illinois C. R. Co. v. Chicago, 176 U. S. 646, 44 L. ed. 602, 20 Sup. Ct. Rep. 509; Equitable L. Assur. Soc. v. Brown, 187 U. S. 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 123; Clarke v. McDade, 165 U. S. 168, 41 L. ed. 673, 17 Sup. Ct. Rep. 284; Iowa v. Rood, 187 U. S. 87, 47 L. ed. 86, 23 Sup. Ct. Rep. 49.

"If a right were claimed under a treaty or statute, and, on looking into the record, it should appear that no such treaty or statute existed, or was in force, it would hardly be insisted," says Mr. Chief Justice Chase in *Millingar v. Hartupee*, 6 Wall. 258, 18 L. ed. 829, *supra*, "that this court could review the decision of a state court that the right claimed did not exist."

The contention that a state railroad commissioner was deprived of his property without due process of law, or was denied the equal protection of the laws, by his temporary suspension from office by the governor of the state by proceedings taken in accordance with the state laws and Constitution is too unfounded in substance to confer jurisdiction on the Supreme Court of the United States, where there was not, by reason of the statute and the proceedings under it, a plain and substantial departure from the fundamental principles upon which the government is based. *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435. See also *infra*, IV. e. 5.—*Lynde v. Lynde*, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555; *Remington Paper Co. v. Watson*, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 486; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; *St. Louis, C. G. & Ft. S. R. Co. v. Missouri*, 156 U. S. 478, 39 L. ed. 502, 15 Sup. Ct. Rep. 443.

And the claim that a forfeiture of the charter of a waterworks company for maintaining illegal rates by a decree of a state court after full hearing by all parties in a proceeding by quo warranto impaired the obligation of a contract, or deprived the company of its property without due process of law, or denied it the equal protection of the laws, because by its charter mandamus was prescribed as the remedy for illegal rates,—is so clearly without color of foundation as to give the Supreme Court of the United States no jurisdiction to review such decree. *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

There is no color of foundation for the claim that a Federal question arises from the forfeiture of a charter of a corporation for alleged violation of its terms, by a decree of a state court made after a full hearing by all the parties in a proceeding in the nature of quo warranto, instituted in the name of the state by the attorney general, to whom the matter had been referred by the legislature to bring such suit or take such other action as he might think proper. *Ibid.*

And, apparently because of the obvious want of merit in the contention that a railroad corporation was deprived of its rights under U. S. Const. 14th Amendment, by enforcing a claim against it by mandatory injunction, instead of 62 L. R. A.

by another and summary form of action, the court, in *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344, dismissed, for want of jurisdiction, a writ of error to review a judgment of a state court compelling a railroad company to operate its road.

And, because the contention based on Federal law, though raised in the pleadings, was regarded by him as clearly unfounded, *Sanderson, Ch. J.*, in *Greely v. Townsend*, 25 Cal. 604, denied an application for a citation upon a writ of error sued out for the purpose of a review of the judgment of the state court in the Supreme Court of the United States.

A claim that a right under the Federal Constitution would be denied by the rendition of a decree of foreclosure by a state court, unless leave to file a supplementary answer should be granted, is so clearly without foundation, where the defense sought to be interposed is without merit, as to confer no jurisdiction on the Supreme Court of the United States of a writ of error to the state court. *Sawyer v. Piper*, 189 U. S. 154, 47 L. ed. 757, 23 Sup. Ct. Rep. 633.

The question must not be a merely abstract or moot one. *Kimball v. Kimball*, 174 U. S. 158, 43 L. ed. 932, 19 Sup. Ct. Rep. 639; *Little v. Bowers*, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620.

Thus, where the question involved was the impairment of the obligation of a contract by certain assessments for taxation, and it appeared that the taxes had been paid under a compromise agreement, the Supreme Court of the United States refused to entertain jurisdiction. *Little v. Bowers*, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620.

The assertion that a state statute violates the Federal Constitution presents but a moot question which confers no jurisdiction on the Supreme Court of the United States to review a judgment of a state court, where, in the case presented, the statute is not so applied as to deny a right claimed under such Constitution. *Castillo v. McConico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

A decision of a state court in favor of the validity of an order for the issue of bonds by an irrigation district, rendered on a petition in a proceeding substantially *ex parte* before issue of the bonds, although a resident of the district appeared in answer and claimed a right under the Federal Constitution, will not sustain a writ of error from the United States Supreme Court, since the adjudication is simply of the right to make a contract, which is a purely moot question, unless the board shall see fit to exercise such right, the proceeding being substantially but one to secure evidence. *Tregua v. Modesto Irrig. Dist.* 164 U. S. 179, 41 L. ed. 395, 17 Sup. Ct. Rep. 52.

A decision by a state court which denied the petition of a woman claiming to be the decedent's widow, for revocation of letters of administration to others and for her own appointment as administratrix, on the ground that a divorce in another state from her former husband was void, involves no Federal question which will warrant a review in the Supreme Court of the United States, where the possibility of issuing any letters of administration has been superseded by the probate of a subsequently discovered will. *Kimball v. Kimball*, 174 U. S. 158, 43 L. ed. 932, 19 Sup. Ct. Rep. 639.

A writ of error to review the judgment of a

state court in an action for usurpation of public office, instituted on the relation of persons superseded therein by a legislative act challenged as unconstitutional, will be dismissed where the terms of office of all the parties to the suit, both relators and defendants, have expired. *Tennessee v. Condon*, 189 U. S. 64, 47 L. ed. 709, 23 Sup. Ct. Rep. 579.

The fact that there are no resident mortgagees in a particular case does not make the question of discrimination between nonresident and resident mortgagees by a state statute a merely abstract or moot question, so as to preclude a decision against the validity of the statute on writ of error to a state court, if such statute makes a discrimination against nonresident mortgagees with respect to sharing in the distribution of the assets of an insolvent foreign corporation. *Sully v. American Nat. Bank*, 178 U. S. 289, 44 L. ed. 1072, 20 Sup. Ct. Rep. 935.

The objection that persons may be deprived of their rights without due process of law, under the Massachusetts Torrens act for land registration, because it provided for adjudicating the rights of certain classes of persons who are notified only by posting notices, registered letters, or by publication, and for the registration of dealings with the land after the original registration, cannot be raised, so as to give jurisdiction on writ of error from the Supreme Court of the United States, by a person who is not affected by those provisions because he has had the requisite notice. *Tyler v. Registration Court Judges*, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206.

The Federal right must be claimed by plaintiff in error for himself, and not for a third person, in order to present a Federal question. *Giles v. Little*, 134 U. S. 645, 33 L. ed. 1062, 10 Sup. Ct. Rep. 623; *Ludeling v. Chaffe*, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439; *Texas & P. R. Co. v. Johnson*, 151 U. S. 81, 28 L. ed. 81, 14 Sup. Ct. Rep. 250; *Conde v. York*, 168 U. S. 642, 42 L. ed. 611, 18 Sup. Ct. Rep. 234. See also *infra*, IV. e, 7.—*Owings v. Norwood*, 5 Cranch. 344, 3 L. ed. 120; IV. e, 8.—*Hale v. Gaines*, 22 How. 144, 16 L. ed. 264; IV. e, 11.—*Long v. Converse*, 91 U. S. 105, 23 L. ed. 233; IV. e, 12.—*Miller v. National Bank*, 106 U. S. 542, 27 L. ed. 289, 1 Sup. Ct. Rep. 536.

b. Validity of Federal law.

A decision of a state court that a tender was bad because made in legal-tender notes of the United States involves a question as to the validity of the legal-tender acts of Congress. *Doolley v. Smith*, 13 Wall. 604, 20 L. ed. 547.

The validity of an act of Congress is not drawn in question, so as to confer jurisdiction upon the Supreme Court of the United States to review the judgment of a state court, every time rights claimed under such statutes are controverted. *Ferry v. King County*, 141 U. S. 668, 35 L. ed. 895, 12 Sup. Ct. Rep. 128; *Cook County v. Calumet & C. Canal & Dock Co.* 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435.

Such a controversy falls more properly within the 3d clause of U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575), as a case wherein a title or right is claimed under a statute of the United States. *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245.

The validity of such a statute is not so drawn 62 L. R. A.

in question where the state court merely denies the existence of facts bringing the case within the operation of the statute. *Crary v. Devlin*, 154 U. S. 619, Appx., and 23 L. ed. 510, 14 Sup. Ct. Rep. 1199.

Whether or not the Pawnee reservation lands in the state of Nebraska are public lands within the meaning of the enabling act of April 19, 1864, § 12 (13 Stat. at L. 47, chap. 59), does not involve any question as to the validity of that section. *Kennard v. Nebraska*, 186 U. S. 304, 46 L. ed. 1175, 22 Sup. Ct. Rep. 879.

Language similar to that used in U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575), respecting the point under discussion, will be found in the act of March 3, 1885, authorizing appeals from the supreme court of the District of Columbia and of the territories without regard to the amount involved, where there was drawn in question "the validity of a treaty or statute of, or an authority exercised under, the United States."

Under this act, the validity, and not the construction, of a treaty or statute of the United States, must be directly drawn in question. *South Carolina v. Seymour*, 153 U. S. 353, 38 L. ed. 742, 14 Sup. Ct. Rep. 871; *United States v. Lynch*, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114.

The decision of a territorial supreme court sustaining a territorial statute providing for verdicts by less than the whole number of jurors, on the ground that the organic act gave the territorial legislature unlimited legislative power, against the contention that the organic act as so construed violated the Federal Constitution, is reviewable in the Supreme Court of the United States, as the question involved was not the construction, but the validity, of the territorial act, and this depended upon the validity of the act of Congress giving it the scope which the court attributed to it. *Springville v. Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717.

The words, "the validity of . . . a statute," as used in this act of March 3, 1885, refer only to the power of Congress to enact the statute as it is by its terms or is made to read by construction, and not to mere judicial construction, as contradistinguished from a denial of the legislative power. *Baltimore & P. R. Co. v. Hopkins*, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503.

Hence, the validity of certain statutes of the United States under which a railroad company claimed the right to the use of a city's streets was not drawn in question so as to authorize the Supreme Court of the United States to review a judgment of the supreme court of the District of Columbia in an action to recover damages from the railroad company for maintaining a nuisance, where the court did not deny the right of the company to use the streets, but limited its right to the use held by it to be authorized by such statute. *Ibid.*

No question as to the validity of a Federal law arises, within the meaning of this statute, when its application to the cause only is involved. *Cameron v. United States*, 146 U. S. 538, 36 L. ed. 1077, 13 Sup. Ct. Rep. 184.

c. Questions respecting Federal authority.

The Supreme Court of the United States is invested by U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575), with the power to review a decision of a state court against the validity

of an "authority exercised under the United States" when drawn in question therein, or a decision adverse to a title, right, privilege, or immunity specially set up or claimed under such an authority. As it is obvious that Federal officials or tribunals have no other authority than such as is conferred by the Federal Constitution, laws, and treaties, an "authority exercised under the United States," within the meaning of this statute, must refer to the exercise of an authority under the sanction of Federal law. "Something more than a bare assertion of such an authority," said Mr. Chief Justice Chase in *Millingar v. Hartuppee*, 6 Wall. 258, 18 L. ed. 829, "seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence derived from competent governmental power. If a different construction had been intended, Congress would, doubtless, have used fitting words. The act would have given jurisdiction in cases of decisions against claims of authority under the United States." Cases which the court has regarded as coming within this provision seem generally to be those in which reliance has been placed upon some official or judicial action under the sanction of Federal law, or some right conferred by such action, instead of upon the law itself or some right created by it. In some instances, however, jurisdiction has been sustained on this ground, where the exercise of such jurisdiction seems equally supportable on the theory that the judgment of the state court was against a right claimed under Federal law.

A question as to the validity of an authority exercised under the United States is involved in a suit in a state court which turns upon the question whether the President of the United States could, under an act of Congress prohibiting the conveyance of Indian lands except by his permission, approve an Indian deed thirteen years after its execution. *Pickering v. Lomax*, 145 U. S. 310, 36 L. ed. 716, 12 Sup. Ct. Rep. 860.

So, where the only question raised and decided in the state court against the plaintiff in error was the sufficiency of the acts of the President of the United States to inaugurate a war which would render invalid the contract in suit, the Supreme Court of the United States has jurisdiction. *Mathews v. McStea*, 20 Wall. 646, 22 L. ed. 448.

Whether the authority of defendants as officers in the army of the United States is a valid defense to an action to try title involves the question of the validity of an authority exercised under the United States. *Stanley v. Schwalby*, 147 U. S. 508, 37 L. ed. 259, 13 Sup. Ct. Rep. 418, 132 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754.

A defense that certain rags were disinfected pursuant to an order of the collector of customs seems, in *Bartlett v. Lockwood*, 160 U. S. 357, 40 L. ed. 455, 16 Sup. Ct. Rep. 334, to have been regarded as drawing in question the validity of an authority exercised under the United States; but the writ of error was dismissed because the ruling was in favor of, and not against, the validity of such authority.

A claim of title founded upon a pre-emption entry presents a question as to the validity of an authority exercised under the United States. *Lytle v. Arkansas*, 22 How. 193, 16 L. ed. 306. This contention would also seem to present a claim of right under Federal law, *i. e.*, a title

claimed under the pre-emption acts. See *infra*, IV. e, 8.

Within the principle declared in this case was held to be a claim of title set up under a survey identifying the locality and boundaries of a concession from the lieutenant governor of upper Louisiana, confirmed by the board of commissioners. *Magwire v. Tyler*, 1 Black, 195, 17 L. ed. 187.

And *Lytle v. Arkansas*, 22 How. 193, 16 L. ed. 306, was regarded as controlling in a case where a title to land confirmed by United States commissioners under the act of March 3, 1807, was drawn in question. *Berthold v. McDonald*, 22 How. 334, 16 L. ed. 318.

A somewhat similar case is *Mobile Transp. Co. v. Mobile*, 187 U. S. 479, 47 L. ed. 266, 23 Sup. Ct. Rep. 170, where a claim of title under a patent from the United States in alleged confirmation of a Spanish grant was regarded as presenting a Federal question.

A decision of a state court adverse to a title to land claimed under an authority alleged to have been exercised by the Secretary of the Treasury in behalf of the United States is against the validity of the authority thus alleged to have been exercised. *Neillson v. Lagow*, 7 How. 772, 12 L. ed. 908.

A denial of a right claimed under the authority of the United States is involved in the refusal of a state court to give the effect claimed for an equitable title apparently conveyed by proceedings in the United States Land Office. *Hussman v. Durham*, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253.

A question respecting a right conferred by a supposed decision of the register and receiver of the Land Office is involved in the contention in ejectment that the boundaries of the land in suit were settled by such officials acting under the authority of acts of Congress. *Doe ex dem. Barbarie v. Mobile*, 9 How. 451, 18 L. ed. 212.

The claim, however, that the action of surveyors for the Federal government in segregating and setting apart a lake by meander lines from the public land, and the approval of such survey by the Commissioner of the General Land Office, was an adjudication by the Federal government, by its authorized officers and agents, that such lake is the property of the state, and not a part of the public domain, is so obviously without foundation that a denial by a state court of the state's claim of title to the bed of such lake cannot be reviewed in the Supreme Court of the United States. *Iowa v. Rood*, 187 U. S. 87, 47 L. ed. 86, 23 Sup. Ct. Rep. 49.

The question whether there can be any liability on an injunction bond given in the course of proceedings in a Federal court, because of the alleged effect of certain stipulations dismissing a portion of the case, and of an appeal from the decree that was afterward rendered, involves a claim of an immunity from liability depending on an authority exercised under the United States. *Tullock v. Mulvane*, 184 U. S. 497, 46 L. ed. 657, 22 Sup. Ct. Rep. 372.

So, also, does a claim of immunity from liability for attorneys' fees as one of the elements of damages under an injunction bond given in a Federal court. *Ibid.*; *Missouri, K. & T. R. Co. v. Elliott*, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446.

It was said in *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 47 L. ed. 460, 23 Sup. Ct. Rep. 375, that, where a state court refuses to

give effect to the judgment of a court of the United States rendered upon a point in dispute, and with jurisdiction of the case and the parties, it denies the validity of an authority exercised under the United States. The actual decisions on this point seem, however, to rest, not so much on the theory that such a refusal is a denial of the validity of such an authority, as that such action is a denial of a title or right claimed under such authority. *Dupasseur v. Rochereau*, 21 Wall. 130, 22 L. ed. 588; *Embry v. Palmer*, 107 U. S. 8, 27 L. ed. 346, 2 Sup. Ct. Rep. 25.

For this reason the Supreme Court of the United States has jurisdiction to review the judgment of the state court which enjoins the enforcement of a decree of a Federal court. *Embry v. Palmer*, 107 U. S. 8, 27 L. ed. 346, 2 Sup. Ct. Rep. 25; *Central Nat. Bank v. Stevens*, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403.

Likewise, a decision of a state court adverse to a claim that a decree of a court of the United States was a complete defense to the action is reviewable in the Supreme Court of the United States. *Dupasseur v. Rochereau*, 21 Wall. 130, 22 L. ed. 588; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472. See also *infra*, IV. e. 2.—*Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *Winona & St. P. R. Co. v. Plainview*, 143 U. S. 371, 38 L. ed. 191, 12 Sup. Ct. Rep. 530.

Evidently referable to this principle is the statement in *Giles v. Little*, 134 U. S. 645, 33 L. ed. 1002, 10 Sup. Ct. Rep. 623, where the court, in holding that the disregard by the state court of the opinion of the Supreme Court of the United States in a former suit on a question of local or general law conferred no jurisdiction upon it to review the judgment of the state court, said that, if the latter court had refused to give due effect to a final judgment of any court of the United States in a case between the same parties, a Federal question would have been presented which might have been brought to the Supreme Court of the United States for review.

A claim that certain confiscation proceedings in a Federal court amounted to a defense to an action is an assertion of a claim under an authority exercised under the United States. *Phoenix Bank v. Risley*, 111 U. S. 125, 28 L. ed. 374, 4 Sup. Ct. Rep. 322.

The same is true of a claim that a lien on property was wholly devested by foreclosure proceedings in a Federal court. *Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238.

The claim of a receiver under an order of a Federal court of immunity as such receiver from suit, without the previous leave of such court, is a claim of an immunity under an authority exercised under the United States. *McNulta v. Lochridge*, 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11.

The defense that an order of a Federal court requiring claims against a receiver to be prosecuted by intervention within a certain time bars an action in a state court to collect such claim presents a question as to the validity of an authority exercised under the United States, or the existence of a right or immunity claimed 62 L. R. A.

thereunder. *Texas & P. R. Co. v. Johnson*, 151 U. S. 81, 38 L. ed. 81, 14 Sup. Ct. Rep. 250.

But a negligence action in a state court does not involve any question as to the validity of an authority exercised under the United States merely because defendant was a receiver appointed by a Federal court. *Bausman v. Dixon*, 173 U. S. 113, 43 L. ed. 633, 19 Sup. Ct. Rep. 316.

A contention that a sale under an order of a Federal court in bankruptcy proceedings to sell mortgaged property free from an encumbrance extinguished the lien of a mortgagor not made a party to the proceedings is a claim of a right under Federal authority. *Factors' & T. Ins. Co. v. Murphy*, 111 U. S. 738, 28 L. ed. 582, 4 Sup. Ct. Rep. 670. And see *infra*, IV. e. 11.—*New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 29 L. ed. 244, 5 Sup. Ct. Rep. 1009,—where jurisdiction to review the judgment of a state court against a title claimed under a sale in bankruptcy was sustained, as a denial of a right claimed under the Constitution or a statute of the United States.

A sheriff's claim to protection against suit in a state court to recover moneys arising out of a sale under an execution because he had paid over such moneys to the clerk of a Federal court under an order made by it in a proceeding in bankruptcy involves a question respecting the authority of the Federal court to make the order. *O'Brien v. Weld*, 92 U. S. 81, 23 L. ed. 675.

This was doubtless the principle the court had in mind in *Riggs v. Johnson County*, 6 Wall. 166, 18 L. ed. 768, when it said that, in case county officials were sued for damages for obeying a writ of mandamus issued out of a Federal court, the proper course was to plead the commands of the writ in bar of the suit; and that, if their defense was overruled, and judgment rendered against them, a writ of error would lie from the Supreme Court of the United States to review the judgment.

The validity of an authority exercised under the United States is not drawn in question, so as to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court, every time an act done by such authority is disputed. *Ferry v. King County*, 141 U. S. 668, 35 L. ed. 895, 12 Sup. Ct. Rep. 128; *Cook County v. Calumet & C. Canal & Dock Co.* 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435.

Where the single question is as to the existence of the authority, and there could have been no decision in the state court against any authority under the United States existing in fact, the Supreme Court of the United States has no jurisdiction. *Millingar v. Hartupee*, 6 Wall. 258, 18 L. ed. 829.

Hence, whether an order of a Federal court releasing captured cotton vested title in the person to whom it is so released is not a question respecting the validity of an authority over the cotton exercised by him under the United States in virtue of the release so directed, where the order does not purport to confer any authority upon him, and simply relieves the cotton from the claim of the government, without passing on the question of ownership or right of possession. *Ibid.*

Whether a question respecting a Federal authority is involved in actions in state courts between persons setting up title under judicial proceedings in the Federal courts and parties

making adverse claims to the property has been the subject of a number of decisions.

Where the sale by a marshal under an execution issued on the judgment of the Federal court was directly attacked, and the invalidity of the purchaser's title successfully set up as a defense, jurisdiction was sustained because plaintiffs' "claim of title was founded on 'an authority exercised under the United States,' which the judgment below drew in question, and the decision was against its validity." *Collier v. Stanbrough*, 6 How. 14, 12 L. ed. 324.

So, where the judgment of the state court was adverse to defendant's title as purchaser at a marshal's sale, on the ground that the judgment of the Federal court ordering the seizure and sale was void, the Supreme Court took jurisdiction on the theory that the validity of an authority exercised under the United States was drawn in question, and that the decision of the state court was against its validity. *Erwin v. Lowry*, 7 How. 172, 12 L. ed. 655.

And the claim of a right to recover as the result of a judicial sale under the decrees of courts of the United States and of a state raises a Federal question which confers jurisdiction on the Supreme Court of the United States to review a judgment of a state court denying a recovery. *Commercial Pub. Co. v. Beckwith*, 188 U. S. 567, 47 L. ed. 598, 23 Sup. Ct. Rep. 382.

But a judgment of a state court against persons who had attached goods by a process of a Federal court raises no Federal question for the consideration of the Supreme Court of the United States, where the authority of the marshal to take the goods was not drawn in question, and the property attached had been sold, and the attachment suit ended when the suit in the state court was commenced. *Day v. Gallup*, 2 Wall. 97, 17 L. ed. 855.

"We do not undertake to say," said Mr. Justice Brown, in commenting on this case, "that the mere fact that the action in the Federal court is no longer pending would oust the jurisdiction of this court to re-examine the action of the state court if the validity of the judgment of the Federal court, or the proceedings by the marshal under that judgment, were directly attacked; but in *Day v. Gallup* it appeared that, not only had the proceedings in the Federal court terminated, but that the real question was the ownership of the goods as between the attaching creditors and Gallup. Gallup claimed under a sale of the goods which the attaching creditors insisted was a fraud." *Avery v. Popper*, 179 U. S. 305, 45 L. ed. 203, 21 Sup. Ct. Rep. 94.

Where the marshal was defendant, and justified under process from the Federal court, jurisdiction has been sustained.

Thus, a decision of a state court in favor of plaintiff in replevin against a United States marshal who claimed a lien on the property under a levy under a judgment of a United States circuit court is reviewable by the Supreme Court of the United States as a decision against a right asserted under the authority of the United States. *Clements v. Berry*, 11 How. 398, 13 L. ed. 745.

Jurisdiction was likewise sustained in *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749, where the state court overruled the marshal's defense to a replevin suit that he held the property under an attachment issued out of a Federal court.

And jurisdiction was sustained where the

state court had rendered judgment against a United States marshal for the value of goods taken by him on a writ of attachment issued out of a United States court. *Etheridge v. Sperry*, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 565.

And where the soundness of the state court's instructions on which judgment was rendered against a United States marshal for the value of the property of a bankrupt which he had seized under a provisional warrant from a district court of the United States depended upon the authority conferred on the marshal by such warrant, the case was regarded by the Supreme Court of the United States as one properly within its appellate jurisdiction. *Sharpe v. Doyle*, 102 U. S. 686, 26 L. ed. 277.

So, a decision of a state court overruling a defense to an action of trespass, that defendant, as United States marshal, took the goods under a writ of attachment issued out of a Federal court, is reviewable in the Supreme Court of the United States as a decision against the validity of an authority exercised under the United States as a protection to him in the action. *Buck v. Colbath*, 8 Wall. 334, 18 L. ed. 257.

"The true rule to be deduced from these authorities," said Mr. Justice Brown in *Avery v. Popper*, 179 U. S. 305, 45 L. ed. 203, 21 Sup. Ct. Rep. 94, "is this: That the writ will lie if the validity or construction of the judgment of the Federal court, or the regularity of the proceedings under the execution, are assailed; but, if it be admitted that the judgment was valid and these proceedings were regular, that the purchaser took the title of the defendant in the execution, and the issue relates to the title to the property as between the defendant in the execution, or the purchaser under it, and the party making the adverse claim, no Federal question is presented,—in other words, it must appear that the decision was made against a right claimed under Federal authority, in the language of U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575)."

Hence, a claim of a right under the state laws as a purchaser of cattle on execution sale as against a chattel mortgagee, because of the insufficient identification of the mortgaged property, is not the claim of a right under "an authority exercised under the United States" within the meaning of U. S. Rev. Stat. § 700 (U. S. Comp. Stat. 1901, p. 575), although the execution was issued out of a Federal court, where there is no question as to the validity of the judgment or the regularity of the proceedings in the Federal court. *Ibid.*

It may be well to consider, in this connection, the decisions construing the act of Congress of March 3, 1885, authorizing a review of judgments or decrees of the supreme courts of the District of Columbia and of the territories, without regard to the amount in dispute, in any case "in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States." But a difference between this statute and that which defines the appellate jurisdiction of the Supreme Court of the United States over state courts should first be carefully noted. Since provision is not made by this act of March 3, 1885, for a review of a decision upon a claim of right or title under an authority exercised under the United States, such review being authorized only where the validity of the authority is drawn in question,

a judgment or decree may not be reviewable under this act, which, had it been rendered by a state court, would have been the subject of review in the Supreme Court of the United States as a denial of a title, right, privilege, or immunity claimed under such authority.

The "validity of an authority exercised under the United States," within the meaning of this act of March 3, 1885, is not drawn in question every time an act done by such authority is disputed. *United States v. Lynch*, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114.

It is the validity, and not the construction merely, of an authority exercised under the United States which must be drawn in question in order to come within this statute. *South Carolina v. Seymour*, 153 U. S. 353, 38 L. ed. 742, 14 Sup. Ct. Rep. 571.

The validity of such an authority is not so drawn in question because it was contended that the territorial court misconstrued the statute upon which the prosecution was based, and acted beyond the authority which it conferred. *Snow v. United States*, 118 U. S. 346, 30 L. ed. 207, 6 Sup. Ct. Rep. 1059.

Nor does a decision which does not deny the right of a railroad company to the use of the city streets by virtue of certain acts of Congress, but limits such right to the use held by it to be authorized by such statute, draw in question the validity of any such authority. *Baltimore & P. R. Co. v. Hopkins*, 130 U. S. 210, 32 L. ed. 308, 9 Sup. Ct. Rep. 503.

Nor is the validity of the authority conferred upon the District commissioners drawn in question, within the meaning of this statute, by the refusal to give instructions in an action against the District of Columbia to recover damages for personal injuries, which involved the acts of Congress creating the District government only so far as they bore upon the question of the liability of the District for negligence in failing to keep the streets in repair, and by way of construction, and did not deny the validity of the acts themselves, or of the authority exercised under them. *District of Columbia v. Gannon*, 130 U. S. 227, 32 L. ed. 922, 9 Sup. Ct. Rep. 508.

The validity of the authority of the second comptroller and fourth auditor of the United States is not drawn in question, within the meaning of this act, when it is merely claimed that, in the exercise of a valid authority, they erred in disallowance of mileage to a naval officer. *United States v. Lynch*, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114.

Neither the question whether the Commissioner of Patents rightly decided upon the presumptive lawfulness of the right of a state to the trademark sought to be registered by it, or whether the Commissioner's duty in the premises was of such a character that mandamus would lie to compel its performance, involves any question as to the validity of the authority exercised by him under the United States. *South Carolina v. Seymour*, 153 U. S. 353, 38 L. ed. 742, 14 Sup. Ct. Rep. 571.

A decision of a territorial supreme court so construing the organic law and the scope of the authority of the legislature as to deny to a small village with extensive corporate limits the right under its charter to tax farming lands for municipal purposes if they lie outside the platted portion and so far removed that the owner will derive no benefit from the municipal government does not involve the validity of an authority exercised under the United States so 62 L. R. A.

as to be reviewable in the Supreme Court of the United States. *Linford v. Ellison*, 153 U. S. 503, 39 L. ed. 239, 15 Sup. Ct. Rep. 179.

But the validity of such an authority is so drawn in question when its existence or constitutionality is denied, and the denial forms the subject of direct inquiry. *United States v. Lynch*, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114.

Mandamus proceedings to check an alleged usurpation, by bodies claiming to constitute the legislative assembly of a territory, of the legislative power conferred by Congress upon such legislative assembly, draw in question the lawful existence of these bodies, and, consequently, the validity of an authority exercised under the assumed, as the legislative assembly, to exercise under the United States. *Crough v. Curtis*, 134 U. S. 361, 33 L. ed. 945, 10 Sup. Ct. Rep. 573.

A controversy as to the power of a territory, under its organic act, to tax that part of a railroad which is in an Indian reservation created by an act of Congress, presents a question as to the validity of an authority exercised under the United States, within the meaning of this statute. *Maricopa & P. R. Co. v. Arizona*, 156 U. S. 347, 39 L. ed. 447, 15 Sup. Ct. Rep. 391.

A controversy as to the power of the governor of a territory, under its organic act, to appoint an auditor of public accounts in the place of one who has been elected as such officer likewise presents a question respecting the validity of an authority exercised under the United States. *Clayton v. Utah*, 132 U. S. 632, 33 L. ed. 455, 10 Sup. Ct. Rep. 190.

An authority exercised under the United States, within the meaning of this statute, is an authority exercised or claimed in favor of one of the parties to the cause, the validity of which was put in issue on the trial of the cause, and, hence, does not include an authority exercised by the United States in removing a fence inclosing public lands pursuant to the judgment sought to be reviewed. *Cameron v. United States*, 146 U. S. 533, 36 L. ed. 1077, 13 Sup. Ct. Rep. 184.

d. *Repugnancy of state statutes or authority to Federal law.*

1. *State authority.*

We have seen that the words, "an authority exercised under the United States," refer to some action under the sanction of Federal law. But, while there would seem to be no reason for giving a different construction to the words, "an authority exercised under any state," it clearly is unnecessary to show the basis for the claim that the official action sought to be reviewed was sanctioned by the state law, where the state court has upheld the validity of such action as tested by that law. This is the view taken by Mr. Chief Justice Taney in *Holmes v. Jennison*, 14 Pet. 540, 10 L. ed. 579, where, in stating the views entertained by him and three other members of the court as to its jurisdiction to review a judgment of the highest court of Vermont refusing to discharge on habeas corpus a fugitive murderer indicted in Canada and arrested within the state under a warrant from the governor, he seems to have regarded it as essential to jurisdiction that the governor's action be authorized by the laws of the state. But that it was so authorized he regarded as placed beyond question by the decision of the state court. "There is, indeed," he said, "no statute

of Vermont giving him the power he exercised. But his conduct has been fully examined by the highest judicial tribunal in the state, and they have adjudged that the warrant issued by him was authorized by law, and bound the sheriff to hold the prisoner, and deliver him in the manner directed to the Canadian authorities. We must receive this decision as conclusive evidence of the laws of Vermont upon this subject; and, consequently, the proceedings of the governor must be taken as justified by the laws of the state, and treated as an authority exercised under it. Here, then, is precisely one of the cases in which the writ of error is given in the 25th section of the act of 1789." The writ of error was, however, dismissed by a divided court because of an equal division of opinion as to whether the validity of the governor's act could be deemed to have been drawn in question as repugnant to the Federal Constitution.

The authority of a state court, under the state laws, to hear and determine cases is not the kind of authority exercised under any state, which is referred to in the 25th section of the judiciary act of 1789; otherwise every judgment of the highest state court would be re-examinable under that section. *Bethell v. Demaret*, 10 Wall. 537, 19 L. ed. 1007.

A city ordinance is an exercise of an authority under the state; and, where its validity has been challenged as repugnant to the Constitution of the United States, and the decision of the state court is in favor of its validity, a writ of error from the Supreme Court of the United States to the state court will lie. *Weston v. Charleston*, 2 Pet. 440, 7 L. ed. 481.

For this reason, as well as because the decision of the state court must be regarded as a decision adverse to a claim under the Federal Constitution, jurisdiction was maintained in *Home Ins. Co. v. Augusta*, 93 U. S. 116, 23 L. ed. 825, where the decision of the state court was adverse to the claim that a city ordinance imposing a license tax upon a foreign insurance company was in conflict with the contract clause of the Federal Constitution.

The jurisdiction exercised in these last two cases could, also, be supported on the additional ground that the decision in each case was in favor of the validity of a state statute challenged as repugnant to the Federal Constitution. See *infra*, IV. d, 2.

Sustainable on all three grounds would seem the holding in *Davis v. Police Jury*, 9 How. 280, 13 L. ed. 138, that a decision of a state court overruling the contention that proceedings by a police jury under the state law for the establishment of a ferry are invalid as contrary to a treaty and the Constitution of the United States is reviewable in the Supreme Court of the United States.

The same is true of the ruling in *Tregoe v. Modesto Irrig. Dist.* 164 U. S. 179, 41 L. ed. 395, 17 Sup. Ct. Rep. 52, that a decision of a state court confirming proceedings had under a state irrigation statute, which were claimed to conflict with the Constitution of the United States, presents a Federal question. See also *infra*, IV. e, 5.—*Wheeler v. New York, N. H. & H. R. Co.* 178 U. S. 321, 44 L. ed. 1085, 20 Sup. Ct. Rep. 940.

2. State statutes generally.

The Supreme Court of the United States has jurisdiction to review a decision of a state court 62 L. R. A.

in a case in which the validity of a state statute was drawn in question as repugnant to the Federal Constitution, and the decision was in favor of its validity. *Byrne v. Missouri*, 8 Pet. 40, 8 L. ed. 859; *Wilson v. Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412; *Satterlee v. Matthewson*, 2 Pet. 380, 7 L. ed. 458; *Craig v. Missouri*, 4 Pet. 410, 7 L. ed. 903; *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483; *Edwards v. Elliott*, 21 Wall. 532, 22 L. ed. 487; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *Philadelphia Fire Asso. v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3; *Sully v. American Nat. Bank*, 178 U. S. 289, 44 L. ed. 1072, 20 Sup. Ct. Rep. 935; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 22 L. ed. 678.

The same is true where such statute is asserted to be repugnant to a Federal statute (*Davenport & N. W. R. Co. v. Renwick*, 102 U. S. 180, 26 L. ed. 51; *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3; *Waite v. Dowley*, 94 U. S. 527, 24 L. ed. 181); or to a treaty (*Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483).

Any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state within the meaning of the statute conferring this jurisdiction. *Williams v. Bruffy*, 96 U. S. 176, 24 L. ed. 716; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741.

A municipal ordinance is such a statute. *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760.

An enactment of the Confederate government to which a state gives the force of law is such a statute of that state. *Williams v. Bruffy*, 96 U. S. 176, 24 L. ed. 716; *Ford v. Surget*, 97 U. S. 594, 24 L. ed. 1018.

But the judgment of a state court which upholds the validity of a territorial statute under which partition proceedings were had in a court of such territory cannot be reviewed in the Supreme Court of the United States. *Messenger v. Mason*, 10 Wall. 507, 19 L. ed. 1028.

And the decision of a state court upholding the validity of an act of the legislature passed before the admission of the territory to the Union as a state cannot be reviewed by the Supreme Court of the United States. *Miners' Bank v. Iowa*, 12 How. 1, 13 L. ed. 867.

The evil to be remedied and guarded against by conferring this jurisdiction on the Supreme Court of the United States was connected merely with the subject-matter of the state statutes, and not with the political competency of their makers. Hence, the validity of a state statute cannot be deemed to have been drawn in question as repugnant to the Federal Constitution when it is assailed on the sole ground that the legislature, at the time of passing the law, was not competent to do so because the territorial government was still in force, and the new state government had not been duly organized. *Scott v. Jones*, 5 How. 343, 12 L. ed. 181.

No Federal question is involved in the contention that a state statute is repugnant to U. S. Const. 5th Amend. (*Twitcheil v. Pennsylvania*, 7 Wall. 321, 19 L. ed. 223); or to U. S. Const. 7th Amend., or the ordinance of 1787 (*Chapla*

v. Fye, 179 U. S. 127, 45 L. ed. 114, 21 Sup. Ct. Rep. 71).

The same is true where the repugnancy of such statute to the 6th Amendment to the United States Constitution is drawn in question. *Twitchell v. Pennsylvania*, 7 Wall. 321, 19 L. ed. 223. But see *infra*, IV. e, 3,—*Bochanan v. Nebraska*, 118 U. S. 231, 30 L. ed. 71, 6 Sup. Ct. Rep. 1049.

The question whether an ordinance of the corporate authorities of New Orleans does or does not impair religious liberty is not Federal, since the Constitution of the United States makes no provision for protecting citizens of the respective states in their religious liberties, and any provisions in the earlier acts of Congress securing civil and religious liberty in the Orleans territory was superseded by the Louisiana Constitution. *Permoli v. Municipality No. 1*, 3 How. 589, 11 L. ed. 739.

The Supreme Court of the United States has jurisdiction to review the judgment of a state court removing a person from the office of county attorney, where the question of the repugnancy of the statute under which the proceedings were instituted to the Federal Constitution was directly raised by defendant and decided against him by the state court. *Foster v. Kansas*, 112 U. S. 205, 28 L. ed. 696, 5 Sup. Ct. Rep. 8, 97. See also *supra*, IV. a,—*Wilson v. North Carolina*, 169 U. S. 566, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; *infra*, IV. e, 9,—*Gleason v. Florida*, 9 Wall. 779, 19 L. ed. 730; IV. e, 13,—*Boyd v. Nebraska*, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375; IV. e, 5,—*Taylor v. Beckham*, 178 U. S. 548, 44 L. ed. 1187; *Kennard v. Louisiana*, 92 U. S. 480, 23 L. ed. 478.

3. State legislation impairing contract obligations.

The claim in a state court that a state statute is invalid because it impairs the obligation of a contract presents a Federal question. *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Furman v. Nichol*, 8 Wall. 44, 19 L. ed. 370; *Hill v. Merchants' Mut. Ins. Co.* 134 U. S. 515, 33 L. ed. 994, 10 Sup. Ct. Rep. 589; *East Tennessee, V. & G. R. Co. v. Frazier*, 139 U. S. 288, 35 L. ed. 196, 11 Sup. Ct. Rep. 517; *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; *The Binghamton Bridge*, 3 Wall. 51, 18 L. ed. 137; *Yazoo & M. Valley R. Co. v. Thomas*, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68; *Yazoo & M. Valley R. Co. v. Levee Comrs.* 132 U. S. 190, 33 L. ed. 308, 10 Sup. Ct. Rep. 74; *Northwestern University v. Illinois*, 99 U. S. 309, 25 L. ed. 387; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; *Given v. Wright*, 117 U. S. 648, 29 L. ed. 1021, 6 Sup. Ct. Rep. 907; *Wilmington & W. R. Co. v. Alsbrough*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; *Walsh v. Columbus, H. Valley & A. R. Co.* 176 U. S. 469, 44 L. ed. 548, 20 Sup. Ct. Rep. 393; *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921; *Williams v. Louisiana*, 103 U. S. 637, 26 L. ed. 595; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Houston & T. C. R. Co. v. 62 L. R. A.*

Texas, 177 U. S. 80, 44 L. ed. 673, 20 Sup. Ct. Rep. 545.

The question whether the right of a railroad company, under its charter, to enter upon, take, and use "lands, streams, and materials of every kind for the complete operation of the road" is impaired by a statute and ordinance prohibiting any encroachment upon or obstruction in the harbor of a city without the permission of the commissioner of public works, is not so destitute of merit as not to constitute a Federal question for review by the Supreme Court of the United States on writ of error to a state court. *Illinois C. R. Co. v. Chicago*, 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. Rep. 509.

And a bill averring that a railroad charter, and an exemption from taxation for a term of twenty years contained therein, constitute a contract with the state, which is violated by subsequent legislation repealing the exemption, raises a Federal question for which there is sufficient color to sustain the jurisdiction of the Supreme Court of the United States on writ of error to a state court which has decided against the exemption. *Gulf & S. I. R. Co. v. Hewes*, 183 U. S. 66, 46 L. ed. 22, 22 Sup. Ct. Rep. 26. See, however, *supra*, IV. a,—*New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

A municipal ordinance is a state statute so far as this question is concerned. *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760.

So, also, is a provision of the state Constitution. *Deimas v. Merchants' Mut. Ins. Co.* 14 Wall. 661, 20 L. ed. 757. See also *supra*, IV. d, 2.

The existence of the contract has been said to be a part of the Federal question itself. *Hoadley v. San Francisco*, 124 U. S. 639, 31 L. ed. 553, 8 Sup. Ct. Rep. 659.

Hence, the Supreme Court of the United States in numerous instances maintains its jurisdiction, although it may be forced to affirm the judgment of the state court because, in reviewing such judgment, it finds, either that there was no contract, or that it did not confer the right claimed. *Ibid.*; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199; *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530; *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Louisville & N. R. Co. v. Palmer*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193.

A different course was adopted in *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142, where the court thought that the ruling in *Millingar v. Hartuppee*, 6 Wall. 258, 18 L. ed. 829, *supra*, IV. a, IV. c, necessitated the conclusion that, before the Supreme Court of the United States can take jurisdiction on the ground that the state court has upheld a state statute drawn in question as impairing the obligation of the contract, it should appear that there was a legal contract subject to impairment, and some ground to believe that it has been impaired. The court, therefore, declined jurisdiction despite the formal raising of the question, because it was of the opinion that no contract existed.

A somewhat analogous case is *St. Paul Gas-light Co. v. St. Paul*, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575, where a writ of error to review a judgment of a state court in a case in which the obligation of a contract with

a municipality was claimed to have been impaired by a subsequent municipal ordinance was dismissed for want of jurisdiction on the ground that such ordinance was a mere denial of liability on the contract; and, hence, that there was no state legislation from the enforcement of which an impairment of the obligation of the contract did, or could, result.

Unless these decisions are referable to the principle that a Federal contention must not be wholly without foundation (see *supra*, IV. a), they do not seem easy of explanation on any other theory than that suggested herein, *infra*, IV. e, 5, to account for the decisions in *Yesler v. Washington Harbor Line*, 146 U. S. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190, and other cases considered in connection therewith, *viz.*: That, as the judgment of the state court was not to be reversed, it was not very material whether the writ of error was dismissed, or the jurisdiction entertained and the judgment affirmed.

And perhaps this is the best explanation for the holding in *Mills v. St. Clair County*, 8 How. 569, 12 L. ed. 1201, that the question whether the contract, if any, under which the owner of land holds under a grant in fee simple was violated by an abuse of the right of eminent domain under the sanction of a state statute was not one which would confer jurisdiction on the Supreme Court of the United States under § 25 of the judiciary act of 1789. "It is not an invasion and illegal seizure of private property on pretense of exercising the right of eminent domain, and which act is an abuse claiming the sanction of a state law," said Mr. Justice Catron, "that gives this court jurisdiction. . . . Were this court to assume jurisdiction and re-examine and revise state court decisions on a doubtful construction that an interest in land held by a patent was a contract, and the owner entitled to constitutional protection by our decision in case of abuse and trespass by an oppressive exercise of state authority, it would follow that all state laws, special and general, under whose sanction roads, ferries, and bridges are established, would be subject to our supervision. A new source of jurisdiction would be opened, of endless variety and extent."

Where the sole question involved is the construction of a charter or contract, no Federal question is presented. *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256.

The question of the validity of a contract under the state law when the contract was made is not Federal, where no subsequent legislation was claimed to impair its obligation. *Bethell v. Demarest*, 10 Wall. 537, 19 L. ed. 1007; *Mississippi & M. R. Co. v. McClure*, 10 Wall. 511, 19 L. ed. 997.

And where certain state bonds were in the possession of the state at the time of the adoption of a constitutional amendment invalidating bonds so held, no question as to the impairment of contract obligations is involved in the inquiry whether such bonds, when subsequently stolen and put into circulation by the state treasurer, were valid obligations in the hands of innocent holders. *Bler v. McGehee*, 148 U. S. 137, 37 L. ed. 397, 13 Sup. Ct. Rep. 580.

If the Supreme Court of the United States could review the decision of a state court because that court held a contract to be void which the former court might have upheld, every case in which a contract was held by the 62 L. R. A.

state court not to be binding for any cause whatever could be reviewed in the Supreme Court of the United States, which would thus become the court of final resort in all cases of contract where the decisions of the state courts were against the validity of the contracts set up in those courts. This obviously was not the purpose of the judiciary act. *Mississippi & M. R. Co. v. Rock*, 4 Wall. 177, 18 L. ed. 381.

Hence, the Supreme Court of the United States has no jurisdiction to review state judgments because they refuse effect to valid contracts, or in their effect impair the obligation of contracts. *Northern R. Co. v. New York*, 12 Wall. 384, 20 L. ed. 412; *Knox v. Exchange Bank*, 12 Wall. 379, 20 L. ed. 414; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 923, 13 Sup. Ct. Rep. 54; *Missouri ex rel. Quincy, M. & P. R. Co. v. Harris*, 144 U. S. 210, 36 L. ed. 407, 12 Sup. Ct. Rep. 838; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

"It is the peculiar province and privilege of the state courts," said Mr. Justice Grier in *Commercial Bank v. Buckingham*, 5 How. 317, 12 L. ed. 169, "to construe their own statutes; and it is no part of the functions of this court to review their decisions or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary."

A change of view by a state court as to the proper construction of a state statute relating to deeds and acknowledgments, so as to render invalid a deed executed prior to the enactment, does not present a Federal question. *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80.

A federal question which will support a writ of error to a state court is not raised by a decision of such court against the validity, under the state Constitution, of a statute under which certain bonds were issued, although it had held such statute valid before their issue, there being no subsequent legislation touching the subject. *Turner v. Wilkes County*, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464.

So, a change of view by a state court in regard to the proper construction of a state statute, even if its former holding had become a rule of property, cannot constitute a Federal question as to the impairment of the obligation of a contract for which a writ of error will lie from the Supreme Court of the United States to the state court. *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023.

And, even assuming that there could be a vested right in an erroneous decision, no question of the impairment of the obligation of the contract is presented by a decision of a state court construing a state statute differently from the construction previously placed by it on a similar, but not identical, statute. *Wood v. Brady*, 150 U. S. 18, 37 L. ed. 981, 14 Sup. Ct. Rep. 6; *Dougherty v. Nevada Bank*, 160 U. S. 171, 40 L. ed. 382, 16 Sup. Ct. Rep. 258.

Where the question is not whether certain constitutional and statutory provisions were valid, but whether, by their adoption and enactment, a condition attached to a conveyance of land for the erection of a capitol was so broken as to authorize the grantor to revoke the deed and take possession of the property, no question

of the impairment of the obligation of a contract is involved, since the most that can be claimed is that the state has violated its contract, not impaired it. *Brown v. Colorado*, 100 U. S. 95, 27 L. ed. 132, 1 Sup. Ct. Rep. 175.

No question as to the impairment of the obligation of a contract by a state statute requiring the purchaser of the property and franchises of a railway company to assume the liability of that company can arise in a suit in a state court brought under that act to enforce a liability founded on tort, and not arising out of any contract relations. *Winona & St. P. R. Co. v. Plainview*, 143 U. S. 371, 36 L. ed. 191, 12 Sup. Ct. Rep. 530.

e. Rights and immunities claimed under Federal law.

1. In general.

The Federal right claimed need not be created by Federal law. It is sufficient that the right be one protected by such law, from whatever source the right may spring. *New Orleans v. De Armas*, 9 Pet. 224, 9 L. ed. 109.

The exercise by Congress of its reserved power to annul portions of a territorial act, accompanied by its assent to the residue, does not make such an act an act of Congress, so that a claim of a right under it will present a Federal question. *Miners' Bank v. Iowa*, 12 How. 1, 13 L. ed. 867.

The assent of Congress to a compact between two states concerning the boundary line between them does not make the act giving such assent a statute of the United States, so that the Supreme Court of the United States can review a decision of a state court construing such compact. *New York v. Central R. Co.* 12 Wall. 455, 20 L. ed. 458.

2. Full faith and credit.

A Federal question is presented by a contention in the state court that full faith and credit were not given to the judicial records and proceedings of a court of another state. *Jacobs v. Marks*, 182 U. S. 383, 45 L. ed. 1241, 21 Sup. Ct. Rep. 865.

Whether a judgment or decree of one state has received full faith and credit in courts of another state is a Federal question. *Huntington v. Attrill*, 146 U. S. 637, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; *Texas & P. R. Co. v. Southern P. R. Co.* 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10; *Green v. Van Buskirk*, 5 Wall. 207, 18 L. ed. 599; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 988, 16 Sup. Ct. Rep. 810.

We have seen that the question as to the effect to be given a judgment of a Federal court in a state court is one respecting Federal authority. See *supra*, IV. c. It is no less true that a question respecting full faith and credit is presented by a contention that a state court denied to the judgment of a circuit court of the United States, sitting in another state, the effect to which it is entitled by U. S. Const. art. 4, § 1, and U. S. Rev. Stat. § 905 (U. S. Comp. Stat. 1901, p. 677). *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 606.

Whether a state court gave the same effect to a judgment of the circuit court of the United States as would be accorded to a judgment and 62 L. R. A.

decree of a state tribunal of equal authority is a Federal question. *Pendleton v. Russell*, 144 U. S. 640, 36 L. ed. 574, 12 Sup. Ct. Rep. 743.

And a Federal question is presented by a contention that due effect to a decree of a Federal court was denied by the action of the court below in sustaining a plea of *res judicata* predicated on a decree of such Federal court, where a determination whether the court correctly applied the plea necessitates deciding whether, by sustaining such plea, rights were denied which were vested under another decree of the Federal court. *National Foundry & Pipe Works v. Oconto City Water Supply Co.* 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111.

But the correctness of a decision of the circuit court of the United States in another case between other parties as to the liability of a town on bonds is not a Federal question. *Winona & St. P. R. Co. v. Plainview*, 143 U. S. 371, 36 L. ed. 191, 12 Sup. Ct. Rep. 530.

A judicial state record must be authenticated as required by the act of Congress of May 26, 1790, or the Federal question whether the same effect has been given to it in another state as it has in its own cannot arise. *Caperton v. Ballard*, 14 Wall. 238, 20 L. ed. 885.

A claim that a state court did not give full faith and credit to the statute of another state, set out in the pleadings, and to the judicial decisions of that state thereon, does not raise a Federal question where such statute and decisions were not proved. *Lloyd v. Matthews*, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70.

A question as to the full faith and credit which must, under the Federal Constitution, be accorded by the courts of one state to the statutes of another, is not ruled by a contention respecting the proper construction of such statutes. *Glenn v. Garth*, 147 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350; *Lloyd v. Matthews*, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70; *Banholtzer v. New York L. Ins. Co.* 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972.

The question of the applicability to the cause before the state court of a statute of another state is not one respecting the full faith and credit to be given such statute. *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194.

A controversy respecting the authority of a foreign corporation to make the contract in suit under the general principles of law which govern corporate charters irrespective of anything peculiar to the jurisprudence of the state by which the charter was granted involves no question of the full faith and credit to be given to the legislation of such state. *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398.

The question as to the effect which a state court should give to one of its own judgments is not Federal. *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471.

The question as to the construction to be given by the highest court of a state to its own judgment in proceedings to charge a party thereto with contempt is not Federal. *Newport Light Co. v. Newport*, 151 U. S. 527, 38 L. ed. 259, 14 Sup. Ct. Rep. 429. See also *infra*, IV. f, 1.—*Chouteau v. Gibson*, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340; *San Francisco v. Itsell*, 133 U. S. 65, 33 L. ed. 570, 10 Sup. Ct. Rep. 241.

3. *Former jeopardy.*

The denial by a state court of a claim of immunity from a second trial for the same offense, under the 5th Amendment to the Federal Constitution, gives the Supreme Court of the United States jurisdiction to review such decision. *Bohannon v. Nebraska*, 118 U. S. 231, 30 L. ed. 71, 6 Sup. Ct. Rep. 1049. See, however, *supra*, IV. d, 2,—*Twitchell v. Pennsylvania*, 7 Wall. 321, 19 L. ed. 223; *Chaplin v. Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71.

4. *Commerce.*

The question whether or not a state tax law as construed by the state courts is in violation of the commerce clause of the Constitution of the United States is a Federal one. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 576; *Western U. Teleg. Co. v. Seay*, 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; *Illinois C. R. Co. v. Illinois*, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096.

5. *Due process of law.*

Whether the due-process-of-law clause of U. S. Const., 14th Amend., constituted a bar to mandamus proceedings in a state court is a Federal question. *Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617.

A claim in a state court that reputation is property of which the owner will be deprived without due process of law, in violation of the 14th Amendment to the Federal Constitution, if a decision should be rendered against his right of action for libelous matter contained in a pleading, raises a Federal question. *Abbott v. National Bank of Commerce*, 175 U. S. 409, 44 L. ed. 217, 20 Sup. Ct. Rep. 153.

A contention in a state court that notice of a reassessment was insufficient, and that, by reason thereof, defendant's property was sought to be taken without due process of law and in conflict with the 14th Amendment to the Federal Constitution, raises a Federal question. *Bellingham Bay & B. C. R. Co. v. New Whatcom*, 172 U. S. 314, 43 L. ed. 460, 19 Sup. Ct. Rep. 205.

A claim in a state court that property is taken without due process of law when condemned under a special statute for the abolition of grade crossings, because it authorizes an increase in the number of tracks and requires the city to pay a portion of the expense incurred for that purpose, which, it is contended, would amount to a donation to a railroad corporation, in violation of the state Constitution, raises a Federal question for the purpose of a writ of error from the Supreme Court of the United States to a state court. *Wheeler v. New York, N. H. & H. R. Co.* 178 U. S. 321, 44 L. ed. 1085, 20 Sup. Ct. Rep. 940. See also *supra*, IV. d, 1,—*Davis v. Police Jury*, 9 How. 280, 13 L. ed. 138; *Tregea v. Modesto Irrig. Dist.* 164 U. S. 179, 41 L. ed. 395, 17 Sup. Ct. Rep. 52.

But where a state statute providing for condemnation proceedings has been construed by the state courts as requiring notice, no Federal question with respect to due process of law can be based upon the objection that such statute allows condemnation without notice. *Baltimore Traction Co. v. Baltimore Belt R. Co.* 151 U. S. 137, 38 L. ed. 102, 14 Sup. Ct. Rep. 294. See 62 L. R. A.

also *supra*, IV. a,—*Tyler v. Registration Ct. Judges*, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206.

A claim that the appointment of a receiver in a foreclosure suit deprives defendant of its property without due process of law does not raise a real, as distinguished from a fictitious, Federal question which will sustain a writ of error to a state court from the Supreme Court of the United States. *St. Louis, C. G. & Ft. S. R. Co. v. Missouri*, 156 U. S. 478, 39 L. ed. 502, 15 Sup. Ct. Rep. 443.

There is no color for a contention that a man is deprived of property without due process of law by enforcing against him a decree for alimony rendered in another state in a proceeding in which he appeared and was heard. *Lynde v. Lynde*, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555.

A party who seeks and is given opportunity in the state court to litigate the rights claimed by it cannot have the judgment reviewed in the Supreme Court of the United States on the ground that due process of law was denied because the litigation did not result successfully. *Remington Paper Co. v. Watson*, 173 U. S. 442, 43 L. ed. 702, 19 Sup. Ct. Rep. 456.

No Federal question is presented by a contention with respect to due process of law which is based simply upon a change by the state court of the established construction of a state statute. *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80.

The misconception of the application of U. S. Const., 14th Amend., is so obvious in the contention in a state court that due process of law was denied by an indictment, where the objection was in effect to the technical sufficiency of the indictment in the ordinary administration of criminal law, and there is nothing special, partial, or arbitrary, or in violation of fundamental principles, in the law of the state in accordance with which the indictment was found, and as applied in passing upon its sufficiency, as to justify the Supreme Court of the United States in declining jurisdiction,—especially where the contention was first made on petition for rehearing. *Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224.

See also *supra*, IV. a,—*Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 407, 16 Sup. Ct. Rep. 344; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

It is difficult to see why the contention in *Yesler v. Washington Harbor Line*, 146 U. S. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190, that the contemplated action of state commissioners in so locating harbor lines as to include existing wharves, and in filing a plat thereof, would deprive a wharf owner of his property without due process of law, did not raise a Federal question which would preclude the Supreme Court of the United States from dismissing a writ of error to review the judgment of the state court overruling such contention. The ground for such ruling by the Federal court seems to be that the action by the state board did not amount to a taking of property within the meaning of the due-process-of-law clause, which would appear to be as much a Federal question as the further question as to the regularity of the procedure by which the result was to be accomplished.

A somewhat similar case is *Taylor v. Beck-*

ham, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, where the contention in the state court, that certain election-contest proceedings deprived a claimant to the office of governor of the state of property without due process of law, was held to confer no jurisdiction of a writ of error to review the judgment of the stated court sustaining the contest proceedings, because an office was not property within the meaning of the "due-process-of-law" clause of the Federal Constitution.

And for the reason that it did not appear that the property of which plaintiff in error was alleged to have been deprived without due process of law was such a vested right as was beyond the control of the state legislature, a writ of error to the state court was dismissed in *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142, *supra*, IV. d, 8.

Taken together, these cases would seem to furnish authority for the proposition that, where the Supreme Court of the United States can see that there has been no taking of property, it will dismiss a writ of error to a state court which is sought to be sustained because of a decision adverse to the contention that property has been taken without due process of law. Just why the determination of this question is not in itself the exercise of jurisdiction is not readily apparent. It seems so to have been regarded in *Hoadley v. San Francisco*, 124 U. S. 639, 31 L. ed. 553, 8 Sup. Ct. Rep. 659, where the contention was that a municipal ordinance either was a contract, the obligation of which was impaired by subsequent legislation, or that it vested property rights which would be taken away without due process of law if such legislation was adjudged to be valid. The court said that, in the consideration of Federal questions of this character, its first duty was to determine whether there was such a contract, or such right of property, as was alleged. "The existence of the contract, or of the right," said Mr. Chief Justice Waite, "is a part of the Federal question itself."

So far as this latter decision respects questions involving the impairment of contract obligations it is, while perhaps in conflict with *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142, *supra*, IV. d, 8, clearly in line with repeated decisions of the Supreme Court of the United States maintaining its jurisdiction, though forced to affirm the judgment of the state court because, in reviewing such judgment, it found, either that there was no contract, or that it did not confer the rights claimed. Examples of this class of cases are *Douglas v. Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199; *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 571; *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247, —*supra*, IV. d, 8.

If the determination of the existence of a contract involves the exercise of jurisdiction, it is submitted that the same is true of a determination of the question whether there has been a taking of property within the meaning of the due-process-of-law clause of the Federal Constitution.

If it be sought to refer these decisions to the principle enunciated in *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245, 62 L. R. A.

and *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. Rep. 178, *viz.*: That questions of fact or local law which are merely preliminary to, or the possible basis of, a Federal question, are not in themselves Federal,—the difficulty still remains, of showing that whether there has been a taking of property is a question of fact, or of local law. And this difficulty is further augmented by the fact that the judges who wrote for the court in the three cases under consideration proceeded to consider for themselves the question whether there was any taking of property, which obviously they would not have done had they considered the question one solely for the state courts to decide. This fact, too, would seem to forbid an attempt to find support for these decisions in the theory that the state courts, by grounding their judgments on the proposition that there was no taking of property, rested such judgments upon a nonfederal ground broad enough to support them. If the decision in *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142, *supra*, or in *Yesler v. Washington Harbor Line*, 146 U. S. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190, *supra*, can be supported because of the frivolousness of the Federal claim, the same can hardly be said of *Taylor v. Beckham*, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, *supra*, where one of the justices thought that the judgment of the state court should be reversed for error in deciding the Federal contention. And jurisdiction of a writ of error to a state court had previously been sustained in *Kennard v. Louisiana*, 92 U. S. 480, 23 L. ed. 478, where the sole question, as stated by Mr. Chief Justice Waite, was whether the state of Louisiana, acting under a state statute through her judiciary, had deprived the plaintiff in error of his office as a member of the supreme court of that state without due process of law. See also *supra*, IV. d, 2,—*Foster v. Kansas*, 112 U. S. 205, 28 L. ed. 696, 5 Sup. Ct. Rep. 97; *infra*, IV. e, 9,—*Gleason v. Florida*, 9 Wall. 779, 19 L. ed. 730; *infra*, IV. e, 13,—*Boyd v. Nebraska*, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375. The true explanation of these decisions probably is that the court, being clearly of the opinion that the judgments of the state courts should not be disturbed, was not inclined to be too critical as to the method to be adopted in carrying out this conclusion.

6. Equal protection of the laws.

Whether the equal-protection-of-the-laws clause of U. S. Const., 14th Amend., constituted a bar to mandamus proceedings in a state court is a Federal question. *Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617.

A case presents a Federal question where the defense of the denial of the equal protection of the law guaranteed by U. S. Const., 14th Amend., is invoked, and is at least plausible on its face. *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43. But see *supra*, IV. a,—*Wilson v. North Carolina*, 160 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 601.

7. Treaty rights.

The appellate jurisdiction of the Supreme Court of the United States over state courts in cases involving treaty rights is not limited to cases in which the mere abstract construction of the treaty is controverted. A claim that a title is protected by a treaty raises a Federal question. *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97. See also *supra*, IV. c. 1.—*New Orleans v. De Armas*, 9 Pet. 224, 9 L. ed. 109.

A claim of title under a Spanish grant, averred to have been perfected under the treaty of February 22, 1819, with Spain, presents a Federal question. *Mobile Transp. Co. v. Mobile*, 187 U. S. 479, 47 L. ed. 266, 28 Sup. Ct. Rep. 170.

A claim to protection under a treaty against confiscation presents a Federal question. *Smith v. Maryland*, 6 Cranch, 286, 3 L. ed. 225.

The contention of plaintiffs in error founded upon the treaty with France of 1880, that they are entitled to an award rendered by the French and American claims commission, presents a question for the jurisdiction of the Supreme Court of the United States. *Burthe v. Denis*, 133 U. S. 514, 33 L. ed. 788, 10 Sup. Ct. Rep. 335.

The mere question at what time, if at all, the interest of the person under whom both parties claim the proceeds of an award under the treaty of 1830, between the United States and Mexico, passed from him under the state insolvent law, is not a Federal one. *Gill v. Oliver*, 11 How. 529, 13 L. ed. 799; *Williams v. Oliver*, 12 How. 111, 125, 13 L. ed. 915, 921.

A decision by a state court adverse to a defense of title set up under a treaty cannot be reviewed by the Supreme Court of the United States, where such claim was not for the party himself, but for a third person in whose title he had no interest. *Owings v. Norwood*, 5 Cranch, 344, 3 L. ed. 120; *Henderson v. Tennessee*, 10 How. 311, 13 L. ed. 434; *Verden v. Coleman*, 1 Black, 472, 17 L. ed. 161.

Whether extradition proceedings were in violation of, and forbidden by, the treaty with, the country from which extradition was accomplished, is a Federal question. *Ker v. Illinois*, 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225.

Whether a person who has settled within the territory of an Indian nation is, by reason of certain treaties made by the United States with the Indians, entitled to reside there free from any legislative interference by the states is a Federal question. *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483.

Whether or not a partition among the grantees from the Mexican government was made under the authority of an appropriate Mexican tribunal before the treaty of Guadalupe-Hidalgo, involves no Federal question, although a valid partition before the treaty would have created rights which the United States would be bound, under that treaty, to respect. *Phillips v. Mound City Land & Water Assn.* 124 U. S. 605, 31 L. ed. 588, 8 Sup. Ct. Rep. 657.

A decision of the supreme court of Louisiana cannot be reviewed in the Supreme Court of the United States on the ground that it was adverse to a right secured by the stipulation in the treaty of cession of Louisiana for the protection of the inhabitants in the free enjoyment of their liberty, property, or religion, as such stipulation ceased to operate when Louisiana 62 L. R. A.

became a member of the Union, and its inhabitants were admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States. *New Orleans v. De Armas*, 9 Pet. 224, 9 L. ed. 109.

Evidently for the same reason a writ of error to the supreme court of Missouri was dismissed in *Choteau v. Marguerite*, 12 Pet. 507, 9 L. ed. 1174, in which case the state court had held a person to be free as against the contention that property in her as a slave was protected by the treaty of April 30, 1803, with France, because at the time of the cession of Louisiana made by such treaty she was a slave therein.

See also *infra*, IV. c. 8.—*San Francisco v. Scott*, 111 U. S. 768, 28 L. ed. 593, 4 Sup. Ct. Rep. 688; *California Powder Works v. Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; *Iowa v. Rood*, 187 U. S. 87, 47 L. ed. 86, 23 Sup. Ct. Rep. 49.

8. Land titles.

The decision of a state court against a right or title to land set up under an act of Congress is reviewable in the Supreme Court of the United States. *Johnson v. Towsley*, 13 Wall. 72, 20 L. ed. 485; *Sliver v. Ladd*, 6 Wall. 440, 18 L. ed. 828; *Atherton v. Fowler*, 91 U. S. 143, 23 L. ed. 205; *Glasgow v. Baker*, 128 U. S. 560, 32 L. ed. 513, 9 Sup. Ct. Rep. 154; *Minnesota v. Bacheider*, 1 Wall. 109, 17 L. ed. 551; *Carondelet v. St. Louis*, 1 Black, 179, 17 L. ed. 102; *Rector v. Ashley*, 6 Wall. 142, 18 L. ed. 733; *Cousin v. Labatut*, 19 How. 202, 15 L. ed. 601; *Ross v. Doe, ex dem. Bariland*, 1 Pet. 655, 7 L. ed. 302; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Northern P. R. Co. v. Colburn*, 184 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98; *Chouteau v. Eckhart*, 2 How. 344, 11 L. ed. 293.

A claim of title under a purchase from the United States which depends upon the laws of the United States concerning the sale of its public lands presents a Federal question. *Moore v. Robbins*, 96 U. S. 530, 24 L. ed. 848.

And a decision of a state court against a claim of title under a purchase from the United States on the ground that an older patent had been issued by the United States in favor of another party may be reviewed by the Supreme Court of the United States. *Beil v. Hearne*, 19 How. 252, 15 L. ed. 614. The principle on which jurisdiction was upheld is not stated in this case; but it would seem sustainable, either on the ground that the controversy involved a claim of title under Federal law, or that the question presented was one respecting Federal authority. Somewhat analogous cases which the court refers to the latter principle are *Lytte v. Arkansas*, 22 How. 193, 16 L. ed. 306; *Magwire v. Tyler*, 1 Black, 195, 17 L. ed. 137; *Berthold v. McDonald*, 22 How. 334, 16 L. ed. 318; *Nelson v. Lagow*, 7 How. 772, 12 L. ed. 908; *Doe ex dem. Barbarie v. Mobile*, 9 How. 451, 13 L. ed. 213,—*supra*, IV. c.

But it is a mistake to suppose that every suit for real estate in which the parties claiming under the Federal government are at issue as to which of them is entitled to the benefit of that title necessarily raises a question of Federal cognizance. *Carpenter v. Williams*, 9 Wall. 785, 19 L. ed. 827.

A decision of a state court which recognizes a title confirmed by an act of Congress, and only determines the person to whom the confirmation was made, gives no appellate jurisdiction

to the Supreme Court of the United States. *Ibid.*

Where both parties claim under a common grantor whose title from the United States is admitted, the Supreme Court of the United States has no jurisdiction to review the decision of the state court as to the title acquired by the several parties under their respective grants. *California ex rel. Hastings v. Jackson*, 112 U. S. 233, 28 L. ed. 712, 5 Sup. Ct. Rep. 113; *Romle v. Casanova*, 91 U. S. 379, 23 L. ed. 374; *White v. Leovy*, 174 U. S. 91, 43 L. ed. 907, 19 Sup. Ct. Rep. 604; *Shaffer v. Scudday*, 19 How. 16, 15 L. ed. 592.

Nor is a Federal question presented by a decision of a state court as to whom, under the law of the state, a title which had passed from the United States to a probate judge had been transferred. *Chever v. Horner*, 142 U. S. 122, 35 L. ed. 959, 12 Sup. Ct. Rep. 184.

And a decision of a state court that a party was given no right by state authority to purchase from the state land granted to that state by Congress, because the state had already sold the land to another, involves no Federal question which will give the Supreme Court of the United States jurisdiction to review the judgment of the state court. *Mace v. Merrill*, 119 U. S. 581, 30 L. ed. 503, 7 Sup. Ct. Rep. 330.

Where a state court only applies the local laws to the construction of a title to land set up under Federal law its decision cannot be reviewed by the Supreme Court. *McDonogh v. Millaudon*, 3 How. 693, 11 L. ed. 787.

This principle applies where the question involved is merely one as to the boundary of the land. *Ibid.*; *Moreland v. Page*, 20 How. 522, 15 L. ed. 1009; *Lanfear v. Hunley*, 4 Wall. 204, 18 L. ed. 325.

Whether parol proof can control written, or monuments restrain distances, are questions which depend on common-law principles or the peculiar laws of the state; and the decision of a state court on such questions is not reviewable in the United States Supreme Court, although the land is held under title confirmed by the United States. *Doe ex dem. Barbarie v. Mobile*, 9 How. 451, 13 L. ed. 212.

Whether or not the courses alleged and distances set forth in a patent from the United States as a matter of fact bring the eastern boundary of the land to the waters of the Mississippi river is not a Federal question, where the validity of the grant is not in any way controverted or drawn in question, and no question is made as to the authority of the government to convey the land to the water's edge if it chooses to do so. *Sweringen v. St. Louis*, 185 U. S. 88, 46 L. ed. 795, 22 Sup. Ct. Rep. 569.

So, where a state court only applies the local laws to a controversy respecting alluvion between a party claiming under a Spanish land grant recognized and sanctioned by Congress as a perfect title and a party claiming by virtue of an act of Congress confirming an incomplete Spanish concession, its decision cannot be reviewed by the Federal Supreme court. *Kennedy v. Hunt*, 7 How. 586, 12 L. ed. 829.

The claim of riparian rights and ownership of percolating waters set up under Mexican and Spanish grants, confirmed and patented under the act of Congress of March 3, 1851 (9 Stat. at L. 631, chap. 41), is not the claim of a title or right under Federal law. *Hooker v. Los An-*

geles, 188 U. S. 314, 47 L. ed. 487, 23 Sup. Ct. Rep. 305.

But a Federal question is presented by an unsuccessful contention in an action to recover possession of land that a proper construction of the government survey and patents gives riparian rights covering the land in dispute, and that it is not competent to overcome such rights by evidence affecting the legal import of the plats and patents. *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563; *French-Glenn Live Stock Co. v. Colwell*, 185 U. S. 54, 46 L. ed. 804, 22 Sup. Ct. Rep. 566.

Whether or not a title claimed under a location of school-land warrants under a state law was invalid because not made upon vacant and unappropriated lands within the meaning of the state law under which the warrant was located is not a Federal question. *Athearn v. Poppe*, 25 Cal. 631.

Whether a claim of title under a United States patent is barred by laches is not a Federal question. *Pittsburgh & L. A. Iron Co. v. Cleveland Iron Min. Co.*, 178 U. S. 270, 44 L. ed. 1065, 20 Sup. Ct. Rep. 931.

Whether the state may be estopped by its acts, silence, and acquiescence from asserting a title to certain lands under the swamp-land grant is not a Federal question. *Michigan v. Flint & P. M. R. Co.*, 152 U. S. 363, 38 L. ed. 478, 14 Sup. Ct. Rep. 586.

Whether a county is, by its conduct, estopped to set up title to land under the swamp-land act, as against a railroad company, is not a Federal question, where the validity of the county's original title was not disputed or involved. *Adams County v. Burlington & M. R. Co.*, 112 U. S. 123, 28 L. ed. 678, 5 Sup. Ct. Rep. 77.

And the validity, in ejectment to recover lands confirmed to the city of San Francisco by an act of Congress, of the defenses of the state statute of limitations and the transfer of the city's title to defendant is not a Federal question. *McStay v. Friedman*, 92 U. S. 723, 23 L. ed. 767.

Whether the title of the true owner of lands in California is extinguished by an adverse possession under color of right for the length of time which would be a bar to a recovery in ejectment is not a Federal question. *Poppe v. Langford*, 104 U. S. 770, 26 L. ed. 922.

The effect of the conquest upon the power of the pueblo of San Francisco under the Mexican laws to make a valid grant of pueblo lands is not a Federal question, where its solution does not depend upon any congressional legislation, or upon the treaty of Guadalupe-Hidalgo, but is a question of general public law. *San Francisco v. Scott*, 111 U. S. 768, 28 L. ed. 593, 4 Sup. Ct. Rep. 688.

The issue as to whether one of the two Mexican grants confirmed by the United States under which the parties respectively claim was forged or obtained by fraud does not present a question respecting right or title under the treaty of Guadalupe-Hidalgo or the act creating a special tribunal for the determination of private land claims. *California Powder Works v. Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350.

The right to bring questions of title decided in a state court before the Supreme Court of the United States is not one of the immunities of citizens of the United States. Hence, the provision of the act of Congress admitting the

state of Louisiana into the Union on an equal footing with the original states cannot be construed as giving appellate jurisdiction over all questions of title between citizens of Louisiana. "If in any case such jurisdiction could be supposed to be given," said Mr. Chief Justice Marshall, "it might be where an act of Congress attempted to divest a title which was vested under the pre-existing government." *New Orleans v. De Armas*, 9 Pet. 224, 9 L. ed. 109.

A claim that title to real property was secured by the compact entered into between the United States and Georgia for the cession of the territory in which the land lies does not raise a Federal question where the claimants fail to prove that the ancestor or person under whom they claim was an actual settler on October 27, 1795, which is essential to bring the case within the terms of the condition in the compact on which they rely. *Hickie v. Starke*, 1 Pet. 94, 7 L. ed. 67.

There is not sufficient foundation for the contention that the sovereignty of the state of Iowa over the bed of an inland lake meandered by the Federal government depends upon the treaty ceding Louisiana to the United States, or the act of Congress in pursuance thereof admitting Iowa into the Union on an equal footing with the original states, to render the decision of a state court adverse to the state's claim of title by virtue of such sovereignty reviewable in the Supreme Court of the United States. *Iowa v. Rood*, 187 U. S. 87, 47 L. ed. 86, 23 Sup. Ct. Rep. 49.

And the mere averment by defendant, in an action by a patentee of public land to recover possession, that his possession was taken with a view to entering the land under the United States homestead laws, does not so raise a genuine Federal question as to give the Supreme Court of the United States jurisdiction to review a decision of a state court adverse to such claim, unless there is some reason to believe that the apparent legal title transferred by the patent was wrongfully conveyed, and that the real title in fact remains in the government. *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353.

Alleging a title in the United States by way of defense in ejectment is not claiming a personal interest affecting the subject in litigation, which is necessary to make the decision of a state court adverse to such claim subject to review in the Supreme Court of the United States. *Hale v. Gaines*, 22 How. 144, 16 L. ed. 264. See also cases cited *supra*, IV. a.

A person who has no interest in land but a naked possession cannot claim the protection of an act of Congress so as to present a Federal question. *Wynn v. Morris*, 20 How. 3, 15 L. ed. 800.

The claim that a title was not destroyed by an act of Congress does not present a Federal question. *Menard v. Aspasia*, 5 Pet. 505, 8 L. ed. 207.

And the claim that a lease of school lands, made under the laws of the state, was valid, although in direct opposition to the provisions of an act of Congress, where no right is claimed under the Constitution or laws of the United States, presents a question exclusively for the state court. *Congdon v. Goodman*, 2 Black, 574, 17 L. ed. 257.

9. Title to office.

In *Gleason v. Florida*, 9 Wall. 779, 19 L. ed. 62 L. R. A.

730, the court thought that a writ of error might properly have been allowed to the Florida supreme court to review a judgment ousting from the office of lieutenant governor, for ineligibility under the state Constitution and laws, a person claiming that he was eligible, elected, and entitled to, such office under the reconstruction acts; but the writ was dismissed because not formally allowed, the chief justice of the state court having refused to allow the writ on the supposition that no Federal question was involved (*State v. Gleason*, 12 Fla. 190, 267), and no allowance of such writ having been made by a justice of the Supreme Court of the United States. See also *infra*, IV. c. 13.—*Boyd v. Nebraska*, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375; *supra*, IV. a.—*Wilson v. North Carolina*, 169 U. S. 536, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; IV. c. 5.—*Kennard v. Louisiana*, 92 U. S. 480, 23 L. ed. 478; IV. d, 2.—*Foster v. Kansas*, 112 U. S. 205, 28 L. ed. 696, 5 Sup. Ct. Rep. 97.

The guaranty of a republican form of government to each state, in U. S. Const. art. 4, § 4, gives no jurisdiction to the Supreme Court of the United States on writ of error, under U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575), to review a decision of the highest court of a state sustaining a determination of an election contest for the office of governor, made by the general assembly under authority of the state Constitution, on the ground that such decision denies the right of the people to choose their own officers, where the legislative, executive, and judicial departments of the state are peaceably operating by the orderly and settled methods prescribed by its fundamental law, notwithstanding there may be difficulties and disturbances arising from the pendency and determination of these contests. *Taylor v. Beckham*, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890.

10. Mining claims.

An action in a state court does not, because brought under U. S. Rev. Stat. §§ 2325, 2326 (U. S. Comp. Stat. 1901, pp. 1429, 1430), in support of an adverse mining claim, necessarily involve a Federal question. *Beals v. Cone*, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275.

The mere fact that defendant in a suit to quiet title to a mining claim claims title under a location made under the general mining laws of the United States is not in itself sufficient to raise a Federal question which will sustain a writ of error from the Supreme Court of the United States to a state court, where the gravamen of defendant's argument is not the denial of any right under the mining laws, but the invalidity of the proceedings in a state court under which plaintiff's claim to have acquired title by virtue of a prior location. *De Lamar's Nevada Gold Min. Co. v. Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715. The court called attention to the holding in *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, that a suit between rival claimants of a mine, brought under Federal statutes, is not one arising under Federal law in such a sense as to confer jurisdiction on a Federal court without diversity of citizenship, where no question is made as to the meaning or construction of the Federal law, and said: "If the fact that the plaintiff takes title, directly or indirectly, from the United States, be insufficient to create a case arising under the Con-

stitution or laws of the United States' within the meaning of the jurisdictional act of 1888, much less does it make one of a 'title, right, privilege, or immunity' claimed under a statute of the United States, an adverse decision of which by the highest court of a state entitles the injured party, under U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575), to a writ of error from this court. To raise a Federal question the right must be one claimed under a particular statute of the United States, the validity, construction, or applicability of which was made the subject of dispute in the state court; and the decision upon such statute must have been adverse to the plaintiff in error."

The question of fact as to the true course of a mining lode or vein, arising in an action of ejectment brought under U. S. Rev. Stat. § 2326 (U. S. Comp. Stat. 1901, p. 1430), to recover possession of a certain portion of a surface location of a mining claim, is not Federal. *Bushnell v. Crooke Min. & Smelting Co.* 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771.

Whether there has been such laches as bars the assertion of a right to a mining claim is not a Federal question. *Moran v. Horsky*, 178 U. S. 205, 44 L. ed. 1038, 20 Sup. Ct. Rep. 856.

Whether ejectment for a mining claim is defeated by a state statute of limitations and an estoppel *in pais* is not a Federal question. *Carothers v. Mayer*, 184 U. S. 325, 41 L. ed. 453, 17 Sup. Ct. Rep. 106.

And the question of the estoppel of a party to deny the validity of a mining location is not a Federal one. *Speed v. McCarthy*, 181 U. S. 269, 45 L. ed. 855, 21 Sup. Ct. Rep. 613.

Whether statements made on a hearing before the Land Department of a protest against a mineral entry work an estoppel *in pais* which amounts to a defense to a claim of title under a subsequent entry involves no Federal question, but is determined by rules of general law. *Beals v. Cone*, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275.

Whether, upon general principles of law and a state statute, a grantor of a portion of a mining claim is, by his deed, estopped to claim priority of title to the space of vein intersection by reason of a location of the portion of the claim which he retained, which he had made subsequent to the deed, but before the location by the grantee of the land conveyed to him, is not a Federal question. *Gillis v. Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131.

11. Bankruptcy:

Whether an assignee in bankruptcy is entitled to certain property of a bankrupt is a Federal question. *Dushane v. Beall*, 161 U. S. 513, 40 L. ed. 791, 16 Sup. Ct. Rep. 637; *Williams v. Heard*, 140 U. S. 529, 35 L. ed. 550, 11 Sup. Ct. Rep. 885.

But where the question is not whether, if a bankrupt has title, it will pass to his assignee by the operation of the bankrupt act, but whether he has title at all, a decision thereon by the state court is not reviewable in the Federal Supreme Court. *Scott v. Kelly*, 22 Wall. 57, 22 L. ed. 729.

A decision in a state court against a party who sets up title to the property in controversy in assignees in bankruptcy, not to protect his own title, but to defeat that of the receiver of the bankrupt, appointed by the state court, is 62 L. R. A.

not reviewable in the Supreme Court of the United States. *Long v. Converse*, 91 U. S. 105, 23 L. ed. 233.

A decision of a state court that a discharge in bankruptcy was not a bar to the action is reviewable in the Supreme Court of the United States as a denial of a right claimed under the laws of the United States. *Dimock v. Revere Copper Co.* 117 U. S. 559, 29 L. ed. 984, 6 Sup. Ct. Rep. 855.

And the effect of a discharge in bankruptcy upon a right to enforce a lien upon property in existence when the proceedings in bankruptcy were commenced is a Federal question. *Long v. Bullard*, 117 U. S. 617, 29 L. ed. 1004, 6 Sup. Ct. Rep. 917. See also *supra*, IV. c.—*Factors' & T. Ins. Co. v. Murphy*, 111 U. S. 738, 28 L. ed. 582, 4 Sup. Ct. Rep. 679.

A Federal question is presented by the claim of immunity, under U. S. Rev. Stat. § 5117, from the operation of a discharge in bankruptcy because of the fraudulent and fiduciary character of the debt. *Palmer v. Hussey*, 119 U. S. 96, 30 L. ed. 382, 7 Sup. Ct. Rep. 158. To the contrary is *Strader v. Baldwin*, 9 How. 261, 13 L. ed. 130, which, though not referred to in *Palmer v. Hussey*, is obviously no longer an authority, and is declared in *McCormick v. Market Nat. Bank*, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433, *infra*, IV. e, 12, to have been overruled by *Palmer v. Hussey*, and *Hennequin v. Clews*, 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576, in which latter case the court, on a similar state of facts, assumed jurisdiction without discussion.

And a denial by a state court of a claim of immunity under U. S. Rev. Stat. § 711 (U. S. Comp. Stat. 1901, p. 577), from the operation of a decree of a state court because that statute made the jurisdiction of the courts of the United States over bankruptcy proceedings exclusive, gives the Supreme Court of the United States jurisdiction to review the decision of the state court. *Winchester v. Heiskell*, 119 U. S. 450, 30 L. ed. 462, 7 Sup. Ct. Rep. 281.

A writ of error lies from the Supreme Court of the United States to review the decision of the highest court of a state against the validity of a title claimed under a sale in bankruptcy. Such a decision is against a right, title, privilege, or immunity specially set up and claimed under Federal law. *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 29 L. ed. 244, 5 Sup. Ct. Rep. 1009.

And the question as to the validity of a transfer by a trustee in bankruptcy appointed under and deriving his authority from the bankrupt act is a Federal one. *Traer v. Clews*, 115 U. S. 528, 29 L. ed. 467, 6 Sup. Ct. Rep. 155. See also *supra*, IV. c.—*Factors' & T. Ins. Co. v. Murphy*, 111 U. S. 738, 28 L. ed. 582, 4 Sup. Ct. Rep. 679,—where the effect of a sale in bankruptcy was regarded as involving a question of right claimed under Federal authority.

The Supreme Court of the United States has no jurisdiction to review the decision of a state court in an action to set aside a conveyance as fraudulent against creditors, merely because the suit was brought by an assignee in bankruptcy. *McKenna v. Simpson*, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365.

And the decision of a state court in such suit, as to what shall be deemed a fraudulent conveyance, does not present a Federal question; nor does the application by the state court of the evidence in reaching that decision raise such

a question, when no question was raised as to the assignee's power under the acts of Congress or the rights vested in him as assignee. *Ibid.*

A decision of a state court against a party who claims that the title to his demand comes through a bankrupt assignee cannot be reviewed by the Supreme Court of the United States where no construction of such bankrupt act was called in question. *Calcote v. Stanton*, 18 How. 243, 15 L. ed. 348.

A decision of a state court that the presentation of a check drawn on a bank by a depositor transferred to the holder so much of the debt due the drawer as was sufficient to pay the check presents no Federal question which will give the Supreme Court of the United States jurisdiction, notwithstanding the subsequent bankruptcy of the drawer, and a claim by the bank to a set-off under the bankruptcy act, against the obligation of the bankrupt arising out of an acceptance of an unpaid draft, as, the only dispute being over the amount of the credit which the bank was entitled to set off against the amount due on the draft, the bankruptcy law is not involved. *Boatmen's Sav. Bank v. State Sav. Asso.* 114 U. S. 265, 29 L. ed. 174, 5 Sup. Ct. Rep. 878.

The decision of a state court upon the legal effect of promises alleged to have been made by a banker after his discharge under the bankruptcy law of the United States cannot be reviewed by the Supreme Court of the United States, as the legal obligation as to promises depends upon the law of the state in which they were made. *Linton v. Stanton*, 12 How. 423, 18 L. ed. 1050.

The question whether a suit brought by the assignee of a trustee in bankruptcy against a prior purchaser was barred by the limitation prescribed by the bankrupt act is a Federal one. *Traer v. Clews*, 115 U. S. 528, 29 L. ed. 467, 6 Sup. Ct. Rep. 155.

The decision of a state court that a writ of error from one state court to another is the beginning of a new suit within the meaning of the limitation clause of the Federal bankrupt law would seem not to be reviewable in the Supreme Court of the United States, or, if reviewable, should be followed by that court. *Jenkins v. International Bank*, 106 U. S. 571, 27 L. ed. 304, 2 Sup. Ct. Rep. 1.

Where a stockholder and creditor of a corporation commenced proceedings in bankruptcy, and two others, to stop such proceedings, purchased his stock and assumed his debt, these facts set up as a defense to their obligation present no Federal question under the bankrupt law which will give the Supreme Court of the United States jurisdiction to review a judgment for plaintiff in the state court. *Van Norden v. Benner*, 131 U. S. 145, Appx., and 24 L. ed. 247.

12. National banks.

Parties setting up as a defense title in a third party under the national banking law, and not claiming for themselves any title, right, privilege, or immunity given by that law, are not entitled to have a judgment of a state court adverse to their contention reviewed in the Supreme Court of the United States. *Miller v. National Bank*, 106 U. S. 542, 27 L. ed. 289, 1 Sup. Ct. Rep. 536.

Where a national bank organized from a state bank is held liable by a state court to pay bills issued by such state bank, and the national bank

claims immunity from such liability by reason of its organization under the national banking act, the Supreme Court of the United States has jurisdiction to review the state decision. *Metropolitan Nat. Bank v. Claggett*, 141 U. S. 520, 35 L. ed. 841, 12 Sup. Ct. Rep. 60.

A question as to the power of a national bank to become a stockholder in a savings bank is a Federal one. *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 531.

And so is the question whether a national bank has power to discount a note on real-estate security. *Swope v. Leffingwell*, 105 U. S. 3, 26 L. ed. 939.

A claim by a national bank of an exemption from liability on a contract because the contract was one which it had no power under the national banking law to make involves a Federal question. *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496.

The decision of a state court that a claim against a national bank was an existing demand at the date of its suspension does not involve a Federal question. *Chemical Nat. Bank v. Hartford Deposit Co.* 161 U. S. 1, 40 L. ed. 505, 16 Sup. Ct. Rep. 439.

Whether, by reason of a false assumption of corporate authority the officers, directors, and shareholders of what purported to be a national bank, but which never attained legal authority to do business, became liable as partners on the principle of agency for contracts entered into in the name of the corporation, is not a Federal question, but only a question of general law. *Seeberger v. McCormick*, 175 U. S. 274, 44 L. ed. 161, 20 Sup. Ct. Rep. 128.

But whether or not a recovery can be had on a lease made by a national banking association not then authorized to commence business, but which had made and filed its articles of association, by virtue of the exception made by U. S. Rev. Stat. § 5136 (U. S. Comp. Stat. 1901, p. 3455), as to incidental and preliminary business, and because the prohibition of business by that section did not make prohibited contracts invalid, is a Federal question. *McCormick v. Market Nat. Bank*, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433.

A claim against a purchaser of shares of stock of a national bank which subsequently became insolvent, for a loss incurred by his failure to insert his name or that of some other responsible person in the blank transfer signed on the books of the bank, presents no Federal question which will give the Supreme Court of the United States jurisdiction to review a judgment of a state court overruling such contention. The purchaser's obligation, if any, grows out of his contract, and not out of the banking law. *Le Sasser v. Kennedy*, 123 U. S. 521, 31 L. ed. 202, 8 Sup. Ct. Rep. 244.

A decision by a state court that, under a state statute, a national bank could not recover from a corporation interest in excess of the statutory rate, although corporations are prohibited from pleading the defense of usury, does not present a Federal question, where it rests upon a determination of the state court of the meaning of the state law as applied to all creditors, without denying the equality of right to the bank. *Union Nat. Bank v. Louisville, N. A. & C. R. Co.* 163 U. S. 325, 41 L. ed. 177, 16 Sup. Ct. Rep. 1039.

A controversy merely as to which of the parties has the superior equity to shares of stock in

a national bank, and in which the national banking act is only collaterally involved, does not raise a Federal question. *Leyson v. Davis*, 170 U. S. 36, 42 L. ed. 939, 18 Sup. Ct. Rep. 500. See also *infra*, IV. e, 26,—*Conde v. York*, 168 U. S. 642, 42 L. ed. 611, 18 Sup. Ct. Rep. 234.

An action to recover back usurious interest from a national bank, expressly based on an act of Congress, presents a Federal question. *Talbot v. First Nat. Bank*, 185 U. S. 172, 46 L. ed. 857, 22 Sup. Ct. Rep. 612; *Talbot v. Sioux Nat. Bank*, 185 U. S. 182, 46 L. ed. 862, 22 Sup. Ct. Rep. 621.

13. Citizenship.

The decision of a state court that plaintiff in error was not eligible to the office of governor of the state is reviewable by the Supreme Court of the United States where it involved the denial of a right or privilege under the Constitution and laws of the United States upon which the determination of whether he was a citizen of the United States or not depended. *Boyd v. Nebraska*, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375. See also *supra*, IV. e, 9.—*Gleason v. Florida*, 9 Wall. 779, 19 L. ed. 730.

A decision of the highest court of the state of New York that a party to a suit for a divorce in Louisiana was not, at the time the suit was commenced, a citizen of New York state, does not present a question of which the Supreme Court of the United States has jurisdiction. *Hunt v. Hunt*, 131 U. S. 165, Appx., and 24 L. ed. 1109.

14. Indians.

A decision by a state court that an Indian nation bringing an action under a state statute is subject to the bar of the statute of limitations under a provision of the statute that such actions may be brought in the same manner and in the same time as if brought by citizens of the state in relation to private individual matters is not the decision of a Federal question, subject to review by the Supreme Court of the United States. *Seneca Nation of Indians v. Christy*, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828.

The Supreme Court of the United States has no jurisdiction to review a decision of a state court dismissing a bill for an injunction against a judgment on a note, where the relief claimed was founded either on fraud or on failure of consideration growing out of inability to convey title to Indian reservations, and no right is claimed under any treaty with the Indians, or any act of Congress. *Maney v. Porter*, 4 How. 55, 11 L. ed. 873.

15. Contracts.

When plaintiffs in error claimed in the state court that contracts made with the defendants were rendered void by provisions of the Federal Constitution and certain acts of Congress, and the decision of the court denied such claim, the case may be reviewed in the Supreme Court of the United States. *Dubuque & S. C. R. Co. v. Richmond*, 15 Wall. 3, 21 L. ed. 118.

The repugnancy of state legislation to the Federal Constitution is the Federal question usually regarded as involved in a case in which the obligation of a contract is claimed to be impaired (see *supra*, IV. d, 3). But jurisdiction 62 L. R. A.

to review the judgment of a state court in such a case may be rested on the ground that its decision was adverse to a right claimed under the Federal Constitution.

For this reason, as well as because the decision of the state court was in favor of the validity of an authority exercised under the state, challenged as repugnant to the Federal Constitution, the Supreme Court of the United States, in *Home Ins. Co. v. Augusta*, 93 U. S. 116, 23 L. ed. 825, assumed jurisdiction to review a decision of a state court adverse to a claim that a city ordinance imposing a license tax upon an insurance company of another state was in conflict with the contract clause of the Federal Constitution.

Whether the contract clause of the Federal Constitution constitutes a bar to mandamus proceedings in a state court is a Federal question. *Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617.

16. Vested water rights.

The questions of priority of possession of a water right and of conformity to local customs, laws, and decisions, which must both be proved in order to establish any rights under U. S. Rev. Stat. § 2339 (U. S. Comp. Stat. 1901, p. 1437), protecting vested water rights, are not Federal, but are merely preliminary to, or the possible basis of, a Federal question. *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 175 U. S. 839, 44 L. ed. 305, 20 Sup. Ct. Rep. 245; *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. Rep. 178.

17. Legal tender.

The Supreme Court of the United States has jurisdiction to review a state judgment involving a denial of the right to demand coin in payment of a note, based on the construction of the several legal-tender acts. *Trebilcock v. Wilson*, 12 Wall. 687, 20 L. ed. 460.

And, although a decision in favor of the validity of the legal-tender acts is not reviewable under the 1st clause of the 25th section of the judiciary act, it may be reviewed under the 3d clause, where a right to payment in coin was based on the construction of the Federal Constitution, and was denied. *Ibid.* The court overruled *Roosevelt v. Meyer*, 1 Wall. 512, 17 L. ed. 500, where jurisdiction had been denied because the decision was in favor of the validity of the legal-tender acts, and said that the 3d clause seemed to have been overlooked in that case.

The contention that levee bonds for a loan of gold coin were payable in money of the United States presents a Federal question where the adverse party contended that they were payable only in the same medium, and were therefore unauthorized. *Woodruff v. Mississippi*, 162 U. S. 291, 40 L. ed. 973, 16 Sup. Ct. Rep. 820.

18. Exemption from taxation.

A decision of a state court denying relief sought under a state law entitling banking associations to reimbursement for taxes illegally collected upon Federal securities exempted from taxation by authority of the United States, upon the ground that the certificates of indebtedness involved were not entitled to exemption under the Constitution and laws of the United

States, is reviewable in the Supreme Court of the United States. *The Banks v. New York*, 7 Wall. 16, *sub nom.* *New York ex rel. Bank of N. Y. Nat. Bkg. Asso. v. Connelly*, 19 L. ed. 57.

19. Customs and internal revenue.

The question as to the right of the United States, by virtue of the revenue collection act of 1799, to a lien on imported merchandise for debts antecedently due by the consignors on custom-house bonds is a Federal one. *Harris v. Dennie*, 3 Pet. 292, 7 L. ed. 683.

And whether imported merchandise on which the duties have not been paid, and which are therefore, in contemplation of the revenue collection act of 1799, virtually in the custody of the United States, is immune from attachment by a state officer, is a Federal question. *Ibid.*

A claim of a right under the internal revenue act is presented on a prosecution in a state court for selling intoxicating liquors, by a defense which is founded upon the effect, under such act, of a license from the United States as a wholesale dealer in liquors. *McGuire v. Massachusetts*, 3 Wall. 382, 387, 18 L. ed. 164, 226.

A right claimed by an express company to shift the burden of the stamp tax imposed by the act of Congress of June 13, 1898, by increasing its rates, which were otherwise conceded to be reasonable, presents a Federal question for the purpose of review by the Supreme Court of the United States. *American Exp. Co. v. Michigan*, 177 U. S. 404, 44 L. ed. 823, 20 Sup. Ct. Rep. 595.

The question as to the amount of revenue stamps necessary to a deed, depending simply on the value of the land conveyed, is not Federal. *Lewis v. Campau*, 3 Wall. 106, 18 L. ed. 211.

But, however frivolous the objection in the state court that a deed was not properly stamped so as to be admissible in evidence under an act of Congress, it raises a question which confers jurisdiction on the Supreme Court of the United States to review the judgment of the state court admitting the deed in evidence. *Hall v. Jordan*, 15 Wall. 393, 21 L. ed. 72.

20. Removal of causes.

Whether a case is made for removal from a state to a Federal court is a Federal question. *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643; *Oakley v. Goodnow*, 118 U. S. 43, 30 L. ed. 61, 6 Sup. Ct. Rep. 944; *Kanouse v. Martin*, 14 How. 23, 14 L. ed. 310; *Stone v. South Carolina*, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Stevens v. Nichols*, 157 U. S. 370, 39 L. ed. 736, 15 Sup. Ct. Rep. 640.

21. Navigation.

A claim in a state court in an action for a maritime tort committed upon navigable waters, and within the admiralty jurisdiction, of a right, under the statutes of the United States, to navigate such waters in accordance with the statutory rules on that subject, presents a Federal question. The appellate jurisdiction of the Federal Supreme Court over questions national and international in their nature cannot be restrained by the mere fact that the party plaintiff has elected to pursue his common-law remedy in a state court. *Belden v. Chase*, 150 U. S. 674, 37 L. ed. 1218, 14 Sup. Ct. Rep. 264.
62 L. R. A.

An action brought under a state statute to recover damages for causing death by negligence in navigating a stream does not involve a Federal question where no claim of right, privilege, or immunity under the navigation laws of the United States was set up as a defense. *Staten Island R. Co. v. Lambert*, 131 U. S. 211, Appx., and 24 L. ed. 615.

An action in a state court upon a policy of insurance to recover for the loss of a steamboat by fire, in which the defense was that the fire was caused by carelessness in the use of turpentine on board as freight to increase the steam, presents no Federal question within the jurisdiction of the Supreme Court of the United States, although the carriage of turpentine was forbidden by an act of Congress. *Marsh v. Citizens' Ins. Co.* 131 U. S. 213, Appx., and 25 L. ed. 90.

Whether or not a lessee of property situated on the bank of the Mississippi river within the city of St. Louis could maintain an action against the city for extending one of its streets into the river so as to destroy the water privileges which were appurtenant to the property is not a Federal question. *St. Louis v. Myers*, 113 U. S. 560, 28 L. ed. 1131, 5 Sup. Ct. Rep. 640. The court distinguished *Davenport & N. W. R. Co. v. Renwick*, 102 U. S. 180, 26 L. ed. 51, *supra*, IV. d, 2, on the ground that there the question was whether a state statute which prevents the appropriation without compensation of improvements made by a riparian owner on the Mississippi river without complying with U. S. Rev. Stat. § 5254 (U. S. Comp. Stat. 1901, p. 3523), was void because Congress, in the exercise of its jurisdiction over the navigable waters of the United States, had, by such statute, prescribed certain conditions on which such improvements should be made.

Apparently because it was obvious that a decision of a state court refusing to prohibit the location of harbor lines by state commissioners, though such location might violate the provisions of the river and harbor act of September 19, 1890, respecting harbor lines, could not amount to a decision against a title or right of a littoral owner arising under such act, the contention that such was the case was held insufficient to confer jurisdiction on the Supreme Court of the United States. *Yesler v. Washington Harbor Line*, 146 U. S. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190. See also *supra*, IV. a.—*Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353.

22. Civil rights.

The remedy for the exclusion of citizens of African descent from a grand jury without authority from the state constitution or laws, in violation of the accused's rights under the Constitution and laws of the United States, is ultimately in the Supreme Court of the United States by writ of error to the state court. *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567.

23. Patents for inventions.

A judgment of a state court declaring invalid certain patents under which plaintiff claimed is reviewable in the Supreme Court of the United States. *Reichart v. Feips*, 6 Wall. 160, 18 L. ed. 849.

But an action in a state court to recover patent royalties in which no question as to the validity or construction of the patent was in-

volved does not present any Federal question which will give the Supreme Court of the United States jurisdiction to review the judgment of the state court. *Felix v. Scharnweber*, 125 U. S. 54, 31 L. ed. 687, 8 Sup. Ct. Rep. 759.

And a judgment of a state court enforcing a contract for the transfer and use of an inventor's right, and not necessarily passing upon any question under the patent laws, cannot be reviewed by the Supreme Court of the United States. *Marsh v. Nichols, S. & Co.* 140 U. S. 344, 35 L. ed. 413, 11 Sup. Ct. Rep. 798.

Whether there was such fraudulent misrepresentation respecting the utility of an invention as would justify the rescission of a contract for the exchange of an invention for merchandise is not a Federal question. *Wade v. Lawder*, 165 U. S. 624, 41 L. ed. 851, 17 Sup. Ct. Rep. 425. See also *infra*, IV. e, 26,—*Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 46, 31 L. ed. 683, 8 Sup. Ct. Rep. 756.

24. Slavery.

The question whether slaves who passed temporarily, by the consent of their master, from Kentucky into Ohio, thereby became free, is for the state courts to decide, as there is nothing in the Constitution of the United States in any way controlling, and the prohibition against slavery, contained in the ordinance of 1787 for the government of the Northwest territory, was superseded by the adoption of the Constitution. *Strader v. Graham*, 10 How. 82, 13 L. ed. 337.

A claim of a right to the services of a person as a slave does not present any question as to the rights of property secured by the general provisions of the ordinance of 1787 for the government of the Northwest territory, even if that instrument could be considered as an act of Congress. *Menard v. Aspasia*, 5 Pet. 515, 8 L. ed. 207. The court said: "No substantial ground of difference is perceived between the assertion of any other right to property and that which is set up in the present case. The provisions of the ordinance will equally apply to every description of claim to property, personal or real. And if, from the general provisions respecting property, this court shall take jurisdiction in this case, on the same principle it may revise the decisions of the supreme courts of Illinois, Indiana, and Ohio,—at least in all cases which involve rights that existed under the territorial government. Give perpetuity to this general provision, and consider it as binding upon the people of these states, and it must have an important bearing upon their interests. Instead of looking to their constitutions as the fundamental law, they must look to the ordinance of 1787. In this instrument their rights are defined and their privileges guaranteed. And, instead of finding an end of legal controversies respecting property in the decisions of their own courts of judicature, they must look to this court. This cannot be the true construction of this instrument. Its general provisions as to the rights of property cannot give jurisdiction to this court."

25. Limitation of actions.

A claim of exemption from liability as surety on the bond of a United States marshal by reason of the provision of an act of Congress requiring suits on marshals' bonds to be brought within six years presents a Federal question. 62 L. R. A.

Montgomery v. Hernandez, 12 Wheat. 129, 6 L. ed. 575.

And the contention that the running of a state statute of limitation was interrupted by the act of Congress of June 11, 1864, also presents a Federal question. *Stewart v. Kahn*, 11 Wall. 493, 20 L. ed. 176.

26. Miscellaneous.

Whether a consul of a foreign power is exempt from suit in a state court is a Federal question. *Davis v. Packard*, 6 Pet. 41, 8 L. ed. 312, 7 Pet. 276, 8 L. ed. 684.

The claim that a mortgage on a vessel, duly recorded under an act of Congress in the collector's office, gave a better lien upon it than a subsequent attachment issued out of a state court, is a claim of a right under such act. *Aldrich v. Aetna Ins. Co.* 8 Wall. 491, 19 L. ed. 473.

A Federal question respecting a right and authority set up under a Federal law is presented by the contention of a purser of a naval vessel of the United States that attachments could not be laid by a state court upon seamen's wages in his hands. *Buchanan v. Alexander*, 4 How. 20, 11 L. ed. 857.

A controversy over the respective equities of rival claimants to moneys paid over by the United States to government contractors, in which the Federal statute with reference to the assignment of claims against the United States was only collaterally involved, does not present a Federal question. *Conde v. York*, 168 U. S. 642, 42 L. ed. 611, 18 Sup. Ct. Rep. 234. See also *supra*, IV. e, 12,—*Leyson v. Davis*, 170 U. S. 36, 42 L. ed. 939, 18 Sup. Ct. Rep. 500.

The claim of a woman to a license to practice law on the ground that, having been a citizen of another state, she was entitled to any rights granted to citizens of that state, presents a Federal question. *Bradwell v. Illinois*, 16 Wall. 130, 21 L. ed. 442.

The contention that the right given by an act of Congress to the "legal representatives" of a person is for the benefit of his next of kin, to the exclusion of his creditors, presents a Federal question. *Briggs v. Walker*, 171 U. S. 466, 43 L. ed. 243, 19 Sup. Ct. Rep. 1.

A prosecution for selling lottery tickets in violation of a state statute involves a Federal question, where defendant on the trial claims the protection of an act of Congress empowering the city of Washington to authorize the drawing of lotteries for public improvements. *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257.

Whether or not the provision for the investigation of the diseases of cattle and the suppression thereof, made by the animal industry act of Congress of March 29, 1884, and the regulations prescribed thereunder, furnish a complete defense to an action in a state court founded upon a state statute to recover damages from a railroad company for the communication of disease to domestic cattle by cattle from other states, is a Federal question. *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 378, 18 Sup. Ct. Rep. 488.

The contention that a court held by a judge appointed by the military governor of Louisiana had no jurisdiction, under the Federal Constitution, to render the judgment in suit, involves a claim of a privilege under such Constitution. *Pennywit v. Eaton*, 15 Wall. 380, 21 L. ed. 72.

And the claim that a state court had no jurisdiction of an action upon a contract to pay

for the use of a patent right because the right to maintain the action depended upon the question whether a second reissue of the patent was valid or invalid under the patent laws, of which question the Federal courts had exclusive jurisdiction, involves a claim of immunity under Federal law. *Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 46, 31 L. ed. 683, 8 Sup. Ct. Rep. 756.

Where the only question involved in the decision of a state court was that a Federal judge who pronounced an unauthorized sentence was not liable for false imprisonment because, in so doing he acted in his judicial capacity, no Federal question is presented of which the Supreme Court of the United States has jurisdiction. *Lange v. Benedict*, 99 U. S. 68, 25 L. ed. 469.

So, a decision of a state court that a judge of the court of commissioners of Alabama claims was not liable in damages for preventing a person from acting as an attorney and counselor in such court because, in concurring in the order complained of, he acted in his judicial capacity, in itself involves no Federal question which will authorize a review of the decision in the Supreme Court of the United States. *Manning v. French*, 133 U. S. 186, 33 L. ed. 582, 10 Sup. Ct. Rep. 258.

It is not very clear why the contention in the state court that a postal clerk was, by reason of certain acts of Congress authorizing the appointment of postal clerks, to be transported on mail trains without extra charge, a passenger within the meaning of a proviso in a state statute exempting passengers from the restrictions there made upon the right of recovery in negligence actions against railroad companies, did not present a Federal question. Such, however, was the ruling in *Price v. Pennsylvania R. Co.* 113 U. S. 218, 28 L. ed. 980, 5 Sup. Ct. Rep. 427. The Federal court doubtless might properly have declined jurisdiction on the ground that such contention was wholly without foundation (see *supra*, IV. a), but does not seem to have done so. The decision is, perhaps, like *Yesler v. Washington Harbor Line*, 146 U. S. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190, and other cases cited in that connection, *supra*, IV. e, 5, best explained on the theory that, as the judgment of the state court was not to be disturbed, it was of little importance whether that result was reached by dismissal or affirmance.

The defense to a suit to enforce a trust in a pre-emption entry, that the transaction by which the trust was created was in violation of an act of Congress, presents no Federal question. *Udell v. Davidson*, 7 How. 769, 12 L. ed. 907. The court said that the only right or privilege claimed under such act was that by means of a fraud upon the government a right to perpetrate a fraud upon the *cestui que trust* was also acquired, and dismissed the writ of error with the remark: "We shall not comment on such a claim."

So, the defense in a suit for the specific performance of a contract to convey lands, that such contract, being made in pursuance of a combination of settlers to defraud the United States by preventing competition for its public lands, was forbidden by the acts of Congress in relation to the sale of public lands, presents no Federal question, since the only right asserted under Federal law is the right to protection from the consequences of a contract made in violation of such law. *Walworth v. Kneeland*, 15 How. 348, 14 L. ed. 724.

But a different result was reached in *Anderson v. Carkins*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905, where a Federal question was held to have been raised in a suit for specific performance of a contract to convey, entered into before title was acquired by the vendor under the homestead act, by a defense that the contract was void under the homestead laws, the policy of which was to secure for the benefit of the homesteader the exclusive benefit of his homestead right.

Whether or not a person has lost a right under the Federal Constitution or laws by his action or failure to act is not a Federal question which will sustain a writ of error from the Supreme Court of the United States to a state court. *Pierce v. Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131.

An application by tenants in common of a tract of 133 acres for a partition under the pre-emption act of Congress of May 29, 1830, which is, by its terms, only applicable to quarter sections, presents no Federal question. *Downes v. Scott*, 4 How. 500, 11 L. ed. 1075.

The mere fact that judgment was rendered in a state court against the United States does not confer jurisdiction on the Supreme Court of the United States to review such judgment. *United States v. Thompson*, 93 U. S. 586, 23 L. ed. 982.

But while the United States, like other litigants, cannot invoke the jurisdiction of the Supreme Court by writ of error to a state court unless the state court decides a Federal question, the United States may assert a Federal right which private parties could not have. *Stanley v. Schwalby*, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754.

1. Questions of local or general law are not Federal.

It obviously is not intended to include in this division all the cases in which the Federal Supreme Court has denied jurisdiction of a writ of error to a state court because the question involved was one of general or local, as distinguished from Federal, law, as this would practically necessitate the duplication of a large percentage of the cases hereinbefore considered, which have been classified with reference to the Federal controversy claimed to have been involved, rather than the ground upon which the refusal to entertain jurisdiction was rested. A number of cases, however, seem to involve only the application of the rule that questions of local or general law are not Federal.

1. In general.

The decision of a state court upon a question of local or general law alone can confer no jurisdiction upon the Supreme Court of the United States to review the judgment. *Hoyt v. Shelden*, 1 Black, 518, 17 L. ed. 65; *Sevier v. Haskell*, 14 Wall. 12, 20 L. ed. 827; *United States v. Thompson*, 93 U. S. 586, 23 L. ed. 982; *Brooks v. Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; *New York L. Ins. Co. v. Hendren*, 92 U. S. 286, 23 L. ed. 709; *Walworth v. Kneeland*, 15 How. 348, 14 L. ed. 724; *Grame v. Mutual Assur. Co.* 112 U. S. 273, 28 L. ed. 716, 5 Sup. Ct. Rep. 150; *Tarver v. Keach*, 15 Wall. 67, 21 L. ed. 82; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Quimby v. Boyd*, 128 U. S. 488, 32 L. ed. 502, 9 Sup. Ct. Rep. 147;

Grand Gulf R. & Bkg. Co. v. Marshall, 12 How. 165, 13 L. ed. 938; *M'Bride v. Hoey*, 11 Pet. 167, 9 L. ed. 673.

Questions of local law which are merely preliminary to, or the possible basis of, a Federal question, are not in themselves Federal. *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 187 U. S. 509, 47 L. ed. 307, 23 Sup. Ct. Rep. 178; *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245.

The question as to whether a party's remedy in a state court was in law or in equity is a matter which depends entirely upon local law, and involves no Federal right. *Loeber v. Schroeder*, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934.

The legal effect of a judgment set up as a bar is a question of general law upon which the decision of a state court is not reviewable in the Supreme Court of the United States. *Chouteau v. Gibson*, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340; *San Francisco v. Itsell*, 133 U. S. 65, 33 L. ed. 570, 10 Sup. Ct. Rep. 241; *California v. Holladay*, 159 U. S. 415, 40 L. ed. 202, 16 Sup. Ct. Rep. 53.

The application of the doctrine of *res judicata* by a state court to a suit to compel the funding of state bonds is not a Federal question. *Adams v. Louisiana Bd. of Liquidation*, 144 U. S. 651, 36 L. ed. 578, 12 Sup. Ct. Rep. 756.

Whether an equitable title can be set up in bar of an action at law brought by the holder of a legal title to recover possession of land is a question of state law, for the state court alone to decide. *Chouteau v. Gibson*, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340.

The same is true of the question whether the pleadings in an action, the judgment of which is set up in bar, were such as to present an equitable defense in proper form for final adjudication. *Ibid.*

Whether certain public boards have a fiduciary capacity to raise a question as to the impairment of the obligations of a contract is a matter of local law, for the state court alone to decide. *Board of Liquidation v. Louisiana*, 179 U. S. 622, 45 L. ed. 847, 21 Sup. Ct. Rep. 203.

The question whether, upon principles of general law, a trustee can be held responsible to his *cestui que trust* for the loss of a trust fund delivered by him into the hands of the confederate authorities under compulsion is not Federal. *Rockhold v. Rockhold*, 92 U. S. 129, 23 L. ed. 507.

The same is true of the question whether, as between vendor and vendee, there can be a sale and delivery of cotton so as to pass title to the vendee before the payment of the government tax assessed upon it under the act of Congress of July 1, 1862. *Carson v. Ober*, 131 U. S. 160, Appx., and 25 L. ed. 157.

Whether or not the failure of a domestic corporation to complete its road within the time limited was such a substantial noncompliance with its charter as to subject it to a decree of forfeiture is a question of state law alone. *Nonconah Turnp. Co. v. Tennessee*, 131 U. S. 158, Appx., and 24 L. ed. 368.

Whether or not, in the absence of fraud or intentional wrong, city assessors are personally liable in damages for any errors in an assessment of national-bank stock, is a question solely 62 L. R. A.

of general municipal law. *Williams v. Weaver*, 100 U. S. 547, 25 L. ed. 708.

Whether or not money paid by a purchaser at a tax sale could be recovered back under the common law or the state statutes where the title had failed because the land was exempt from taxation under the laws of the United States is not a Federal question. *Tyler v. Cass County*, 142 U. S. 288, 35 L. ed. 1016, 12 Sup. Ct. Rep. 225.

And whether, under a state statute, a person must exhaust his remedy before a state board of equalization before he can bring suit in equity to restrain the collection of taxes on land claimed to be exempt because not so-segregated from the public domain as to extinguish all interest of the United States therein is not a Federal question. *Northern P. R. Co. v. Patterson*, 154 U. S. 130, 38 L. ed. 934, 14 Sup. Ct. Rep. 977.

A decision by a state court that a decree of a foreign court annulling a marriage is valid, and that, consequently, the plaintiff in error was not the widow of a decedent, and was not entitled to dower or to inheritance under the state laws, presents no Federal questions, *Roth v. Ehman*, 107 U. S. 319, 27 L. ed. 499, 2 Sup. Ct. Rep. 312.

Where the only question before the state court related to the interruption of the state statute of prescriptions, and this question was decided exclusively upon principles of the jurisprudence of the state, the case cannot be reviewed in the Supreme Court of the United States. *Marquese v. Bloom*, 16 Wall. 351, 21 L. ed. 280.

The question where a dividing line runs between two tracts of land is not Federal. *Almonester v. Kenton*, 9 How. 1, 13 L. ed. 21. See also cases cited *supra*, IV. e. 8.

Whether or not a public survey, under the authority of the United States, of a large tract of country including the land in question was *per se* an eviction is not a Federal question, but is a collateral matter independent of and wholly aside from any such question. *Keene v. Clark*, 10 Pet. 291, 9 L. ed. 429.

Whether the owner of land out of possession can recover from one in possession, holding adversely under claim of title, the value of a crop raised by the latter in cultivating the soil, is not a Federal question. *Martin v. Thompson*, 120 U. S. 376, 30 L. ed. 679, 7 Sup. Ct. Rep. 586.

2. Practice and procedure.

Questions purely of local practice obviously are not Federal. *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Ludelling v. Chaffe*, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439; *Tripp v. Santa Rosa Street R. Co.* 144 U. S. 126, 36 L. ed. 371.

Such are questions respecting evidence. *Sherman v. Grinnell*, 144 U. S. 108, 36 L. ed. 403, 12 Sup. Ct. Rep. 574; *Baldwin v. Kansas*, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; *Wood v. Brady*, 150 U. S. 18, 37 L. ed. 981, 14 Sup. Ct. Rep. 6; *Brooks v. Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; *Marsh v. Citizens' Ins. Co.* 131 U. S. 213, Appx., and 25 L. ed. 90.

But the question as to the competency and legal effect of the evidence as bearing upon a question of Federal law is said to be a Federal one. *Dower v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452.

The refusal of a state court to set aside the submission of a suit in equity in order to give complainant time to obtain the deposition of witnesses, where there was ample time before the submission to have done so, does not raise any Federal question, but is a decision upon a matter of practice under the state procedure. *Thorington v. Montgomery*, 147 U. S. 490, 37 L. ed. 252, 13 Sup. Ct. Rep. 394.

Whether the bondholders of a corporation are indispensable parties to a suit instituted by the attorney general in the name of the state to enforce a forfeiture of the company's charter for an alleged violation of its terms is not a Federal question. *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

Whether an action to foreclose a lien for assessments for street improvements is *in rem* or *in personam* under the state practice is not a Federal question. *Wood v. Brady*, 150 U. S. 18, 37 L. ed. 981, 14 Sup. Ct. Rep. 6.

The refusal of the highest court of a state to permit the defense of a discharge in bankruptcy to be set up in that court as a new defense raises no Federal question. *Wolf v. Stix*, 96 U. S. 541, 24 L. ed. 640.

And the decision of the highest state court on a second appeal, refusing to reopen the question involved upon the first hearing to let in a Federal defense presented by new pleas filed without leave of court after the cause had been remanded for a new trial, settles merely a matter of state practice, which cannot be inquired into by the Supreme Court of the United States. *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240.

The decision of the highest court of a state that the verdict of a jury was to be taken as rendered upon the second count in the declaration involves no Federal question. *Delaware City, S. & P. S. B. Nav. Co. v. Reybold*, 142 U. S. 636, 35 L. ed. 1141, 12 Sup. Ct. Rep. 290.

The decision of a state court confirming the sale of mortgaged property as a whole and in one parcel under decree of foreclosure, though it was capable of division into parts, involves no question of Federal law which will give the Supreme Court of the United States jurisdiction to review such decision. *French v. Hopkins*, 124 U. S. 524, 31 L. ed. 536, 8 Sup. Ct. Rep. 589.

Whether or not the state Constitution was complied with in the proceedings on a criminal trial is not a Federal question. *Baldwin v. Kansas*, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; *Brooks v. Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443.

The question as to the propriety of consolidating several offenses in one complaint is purely one of state practice. *O'Neill v. Vermont*, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 603.

An exception to the ruling by the state court with reference to the right of the public to be admitted to the court room presents no Federal question giving the Supreme Court of the United States jurisdiction to review the judgment of the state court, where no reliance was placed on any Federal law. *Brooks v. Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443.

Exceptions to rulings of the state court claimed to deprive defendant of an impartial jury give no jurisdiction to the Supreme Court of the United States to review the judgment of a state court, where it is not claimed that the Federal Constitution guaranteed to him such a jury. *Ibid.*

62 L. R. A.

An instruction that the jury should be governed by the law as given them by the court, and the court's refusal to allow counsel to read in argument portions of an opinion of the state supreme court, raise no question which will give the Supreme Court of the United States jurisdiction to review a judgment of the state court, where no reference was made to any portion of the Federal laws or Constitution giving the defendant any such right. *Ibid.*

Whether a continuance of a criminal case was properly refused by the trial court in the exercise of the discretion intrusted to it by the statutes of the state is for the state courts to decide, and their action presents no Federal question. *Davis v. Texas*, 139 U. S. 651, 35 L. ed. 300, 11 Sup. Ct. Rep. 675.

The extent to which the party accused of crime who is a witness in his own behalf may be examined is a question of state law as administered in the courts of the state, and not of Federal law. *Spies v. Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21.

3. Validity of state legislation under state Constitution.

Whether the provisions of a state law are consistent with the state Constitution is not a Federal question. *Medberry v. Ohio*, 24 How. 413, 16 L. ed. 739; *Porter v. Foley*, 24 How. 415, 16 L. ed. 740; *Re Kenmiller*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *Edwards v. Elliott*, 21 Wall. 552, 22 L. ed. 490; *Salomons v. Graham*, 15 Wall. 208, 21 L. ed. 37; *Levy v. San Francisco City & County Super. Ct.* 167 U. S. 175, 42 L. ed. 126, 17 Sup. Ct. Rep. 769; *Kipley v. Illinois*, 170 U. S. 182, 42 L. ed. 998, 18 Sup. Ct. Rep. 550; *Miller v. Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34.

Whether state statutes have been duly enacted in accordance with the requirements of the state Constitution is likewise not a Federal question. *Davis v. Texas*, 139 U. S. 651, 35 L. ed. 300, 11 Sup. Ct. Rep. 675.

4. Statutory construction.

The proper construction to be given to a state statute in itself involves no Federal question, but is exclusively for the state courts to determine. *Phoenix Ins. Co. v. The Treasurer*, 11 Wall. 204, 20 L. ed. 112; *Smith v. Hunter*, 7 How. 738, 12 L. ed. 894; *Ludeling v. Chaffe*, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439; *Commercial Bank v. Buckingham*, 5 How. 317, 12 L. ed. 169; *Robertson v. Coulter*, 16 How. 106, 14 L. ed. 864; *Susquehanna Boom Co. v. West Branch Boom Co.* 110 U. S. 57, 28 L. ed. 69, 3 Sup. Ct. Rep. 438; *Miller v. Nicholls*, 4 Wheat. 211, 4 L. ed. 578; *Downham v. Alexandria*, 10 Wall. 173, 19 L. ed. 929; *Loeber v. Schroeder*, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; *Marchant v. Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; *Santa Cruz County v. Santa Cruz R. Co.* 111 U. S. 361, 28 L. ed. 456, 4 Sup. Ct. Rep. 474; *Sage v. Louisiana Bd. of Liquidation*, 144 U. S. 647, 36 L. ed. 577, 12 Sup. Ct. Rep. 755; *Adams v. Louisiana Bd. of Liquidation*, 144 U. S. 651, 36 L. ed. 578, 12 Sup. Ct. Rep. 756; *Grand Gulf R. & Bkg. Co. v. Marshall*, 12 How. 165, 13 L. ed. 938; *McNulty v. California*, 149 U. S. 645, 37 L. ed. 882, 13 Sup. Ct. Rep. 959; *Castillo v. McConico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; *Hooker v. Los An-*

geles, 188 U. S. 314, 47 L. ed. 487, 23 Sup. Ct. Rep. 395; Stryker v. Goodnow, 123 U. S. 527, 31 L. ed. 194, 8 Sup. Ct. Rep. 203; Dibble v. Bellingham Bay Land Co. 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939.

The construction of a state statute empowering a railroad company to sell its lands, and of a reservation of such power in a mortgage executed by the company, is not a Federal question, although both the statute and the mortgage refer to certain acts of Congress as prescribing the extent of such power. *Miller v. Swann*, 150 U. S. 132, 37 L. ed. 1028, 14 Sup. Ct. Rep. 52. The court said: "A state may prescribe the procedure in the Federal courts as the rule of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of Congress, the rules of the Federal courts, and the practices of the Land Department, and yet the questions for decision would not be of a Federal character. The inquiry along Federal lines is only incidental to a determination of the local questions of what the state has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a Federal origin."

The question as to the proper construction of a state statute may, however, be bound up so intimately with a Federal question as in itself to present such a question. This we have seen to be true where the question whether a contract has been impaired by state legislation depends upon the construction to be given to a state statute which is claimed to confer the contract right claimed so to have been impaired. See cases cited *supra*, IV. d. 3.

5. Questions of fact.

Questions of fact are not Federal. *Bartlett v. Lockwood*, 160 U. S. 357, 40 L. ed. 455, 16 Sup. Ct. Rep. 334; *Merced Min. Co. v. Boggs*, 3 Wall. 304, 18 L. ed. 245; *Quimby v. Boyd*, 128 U. S. 488, 32 L. ed. 502, 9 Sup. Ct. Rep. 147.

A decision of a state court which rests upon the sole ground that the principal event which was to terminate a franchise had in fact happened presents no Federal question. *France v. Missouri*, 154 U. S. 867, Appx., and 26 L. ed. 86.

The question whether a bond was or was not executed with reference to confederate notes is one of fact for the state court, and is not a Federal question. *Kenney v. Effinger*, 115 U. S. 577, 29 L. ed. 498, 6 Sup. Ct. Rep. 985.

Questions of fact which are merely preliminary to, or the possible basis of, a Federal question, are not in themselves Federal. *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245; *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. Rep. 178.

See also *supra*, IV. b.—*Crary v. Devlin*, 154 U. S. 619, Appx., and 23 L. ed. 510, 14 Sup. Ct. Rep. 1199; IV. e, 8.—*Carpenter v. Williams*, 9 Wall. 785, 19 L. ed. 827; *California Powder Works v. Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; *Sweringen v. St. Louis*, 185 U. S. 38, 46 L. ed. 795, 22 Sup. Ct. Rep. 569; IV. e, 10.—*Bushnell v. Crooke Min. & Smelting Co.* 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771; IV. e, 19.—*Lewis v. Campau*, 3 Wall. 106, 18 L. ed. 211.

62 L. R. A.

V. Conclusion.

It is the Federal character of the controversy which furnishes the justification for the revision of the judgment of a state court in the Supreme Court of the United States, and, unless it is clearly of that character, the foundation, as well as the policy, for such interference entirely fails. *Doe ex dem. Barbarie v. Esliava*, 9 How. 421, 13 L. ed. 200.

The congressional statutes on this subject, which alone furnish the test of this jurisdiction (*Capital Nat. Bank v. First Nat. Bank*, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; *Duncan v. Missouri*, 152 U. S. 371, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Williams v. Norris*, 12 Wheat. 117, 6 L. ed. 571; *Ryan v. Thomas*, 4 Wall. 603, 18 L. ed. 460; *Steines v. Franklin County*, 14 Wall. 15, 20 L. ed. 846; *Caperton v. Ballard*, 14 Wall. 238, 20 L. ed. 885), define three classes of cases in which the requisite Federal controversy is deemed to exist. It has seemed advisable in this note to follow in the main the congressional classification, principally because of the different requirements made by these statutes respecting the manner of the presentation of the Federal question when the case falls within the first two or the last of the three classes, the effect of which is reserved for future consideration in this series. But, in defining the nature of the controversy essential to this jurisdiction, the congressional division may be disregarded. Such a controversy exists where reliance has been placed upon Federal law or authority as conferring some right or title, or where protection against state action or legislation has been sought in such law or authority. If Federal law be understood to mean the Federal Constitution and the treaties concluded by the Federal government, as well as the laws enacted by Congress, this definition, it is submitted, furnishes as accurate a test as may reasonably be expected from a general proposition. It might be well to add that the word "authority" seems to mean some official or judicial action under the sanction of Federal law.

Whether or not the Federal contention is correct would not seem to be, and probably ordinarily is not, a jurisdictional question. But the court is committed to the doctrine that to confer this jurisdiction the Federal question must not be without color of foundation, and must not be a moot or abstract one. In some cases too, where the court has declined jurisdiction, its action seems explicable only on the theory that, being clearly of the opinion that the judgment sought to be reviewed should not be disturbed, the court thought it was not very material whether this conclusion was carried into effect by dismissal or affirmation. W. W. N.

ELLA SCOTT, Admr., etc., of W. M. Scott,
Deceased, *Respt.*,

v.

ASTORIA & COLUMBIA RIVER RAIL-
ROAD COMPANY, *Appt.*

(.....Or.....)

1. In considering the correctness of a single instruction in a charge to the jury the entire charge must be viewed, and,

NOTE.—As to admissibility in evidence of record of weather bureau, see, in this series, *Hus*

unless it appears that the jury would or might have been misled, mere verbal inaccuracies will not require a reversal.

2. The jury cannot be permitted to consider whether or not the safest route for the erection of a railroad was selected in an action to hold the company liable for the death of an employee.
3. An instruction in an action against a railroad company for the death of an employee, which permits the jury to consider the question of the safety of the location of the road, is reversible error, although other portions of the charge correctly instruct them as to the degree of care which it is necessary for the company to have exercised.
4. An exception is sufficient to bring up for review a portion of a charge to the jury when it particularly sets out the language complained of.
5. An agent of the government weather bureau in charge of a particular station may testify as to whether or not the rainfall of a particular day was excessive, from knowledge gained by an examination of the records of the station, although for a portion of the time they were kept by his predecessor in office.
6. A civil engineer may give in evidence his opinion respecting the proper slope of an embankment which may affect the safety of a railroad track, although he has no acquaintance with railroad building if he has knowledge of the subject derived from study of works of civil engineering, and from practical experience in the construction of roads, ditches, and canals.
7. The possibility of a landslide is not such a fact as the court can take judicial notice of, or resort to appropriate books for reference to enable it to declare the fact as conclusive to the jury.
8. A civil engineer testifying as an expert may refer to standard works upon the subject of civil engineering as corroborating his opinion.

(May 25, 1903.)

APPEAL by defendant from a judgment of the Circuit Court for Clatsop County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed.*

Statement by **Moore**, Ch. J.:

This is an action by Ella Scott, as administratrix of the estate of W. M. Scott, deceased, to recover damages for his death, which occurred January 12, 1901, while in the defendant's employ as a locomotive engineer, and is alleged to have been caused by its negligence in constructing its railroad too near a hillside, without adopting any means

to prevent a slide, and in not properly watching its track, so as to discover the danger therefrom, and to warn the deceased thereof. The answer, after denying the material allegations of the complaint, alleges that the day the accident occurred was unusually stormy, the rainfall along the line of the defendant's railway being the heaviest of the season; that for more than two years prior thereto Scott had been in its employ as such engineer, was acquainted with the road and the construction thereof, and knew the nature, formation, and character of the country through which it extended, and the effect of rains thereon; that at the point where he lost his life no slide had ever occurred, but the road was necessarily constructed through a mountainous region, where slides frequently happen in the rainy season, against which it is impossible to guard, which fact he well knew; that, during all the time he was so employed, defendant kept a competent track walker to examine the line before every train passed over it, who immediately preceded the train operated by Scott, examined the track, and found no obstruction thereon; that it was Scott's duty to exercise great care in running the engine, and on the night of January 12, 1901, he was informed that slides might possibly occur, in consequence of the heavy rainfall, and notified to proceed with caution, but, not heeding the direction, he ran the engine at a higher rate of speed than usual, and in such a careless manner that he could not stop it in time to avoid the disaster. For a second defense, it is alleged that Scott, knowing the character of the road and the effect of heavy rains thereon, assumed the danger incident thereto. The reply having denied the material allegations of new matter in the answer, a trial was had, resulting in a judgment for plaintiff in the sum of \$4,000, and the defendant appeals.

Messrs. Fulton Brothers, for appellant:

It was error to admit evidence of the contents of books on civil engineering as to what was the proper slope.

Ashworth v. Kittridge, 12 Cush. 193, 59 Am. Dec. 178; *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *Bloomington v. Shrock*, 110 Ill. 219, 51 Am. Rep. 679; *Boyle v. State*, 57 Wis. 472, 15 N. W. 827; *Gallagher v. Market Street R. Co.* 67 Cal. 13, 56 Am. Rep. 713, 6 Pac. 869; *Link v. Sheldon*,

ton v. Council Bluffs, 36 L. R. A. 211, and *Meers v. New York, N. H. & H. R. R. Co.* 56 L. R. A. 884.

As to admissibility of scientific books and treatises, see *Union P. R. Co. v. Yates*, 40 L. R. A. 553, and *note*.

As to admissibility of computations of expert 62 L. R. A.

made from books which are themselves inadmissible, see *State Bank v. Brown*, 53 L. R. A. 513.

As to reading statistics of mechanical experiments to support opinions of experts, see *Western Assur. Co. v. J. H. Mohlman Co.* 40 L. R. A. 561.

45 N. Y. S. R. 165, 18 N. Y. Supp. 815; *Lilley v. Parkinson*, 91 Cal. 655, 27 Pac. 1091; *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 106, 57 N. W. 680; *Seliger v. Bastian*, 66 Wis. 521, 29 N. W. 244; *McLean v. Schuyler Steam Tow-Boat Line*, 52 Hun, 43, 4 N. Y. Supp. 790.

It was error to admit evidence of the cost of constructing appellant's railroad.

Barbour County v. Horn, 48 Ala. 566; *Higgins v. Cherokee R. Co.* 73 Ga. 149; *Hunt v. Chicago & N. W. R. Co.* 26 Iowa, 363; *Hayes v. St. Louis R. Co.* 15 Mo. App. 583.

The instruction assumes (1) that the track was improperly located, and (2) that there were "other dangers arising from the character of condition of the slope," and that Scott had no knowledge thereof. It was improper for the court to so assume.

2 Enc. Pl. & Pr. p. 116; *Patten v. Newell*, 30 Ga. 271; *Winters v. Mowrer*, 163 Pa. 238, 29 Atl. 916; *Illinois C. R. Co. v. Zang*, 10 Ill. App. 594; *Michigan S. & N. I. R. Co. v. Shelton*, 66 Ill. 424.

Messrs. George Noland and Bennett & Sinnott, for respondent:

An expert witness may be permitted to state the rules, approved and adopted by scientific engineering, for the construction of slopes, and may refer generally to the authorities from which his conclusions as to such rules are deduced.

Central R. Co. v. Mitchell, 63 Ga. 173; *Western Assur. Co. v. J. H. Mohlman Co.* 40 L. R. A. 561, 28 C. C. A. 157, 51 U. S. App. 577, 83 Fed. 811; *Collier v. Simpson*, 5 Car. & P. 73; *Blair v. Madison County*, 81 Iowa, 313, 46 N. W. 1094; *Barrows v. Downs*, 9 R. I. 446; *Nelson v. Bridport*, 8 Beav. 527; *Carter v. State*, 2 Ind. 617; 1 Wharton. Ev. § 438; *Lawson, Expert & Opinion Ev.* 1st ed. p. 176; *State v. Baldwin*, 36 Kan. 17, 12 Pac. 318.

The rainfall in any given locality may be shown by the record of government observations, and in such cases the record itself does not have to be introduced in evidence.

De Armond v. Neasmith, 32 Mich. 231; *Sisson v. Cleveland & T. R. Co.* 14 Mich. 489, 90 Am. Dec. 252.

If any part of an instruction is correct a general exception will not be sufficient, but the particular part complained of must be pointed out.

Murray v. Murray, 6 Or. 22; *Salomon v. Cress*, 22 Or. 178, 29 Pac. 439; *Langford v. Jones*, 18 Or. 307, 22 Pac. 1064; *McDonough v. Great Northern R. Co.* 15 Wash. 260, 46 Pac. 334; *McKinstry v. Clark*, 4 Mont. 370, 1 Pac. 764; *Hicks v. Coleman*, 25 Cal. 146, 85 Am. Dec. 103; *McAlister v. Long*, 33 Or. 368, 54 Pac. 194, 62 L. R. A.

Moore, Ch. J., delivered the opinion of the court:

It is contended by defendant's counsel that the court erred in instructing the jury as follows: "The railroad company has a right to locate its road, in a general way, upon any route it may deem fit, but, in making a specific location at any particular point, it should use due care to provide a safe place for its employees to work; and if it construct its road in a place that is manifestly dangerous, when, with reasonable care and slight expense, it could just as well be constructed in a perfectly safe place, a few feet to one side, that may be negligence, which you would have a right to consider in determining the degree of diligence and care defendant should have exercised in watching, inspecting, and protecting its road, and its employees thereon." To render the application of this part of the charge intelligible, a brief statement of the facts involved is deemed essential. The bill of exceptions discloses that plaintiff introduced testimony tending to show that the defendant constructed a railway from Goble to Astoria, and operates trains thereon, and also over the line of the Northern Pacific Railway Company from Goble to Portland. The defendant's road near Bugby, for about half a mile, is built along the south bank of the Columbia river, about 90 feet from a cliff of basaltic rock, the disintegration of which, and the débris carried over the precipice by surface water, formed a slope of about 45 degrees, extending from the face of the crag to a line parallel with, and about 6 feet from, the track. This incline was originally covered with brush and trees, which were cut down when the railroad was built, and their stumps and roots had rotted. In the rainy season, considerable water flows over the precipice at this point; but, there being no ditch to carry it off, the earth and débris composing the acclivity becomes saturated therewith. Slides have occurred in the immediate vicinity prior and subsequent to the building of the road, but the defendant made no attempt to carry away the material of the slope, or to build retaining walls. The track walker, whose duty it was to inspect the line near Bugby, was obliged to examine a section of 8 miles, and, to avoid being run down, was compelled to start on his velocipede thirty minutes before train time, according to schedule; and as the train was half an hour late on the evening of January 12, 1901, no watchman had passed over the track at that point within an hour of the train's arrival. Some time after the track walker passed Bugby, a slide occurred, the rocks and earth lodging upon the track; and at about 10 o'clock that night the lo-

comotive driven by Scott, and drawing a passenger train, ran into the obstruction, throwing the engine into the river, whereby he was drowned.

It is argued by defendant's counsel that the court, in the instruction complained of, told the jury, in effect, that, if the defendant could have located its road "in a perfectly safe place," but neglected to do so, a higher degree of care in operating it was demanded than in case they should find that such place could not have been discovered "a few feet to one side;" that, though the defendant might select the location of its road, it exercised the right to do so at its peril, and if a safer route than that chosen could have been discovered, but was not found, a different measure of care was required "in watching, inspecting, and protecting its road and employees;" that the degree of care imposed upon the defendant depended upon the wisdom exercised in locating its road; and that a jury, and not a railroad company, are the judges of where a line of railway shall be specifically located. Plaintiff's counsel maintain, however, that the exceptions taken to the instructions were general, and did not point out any particular part thereof of which the defendant complained, and that the charge should be considered in its entirety, and, when so construed, any seeming inconsistency therein is rendered harmless. In construing the language employed by courts in charging juries in this state, a very liberal policy has been pursued; the rule being that, in considering a single instruction, the entire charge must be viewed, and, unless it appears that the jury were or might have been misled, mere verbal inaccuracies will not be sufficient cause for reversal. *Matlock v. Wheeler*, 29 Or. 64, 40 Pac. 5, 43 Pac. 867; *Smitson v. Southern P. Co.* 37 Or. 74, 60 Pac. 907; *Farmers' Nat. Bank v. Woodell*, 38 Or. 294, 61 Pac. 837, 65 Pac. 520. The court, in other parts of its charge, correctly instructed the jury that it was incumbent upon the defendant to exercise only reasonable and ordinary care; saying in one instance: "It is sufficient to defeat the right of the plaintiff to recover in this case that you should find from the evidence that defendant exercised such care as is common and usual under like circumstances and conditions, under prudent management." We think that, notwithstanding the charge, as a whole, correctly informed the jury of the degree of care required of the defendant in operating its road, the instruction complained of might have misled them, for it seems to assume that negligence could be predicated upon the defendant's original location of the road. So many elements are to be consid-

ered in locating a railway, as factors in its construction and operation, that its permanent establishment must necessarily be left to its builders. To shorten distance, to increase speed, and to cheapen the cost of transportation of passengers and freight, railroad companies must occasionally cut long tunnels, build high trestles, and erect massive bridges, which might possibly be avoided in many instances by pursuing more circuitous routes. The demands of commerce necessitate the construction of railways in the places and manner indicated, and their location can never become a question to be submitted to a jury, for, if they could find that a certain line should have been deflected a "few feet to one side" of that determined upon by a railway company, where would be the limit to their power? The question to be determined by the jury was whether the defendant had exercised the degree of care that the law enjoins, which is measured by the extent of danger incident to the building and operating of its road on the line selected, and not by considering whether a safer location might possibly have been made elsewhere. We think the instruction complained of is manifestly erroneous, and might have misled the jury, by permitting them to consider as negligence the location of the road in the particular place in which it was built, though the court, in other parts of its charge, correctly instructed them as to the degree of care which it was necessary for the defendant to exercise.

The remaining question, on this branch of the case, is whether the exception is sufficient to bring up for review the error relied upon. The bill of exceptions shows that, at the conclusion of the charge to the jury, defendant's counsel excepted to the part thereof hereinbefore quoted, particularly setting out the language complained of. An exception to a charge is sufficient when it distinctly points out the particular parts to which it is directed. *Langford v. Jones*, 18 Or. 307, 22 Pac. 1064; *McAlister v. Long*, 33 Or. 368, 54 Pac. 194. Under the rule announced in those cases, we think the exception adequate to challenge that part of the charge of which the defendant complains.

In view of a new trial, it is deemed proper at this time to consider other alleged errors which it is claimed by defendant's counsel the court committed.

At the trial, plaintiff's counsel, desiring to show that the rainfall, on the day Scott lost his life, was not unusual, but such as might reasonably have been anticipated, and the effects thereof guarded against by the defendant when building its road, called B. Johnson, who, as agent at Astoria, of the

Weather Bureau, testified that it was incumbent upon him to keep a record of the rainfall in that city; and, producing a book containing such record, he stated that on January 12, 1901, 2.72 inches of water fell in the twenty-four hours ending at 5 o'clock P. M. of that day, which was the greatest daily rainfall that winter. He was then permitted to state, over defendant's objection and exception, that such quantity was less than the average excessive daily precipitation, which was 3.30 inches; giving the date and quantity of water that had fallen on the day of the greatest rainfall during ten years, and also the average annual rainfall for eighteen years preceding 1901. The witness, upon cross-examination, having stated that the book to which he referred was kept, prior to March, 1897, by his predecessors, defendant's counsel thereupon moved to strike out those parts of his testimony that related to the average rainfall and to the entries made in the record prior to his assuming charge of the office, on the ground that they were hearsay and not based upon his personal knowledge. Johnson having been permitted further to testify, in answer to questions asked by plaintiff's counsel, that the book to which he referred was an official government record, compiled from smaller books in his office, the motion was denied, and an exception allowed. The book kept by the agents of the Weather Bureau at Astoria not having been offered in evidence, it could only have been used to refresh the memory of the witness by an examination of entries made therein by him, or by another under his direction; and, this being so, could he testify concerning any memoranda made prior to his taking charge of the office? The rule is well settled that a record kept by a person employed in the signal service of the United States, whose public duty it is to record truly the facts therein stated, is admissible in evidence to prove such facts. *Knott v. Raleigh & G. R. Co.* 98 N. C. 73, 3 S. E. 735; *Chicago & N. R. Co. v. Trays*, 17 Ill. App. 136; *Moore v. H. Gaus & Sons Mfg. Co.* 113 Mo. 98, 20 S. W. 975; *Evans-ton v. Gunn*, 99 U. S. 660, 25 L. ed. 306. So, too, the record of the weather, kept for a number of years at a state public institution, is admissible to prove the meteorological condition of the atmosphere. *De Armond v. Neasmith*, 32 Mich. 231; *Hart v. Walker*, 100 Mich. 406, 59 N. W. 174. In *Willis v. Lance*, 28 Or. 371, 43 Pac. 384, 487, an agent of the Weather Bureau was permitted to testify concerning the direction and velocity of the wind, from a record made in his office by an automatic register. So, too, in *State v. McDaniel*, 39 Or. 161, 65 Pac. 520, it was held that the testimony

of an officer of the city fire department that the fire bell did not ring on a certain night before 12 o'clock, basing his knowledge on the fact that the automatic indicator of the department did not register a ringing of the bell, was competent. It is possible, however, that the record made by automatic registers may have consisted in hieroglyphics, which, if offered in evidence, could not have been understood by the jury; thereby rendering the testimony of the officers, who possessed a knowledge of the symbols used, necessary to explain their meaning. If this be so, the decisions in the last two cases are not controlling in the case at bar, and the legal principle involved must be considered in the nature of *res nova*. The adjudicated cases sustain the rule that the best obtainable evidence should be adduced to prove every disputed fact (*Mooney v. Holcomb*, 15 Or. 639, 16 Pac. 716); the presumption being that higher evidence would be adverse, from inferior being produced. *Bellinger & Cotton's Codes & Statutes*, § 788, subd. 6. The rule rejecting secondary evidence of a writing is subject, among others, to the exception that, when the originals consist of numerous accounts, or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole, oral evidence thereof is admissible. *Id.* § 703, subd. 5. It will be remembered that the witness had with him a book showing the quantity of rain that had fallen at Astoria each day for eighteen years; and, courts being obliged to take judicial notice of the laws of nature (*Id.* § 720), it requires no proof to show that such a record, in this state, would contain so many entries that an examination of each would have occasioned great loss of time to the court; and, as only the general result of the whole was desired, we believe that the testimony objected to was admissible, under the exception mentioned. The record of the meteorological observations at Astoria, prior to March, 1897, was made by Johnson's predecessors; but, as official duty is presumed to have been regularly performed, the entries noted in the book produced by the witness must be treated as *prima facie* correct. In *Evanston v. Gunn*, 99 U. S. 660, 25 L. ed. 306, *supra*, Mr. Justice Strong, commenting upon this subject, says: "Extreme accuracy in all such observations, and in recording them, is demanded by the rules of the signal service, and it is indispensable, in order that they may answer the purposes for which they are required. They are, as we have seen, of a public character, kept for public purposes, and so immediately before the eyes of the community that inaccuracies, if they should

exist, could hardly escape exposure." In view of the public character of the entries, and the presumption of their verity, the witness was undoubtedly competent to state the general result of the whole record from an inspection thereof for the time embraced in the questions asked, though all such entries were not made during his term, for, as he was an expert in the manner of keeping the book produced, he was qualified, and could therefore testify as to the result of his examination and investigation. *State v. Reinhart*, 28 Or. 466, 38 Pac. 822; *Salem Traction Co. v. Anson*, 41 Or. 562, 67 Pac. 1015, 69 Pac. 675.

W. J. Roberts, as plaintiff's witness, having testified that he was a graduate of the University of Oregon, and also of the Massachusetts Institute of Technology, where he took a course in civil engineering, which branch, including the science of railroad construction, he was engaged in teaching at the Agricultural College and School of Science at Pullman, Washington; that he had practised civil engineering fourteen years, and, though he had never been actively engaged in railroad building, he had constructed roads, irrigating ditches, canals, and other works requiring the construction of slopes; that he was acquainted with the approved methods of civil engineers in relation to the construction of railroads and embankments; that, having visited the place where Scott lost his life, he measured the slope from its foot, at a point 6 feet from the track, to the bluff, and found it to be 105 feet, and its angle, where the surface was undisturbed by the slide, 46 degrees,—was permitted, over defendant's objection and exception, to state that there are certain standard slopes, approved by civil engineers, that are applicable to all kinds of known earth; to detail the degrees of inclination recommended by a majority of such engineers for the construction of slopes in shallow or deep cuts, and in cohesive or immiscible soils; and to give the names of several authors whose works on civil engineering coincided with his opinion. The admission of the testimony so objected to presents the question whether a witness who has no actual experience in railroad building, and whose knowledge thereof is derived from the study of works on civil engineering, is competent to express an opinion upon the degree of inclination of earthwork; and, if so, can he properly refer to the authors whose works on the subject corroborate his opinion? In *Boyle v. State*, 57 Wis. 472, 46 Am. Rep. 41, 15 N. W. 827, one Dr. Cody, in answer to a hypothetical question, was permitted, over objection and exception, to state that in his opinion a certain person had died "from asphyxia; saying, 62 L. R. A.

however, that his conclusion was based upon information derived from the perusal of medical books; that he had never seen a case of death from strangulation, and did not know, from experience, its post mortem indications. He was also permitted to be interrogated as follows: "Do you know, from books or otherwise, whether death is ever produced from strangulation without leaving marks upon the throat; that is, your own personal observation?" to which he replied:

In Taylor's Jurisprudence such cases are recorded.

Q. In standard medical works?

A. Yes, sir.

In that case, the defendant having been convicted, the judgment on appeal was reversed; the court holding that an error was committed in permitting an expert to testify as to statements contained in medical books; Mr. Justice Taylor saying: "The palpable error in permitting Dr. Cody [to answer the questions hereinbefore detailed] is apparent from the fact that he testified on the stand that he had no personal knowledge on the subject he was testifying about." A new trial having been granted, the defendant was reconvicted, and appealed; and, in affirming the judgment, Mr. Chief Justice Cole, referring to the examination of medical witnesses, says: "They testified as to facts within their personal knowledge; also, probably, to matters derived from professional study and experience. We suppose they could give their opinion as to the cause of the death of the deceased. . . . When this case was here before, we did not intend to lay down any new rule as to expert testimony, and certainly did not, as an examination of the opinion of Mr. Justice Taylor will show." *Boyle v. State*, 61 Wis. 440, 21 N. W. 289. In *Soquet v. State*, 72 Wis. 659, 40 N. W. 391, it was held, however, that a physician could not testify as an expert as to symptoms of arsenical poisoning, if his knowledge of the subject, had been obtained wholly from medical or scientific books or medical instruction, and not from personal observation or experience. Mr. Justice Orton, referring to the admission of the testimony of physicians whose knowledge of the symptoms of arsenical poisoning was derived solely from medical or scientific books and from medical instruction, says: "In receiving their testimony, the court committed and repeated the very error by reason of which the judgment in the case of *Boyle v. State*, 57 Wis. 472, 46 Am. Rep. 41, 15 N. W. 827, was reversed." See also *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778. In *State v. Simonis*, 39 Or. 111, 65

Pac. 595. Mr. Chief Justice Bean calls attention to the rule adopted in Wisconsin, and says: "But in an equally well considered opinion by the supreme court of Michigan (*People v. Thacker*, 108 Mich. 652, 66 N. W. 562), it is held that a practising physician, who is a graduate of a reputable medical college, and who has sufficiently qualified himself to have a definite opinion of his own, may testify as an expert on the subject of poisoning, though it is not shown that he has had any experience in such cases." We believe the Michigan rule is founded upon better reason and supported by a greater weight of authority than that announced by the supreme court of Wisconsin. See, upon this subject, Gillett, *Indirect & Collateral Ev.* § 209; Rogers, *Expert Testimony*, 2d ed. § 1; *Citizens' Gaslight & Heating Co. v. O'Brien*, 118 Ill. 174, 8 N. E. 310; *Carter v. State*, 2 Ind. 617; *Ft. Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82, 7 N. E. 743; *State v. Terrell*, 12 Rich. L. 321. An expert is a person who is so qualified, either by actual experience or by such careful study, as to enable him to form a definite opinion of his own respecting any division of science, branch of art, or department of trade, about which persons having no particular training or special study are incapable of forming accurate opinions or of deducing correct conclusions. *State v. Anderson*, 10 Or. 448; *Farmers' Nat. Bank v. Woodell*, 38 Or. 294, 61 Pac. 837, 65 Pac. 520; *State v. Simonis*, 39 Or. 111, 65 Pac. 595. Though Roberts had no acquaintance with railroad building, his knowledge of the subject, derived from study of works on civil engineering, and his experience in constructing roads, irrigating ditches, and canals, undoubtedly qualified him to express an opinion respecting the "approved" slope of an embankment. *Central R. Co. v. Mitchell*, 63 Ga. 173.

Whatever the rule may have been, it is now almost universally conceded that medical books cannot, over the objection of the adverse party, be introduced in evidence to prove any statement contained therein. *Bloomington v. Shrock*, 110 Ill. 219, 51 Am. Rep. 679; *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 106, 57 N. W. 680; *Link v. Sheldon*, 45 N. Y. S. R. 165, 18 N. Y. Supp. 815; *Lilley v. Parkinson*, 91 Cal. 655, 27 Pac. 1091. The reasons usually assigned for the rejection of such a work are that the statements which it contains lack the solemnity of a judicial oath; that the author, not being present, cannot be cross-examined; that, if he could be called upon to state the grounds of the opinions so announced, he might change or modify them; that several recognized "schools" of

medicine exist, that materially differ in theory and practice; that the language used in medical books is technical, and not capable of being understood by ordinary persons; and that the practice of medicine and surgery is changing, so that what was formerly regarded by the profession as settled has become in many instances obsolete, or superior methods or more efficacious remedies have been substituted therefor. *Ashworth v. Kittridge*, 12 Cush. 193, 59 Am. Dec. 178; *Gallagher v. Market Street R. Co.* 67 Cal. 13, 56 Am. Rep. 713, 6 Pac. 860. Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are primary evidence of facts of general notoriety and interest. *Bellinger & Cotton's Codes & Statutes*, § 770. There are certain facts, constituting a species of evidence (*Id.* § 680), of such general notoriety that they are assumed to be already known to the court, and no evidence thereof need be produced. *Id.* § 719. In all cases in which judicial notice of facts may be taken by the court, if it is not sufficiently advised thereon, it may resort for its aid to appropriate books or documents for reference (*Id.* § 720), and declare its knowledge to the jury who are bound to accept it as conclusive (*Id.* § 136; *State v. Magers*, 35 Or. 520, 57 Pac. 197). Though a court must take judicial notice of the laws of nature (*Bellinger & Cotton's Codes & Statutes*, § 720), the probability of a landslide is not such a fact as a resort to appropriate books would enable the court to declare as conclusive to the jury. In determining the angle of repose of an embankment, the possibility of a slide depends upon the character of the material, the climatic influences thereon, and so many other elements, that it cannot be said, as a matter of law, to be a fact of "general notoriety and interest," so as to render books on civil engineering primary evidence thereof. *Id.* § 770; *Gallagher v. Market Street R. Co.* 67 Cal. 13, 56 Am. Rep. 713, 6 Pac. 860. These books not being admissible upon either of the grounds stated, the question to be considered is whether the court erred in permitting the witness to refer to them as tending to corroborate his opinion. In *Collier v. Simpson*, 5 Car. & P. 73, decided at nisi prius in 1831, it was held by Mr. Chief Justice Tindal that, though medical books which were stated by expert witnesses to be standard authority in that profession could not be offered in evidence to prove any facts therein stated, such witnesses might be asked their judgment, and the grounds thereof, which might in some degree be founded on such books, as a part of their general knowledge. In *Central R. Co. v.*

Mitchell, 63 Ga. 173, an engineer, having been injured in a slide of earth upon a railroad track, instituted an action to recover the damages sustained, and called a civil engineer, who testified in relation to the character of the cut where the slide occurred, the effect of water upon the material, as tending to disturb it, and gave the angle of the steepest slope for which he knew any authority; saying: "The rules for construction of cuts, etc., which I have given, are found in books on engineering. I give these rules solely from what I recollect of the books. These rules are found in Mahan, Gillespie, and Gilmore, and many others." The plaintiff having secured a judgment, Mr. Justice Jackson, speaking for the court, in affirming it, says, concerning the testimony of the civil engineer: "The expert was competent to testify. Every expert derives much of his knowledge from books as well as from experience, and can give his opinion based upon the knowledge acquired from both sources." In *Western Assur. Co. v. J. H. Mohlman Co.* 40 L. R. A. 561, 28 C. C. A. 157, 51 U. S. App. 577, 83 Fed. 811, upon an issue as to whether a building in which insured property was confined fell before a conflagration, or as a result of the fire, it was held that a civil engineer, testifying as an expert, may read in support of his opinion excerpts from engineering books, recognized as standard authorities, giving the tabulated results of tests made to determine the strength and resisting power of timbers of the kind used in the construction of the building; the court saying: "The general proposition that scientific books are not to be read in evidence is a familiar one, and many citations from text writers and reported cases are found in the brief of the plaintiff in error. Nearly all the reported cases deal with medical works, and most excellent reasons for the application of the general rule in such cases may be found therein. But the rule is not of universal application. It would be a reproach to the administration of the law if it were so. Records of observations are undoubtedly secondary evidence, but, if all such records were excluded from the sources of knowledge available to a court of justice, it would frequently find itself unable to obtain information which was open to every individual in the community. It has been held repeatedly that standard life and annuity tables, showing at any age the probable duration of life, are competent evidence (*Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 554, 30 L. ed. 258, 7 Sup. Ct. Rep. 1); and yet these tables show merely the deductions from records of past transactions, when neither the record of the transactions nor the individual who has worked

out the deductions is called to testify to the accuracy of his work, or to the conditions under which it was performed. So, too, almanacs, astronomical calculations, tables of logarithms, interest tables, weather reports, tables of the rise and fall of the tide, have been admitted in evidence." A text writer discussing this subject, says: "Even by those courts who have been most resolute in excluding such works when offered substantively, it is agreed that an expert may show that his views are sustained by standard authorities in his profession." Wharton, Ev. § 438. This author further says: "It has, indeed, been held that an expert, when called to state the sense of his profession on a particular topic, may cite authorities as agreeing with him." Id. § 666. Prof. Lawson, in his work on *Expert & Opinion Evidence*, p. 176, says: "Notwithstanding the inadmissibility of the books themselves, the opinions contained in them may go to the jury through the mouth of a witness,—an expert." It will be generally admitted that standard works on civil engineering are treatises that relate more nearly to matters of an exact science than do medical books; but whether excerpts from the former can be read to corroborate the opinion of an expert witness, it is not necessary to inquire, for the question is not involved herein. Though the weight of current authority prevents the reading of scientific books to contradict a witness generally, yet, when he bases his opinion upon the work of a particular author, such book may be read in evidence for that purpose. *Connecticut Mut. L. Ins. Co. v. Ellis*, 89 Ill. 516; *Bloomington v. Shrock*, 110 Ill. 219, 51 Am. Rep. 679; *Pinney v. Cahill*, 48 Mich. 584, 12 N. W. 862; *Marshall v. Brown*, 50 Mich. 148, 15 N. W. 55; *Huffman v. Click*, 77 N. C. 55; *Ripon v. Bittel*, 30 Wis. 614. Plaintiff's counsel, by securing from Roberts a statement of the authors whose works on civil engineering supported the opinion of the witness, thereby invited his cross-examination, in which case the books to which he referred could have been read in evidence to contradict him. True, it may be possible that a pretended expert might give an opinion upon a material fact, and fortify it by referring to the work of some fictitious author upon the subject; and, the adverse party being unable to secure the book mentioned, the reference of the witness might add to his false testimony a weight to which it was not entitled. In the case at bar, however, no danger from the course of practice so assumed could have been possible, for Roberts was unquestionably a reputable witness, and thoroughly qualified to express an opinion upon the matter to which his attention was directed;

and, in our opinion, it was proper to permit him to name the authors whose works on civil engineering coincided with his views.

But for the error committed in giving the instruction complained of, *the judgment is reversed*, and a new trial ordered.

ALABAMA SUPREME COURT.

W. W. THOMPSON, *Appt.*,
v.
NEW SOUTH COAL COMPANY *et al.*

(135 Ala. 630.)

1. If a bill to compel specific performance of a contract for the sale of land shows the contract to be void under the statute of frauds, that defense may be set up by demurrer.
2. The indorsement by the principal of a check given in part payment of the purchase price of land is not a sufficient subscription of the contract to make it binding on him, where it was made by an agent not having sufficient authority to bind the principal, although the check was attached to the contract.
3. Mere acceptance of a portion of the purchase money is not sufficient to take a contract for the sale of land out of the statute of frauds, where the statute requires, not only the payment of the purchase money, but the placing of the purchaser in possession.
4. A person is not estopped from asserting the invalidity of an unauthorized contract made by his agent for the sale of his land by accepting a portion of the purchase money.

(February 28, 1903.)

A PPEAL by plaintiff from a decree of the Chancery Court for Jefferson County in favor of defendants in a suit to compel specific performance of a contract to sell real estate. *Affirmed.*

The material portions of the contract upon which the suit was brought were as follows:

Birmingham, Ala., Feb. 18, 1901.

To Whom It May Concern:

I have this day sold to W. W. Thompson 875 acres of land . . . under authority as per letter of L. B. McFarland copy of which is attached hereto, at and for the sum of \$8.00 per acre and the additional sum of \$350 as commission to me . . . To bind this sale said W. W. Thompson has paid me the sum of \$250.00 by check payable to the

NOTE.—As to what constitutes sufficient ratification of agent's act to bind principal, see *Reed v. Morton*, 1 L. R. A. 736; *Wheeler v. McGuire*, 2 L. R. A. 808, and cases in note thereto; *Daniels v. Brodrie*, 11 L. R. A. 81; *Brown v. Wright*, 21 L. R. A. 467; *Bierman v. City Mills Co.* 37 L. R. A. 799; *Kimball v. Ranney*, 46 L. R. A. 403; and *Holmes v. McAllister*, 48 L. R. A. 396.

62 L. R. A.

New South Coal Company, receipt of which is hereby acknowledged, this February 18th, 1901.

[Signed]

J. A. Montgomery.

The letter referred to in said contract is as follows:

Memphis, Tenn., Feb. 18th, 1901.

J. A. Montgomery,

Birmingham, Ala.

Dear Sir:—

We have your favor of the 17th of February and wish to accept your terms as to the sale of the 875 acres in so far as we can,—that is, our president, Judge Latham, is now in California; we have not a majority of directors now in Memphis, and it will be several weeks before they will return and I can have a meeting that will formally authorize this sale. I am satisfied that when we can have this meeting they will do as I suggest, but I do not want to make now an agreement without authority. I suggest, however, that you go ahead and get up the abstract at our expense of this land, and proceed to do all we can until the return of Judge Latham. As to the balance of this 1,600 acre tract, it occurs to me that the whole tract would furnish a better basis for the placing of bonds, than only a portion, and I hope that before we finally conclude this, that you will be able to get them to take the whole 1,600 acres.

Very truly,

[Signed]

L. B. McFarland.

The check was as follows:

Birmingham, Ala., Feb. 19, 1901.

First National Bank of Birmingham:—

Pay to the order of New South Coal Company \$250.00 Two Hundred and Fifty—part payment on coal lands—Dollars.

[Signed]

W. W. Thompson.

The bill alleged that this check was sent by Montgomery to the New South Company, and the money collected thereon by said company and retained by it.

Messrs. Leadbeater & Johnston, for appellant:

The aspects of the bill showing ratification of Montgomery's unauthorized contract on behalf of the company, and estoppel, are not subject to demurrer.

Tillman v. Thomas, 87 Ala. 321, 6 So. 151; *Beull v. Lehman Durr Co.* 110 Ala. 446, 18 So. 230; *Echols v. Orr*, 106 Ala. 237, 17 So. 677.

The paper signed by Montgomery without authority (fully setting out price, terms, and description) recites that a check has been given, payable to the company, in part payment for the lands, and describes the check. This check, corresponding with the description, is attached to the contract, sent to the company, indorsed by it, and the proceeds collected and retained. The check on its face purports to be "in part payment of coal lands," and, although not referring specifically to the other paper, it was attached to, and made a part of, it as much as if written on the same sheet. The memoranda were, therefore, complete, and, on the indorsement of the check by the New South Coal Company the contract was "subscribed by the party to be charged therewith" within the meaning of the statute of frauds.

Raubitschek v. Blank, 80 N. Y. 478; *White v. Breen*, 106 Ala. 159, 32 L. R. A. 127, 19 So. 59; *Reynolds v. Kirk*, 105 Ala. 446, 17 So. 95; *Jenkins v. Harrison*, 66 Ala. 357.

Apart from having been attached to, and made a part of, the first paper, the check was fully identified as one of the memoranda of sale by that writing.

Oliver v. Alabama Gold L. Ins. Co. 82 Ala. 417, 2 So. 445; *White v. Breen*, 106 Ala. 159, 32 L. R. A. 127, 19 So. 59.

If the agreement unlawfully entered into by Montgomery on behalf of the company is subsequently ratified by it, previous authority in him is unnecessary.

Taylor v. Agricultural & M. Asso. 68 Ala. 229; *Morawetz, Priv. Corp.* §§ 618, 630, 633, 635.

Having enjoyed the fruits of the contract with full knowledge of the circumstances, the New South Coal Company is estopped to deny the validity of the agreement.

1 Am. & Eng. Enc. Law, 2d ed. pp. 1191, 1196.

Messrs. Walker, Tillman, Campbell, & Morrow, for appellees:

The contract was void under the statute of frauds. While the defense of the statute of frauds is ordinarily interposed by plea or answer, it may be interposed by a demurrer when the bill shows that the contract is obnoxious to it.

Bolling v. Munchus, 65 Ala. 558; *Phillips v. Adams*, 70 Ala. 373; *Lewis v. Teal*, 82 Ala. 288, 2 So. 903; *Manning v. Pippen*, 86 Ala. 357, 5 So. 572; *Trammell v. Craddock*, 93 Ala. 450, 9 So. 587; *White v. Levy*, 93 Ala. 484, 9 So. 164; *Clanton v. Scruggs*, 95 Ala. 279, 10 So. 757; *Beadle v. Seat*, 102 Ala. 532, 15 So. 243; *Harper v. Campbell*, 102 62 L. R. A.

Ala. 342, 14 So. 650; *Strouse v. Elting*, 110 Ala. 132, 20 So. 123.

The statute of frauds provides that every contract for the sale of lands, unless the purchase money, or a portion thereof, be paid, and the purchaser be put in possession of the land by the seller, is void, unless some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party to be charged therewith. Not only the payment of the purchase money, or a part thereof, is necessary, but the purchaser must also be put in possession of the land by the seller. The one is as essential under our statute as the other, and a parol contract for the sale of land without a compliance with both is void under the statute.

Heslin v. Milton, 69 Ala. 354; *Manning v. Pippen*, 95 Ala. 537, 11 So. 56; *Linn v. McLean*, 85 Ala. 250, 4 So. 777.

Even if the owner's conduct amounted to fraud, it would not operate an estoppel. In all cases like this the complaining party has only himself to blame for not complying with the statute of frauds; it is his negligence or laches which defeats his right; it is such cases as this for which the statute of frauds was enacted.

White v. Levy, 93 Ala. 484, 9 So. 164; *Clanton v. Scruggs*, 95 Ala. 279, 10 So. 757.

Tyson, J., delivered the opinion of the court:

The bill in this cause seeks the specific performance of a contract for the sale of lands alleged to have been entered into between complainant and the respondent New South Coal Company, and to have their rights in and to the lands adjudged superior to the claim of the respondents Cornwell and Lopez under and by virtue of a certain lease executed by the New South Coal Company to Ellis Bros., and assigned by Ellis Bros. to Cornwell and Lopez. It is clear from the averments of the bill that complainant predicates all his rights against Cornwell and Lopez upon his right to have the alleged contract between him and the respondent coal company declared binding and efficacious. No other or independent equity is asserted or attempted to be enforced against them. So then, the question is, Do the facts alleged show a right to a specific performance of the alleged contract against the coal company? If they do not, confessedly the complainant is not entitled to any relief whatever.

One of the objections taken to the bill by demurrer interposed by the coal company, which was sustained, is that the alleged contract upon which the complainant relies is void under the statute of frauds. The contract relied on by complainant is shown by

the bill, and if, as shown, it is obnoxious to the statute of frauds; that defense may be appropriately set up by demurrer. Indeed, "a demurrer is the more appropriate mode of taking advantage of it." *Bolling v. Munchus*, 65 Ala. 558; *Phillips v. Adams*, 70 Ala. 373, 3 Mayfield's Digest, p. 847, § 336. What is that contract? It is an agreement made with one J. A. Montgomery, who alone subscribes it, not as the agent or representative of anyone, but as an individual; and that, too, without authority, as shown by the letter referred to in it, which is also made an exhibit to the bill, even if it be conceded that McFarland, the writer of it, was authorized by the coal company to write it. It cannot be doubted that, if the contract with Montgomery was made with him as the agent of the coal company, and he undertook by that instrument to bind that company, in order to do so he must have been "lawfully authorized in writing;" and, unless he was so authorized, any contract made by him, as agent for his principal, with respect to a sale of the lands, is void under the statute of frauds (Code 1896, § 2152). *Linn v. McLean*, 85 Ala. 250, 255, 4 So. 777; *Johnston v. Jones*, 85 Ala. 286, 4 So. 748; *Hutton v. Williams*, 35 Ala. 503, 76 Am. Dec. 297.

Doubtless for the purpose of avoiding the force and effect of the statute, the estoppel alleged in the bill is pleaded. Indeed, it could have been pleaded for no other purpose, except to give effect to the contract by way of ratification of the act of Montgomery, the alleged agent of the coal company, in the making of it. The facts relied upon to constitute the estoppel may be stated to be these: That the check which complainant delivered to Montgomery as the cash payment was payable to the coal company, and, after being sent with the contract to and received by that company, was indorsed by it, and the money collected upon it and retained. One theory seems to be that the indorsement of the check was a sufficient subscription by the coal company of the contract, within the purview of the statute. Of course, if this be sound, the retention by the defendant of the money collected upon it is of no consequence. If it be true that the indorsement by the company of its name across the back of the check was the equivalent of its subscription of the contract, under the statute, this made the contract its in fact, just as though it had affixed its name at the bottom of it, and there would be no need for the invocation of the doctrine of estoppel. But we do not think that the check was any part of the contract itself, although it may have been attached to it. They are not only separate and distinct pieces of paper, but separate and distinct obligations. The check was a sequence to the contract, and 62 L. R. A.

constituted no part of it. It was nothing more than the payment of a part of the purchase money after the terms of the contract had been fully agreed upon, reduced to writing, and signed by Montgomery. It came into existence, necessarily, after the contract had become a completed executory one. Indeed, the dates, of the two papers show this to be so.

The fact that the check was attached to the contract did not make it a writing containing any part of the negotiations leading up to and resulting in the contract, and therefore does not bring the case in that category of cases in which several writings containing the negotiations between the parties culminate in an agreement of sale. *White v. Breen*, 106 Ala. 159, 32 L. R. A. 127, 19 So. 59. There is nothing on its face that shows it was given in part payment for the particular lands described in the alleged contract. It is true, it does contain the words "part payment on coal lands," but what lands are there referred to would have to be ascertained by resort to parol evidence, which, of course, could not be done. It is, therefore, not in and of itself a sufficient memorandum of the sale of the lands, within the requisites of the statute, if it be conceded that the indorsement by the coal company of the check is a subscription, within the meaning of the statute. *Nelson v. Shelby Mfg. & Improv. Co.* 96 Ala. 515, 11 So. 695.

Having shown that the alleged contract was void on account of being obnoxious to the statute of frauds, and that the indorsement of the check did not import validity into it, and was not, in and of itself, a sufficient memorandum of sale, we shall next consider the question, Did the acceptance of the check, the collection of the money upon it, and its retention as purchase money, upon which, of course, may be predicated, a verbal promise on the part of the coal company to make the sale, have the effect of avoiding a compliance with the statute? In other words, Does the fact of the payment alone of a portion of the purchase money bring the parol contract of sale within the exception prescribed by the statute? The statute requires that "every contract for the sale of interest therein, except leases for a term not longer than one year, unless the purchase money, or a portion thereof, be paid and the purchaser be put in possession of the land by the seller," must be "in writing and subscribed by the party to be charged therewith or some other person by him thereunto lawfully authorized in writing." It will be noted that not only the payment of the purchase money, or a portion thereof, is necessary, but that the purchaser be put in possession by

the seller, in order to come within the exception. Speaking to this point, it was said in *Heflin v. Milton*, 69 Ala. 357: "The present statute contains an exception of the only parol contract for the lease or sale of lands which can be withdrawn from its operation. The exception is, when the purchase money, or a portion thereof, is paid, and the purchaser is put in possession by the seller. The two facts must concur,—the payment of the purchase money or a part thereof, and the placing of the purchaser in possession. The one without the other—the possession without paying part or the whole of the purchase money, or paying the purchase money or any part thereof without letting into possession—will not satisfy the requirements of the statute. The introduction of exceptions to the statute of frauds—the departure from its letter and policy by courts of equity to prevent parties, through fraud, from escaping performance of contracts they were in sound morality bound to perform—was much regretted. . . . The purpose of the present statute is the exception of the only parol contract for the lease or sale of lands which can be withdrawn from its general words. No other can be introduced or recognized by judicial decision." In the concluding part of the opinion it is further said: "There must be a contract or agreement in writing, or a note or memorandum thereof in writing, subscribed by the party to be charged, or by his agent thereunto lawfully authorized in writing, or the concurring acts of part performance expressed in the statute, to avoid its operation. If there be not, however strong may be parol evidence that the contract was made, that it was assented to and accepted, the party is not bound, and cannot be charged. There can be no relaxation of the requisitions of the statute without introducing the mischief intended to be avoided." See also *Manning v. Pippen*, 95 Ala. 537, 11 So. 56; *Nelson v. Shelby Mfg. & Improv. Co.* 96 Ala. 515, 11 So. 695. There is no pretense that the complainant was ever put in possession of the land.

The remaining question to be determined is whether the acceptance of the money with full knowledge that it was paid on account of the attempted sale by Montgomery estops the coal company from asserting the invalidity of the contract. In *Clanton v. Scruggs*, 95 Ala. 279, 283, 10 So. 757, 758, it is said: "One party to an invalid executory agreement is not entitled to hold the other party to the agreement, just as if it had been orig-

inally valid, because the latter has received the benefit of a part performance by the former. The fact that one of the parties to such an agreement has acted on the faith of its validity does not raise up an estoppel against the other party to deny that it is binding on him. A mere breach of promise cannot constitute an estoppel *in pais*. . . . An executory agreement which is void under the statute of frauds cannot be made effectual by estoppel merely because it has been acted on by the promisee, and has not been performed by the promisor. . . . Such a rule of estoppel would take the sting out of the statute of frauds, and defeat its manifest purpose." In *White v. Levy*, 93 Ala. 484, 9 So. 104, Justice McClellan, speaking to this proposition says: "To admit the doctrine elaborated in argument, that defendant is estopped to set up the statute of frauds here because, while his contract was not in writing, yet he did promise to occupy the premises as a tenant for the term commencing November 1, 1899, and failed to notify plaintiff to the contrary, the consequence being that she lost opportunity to secure another tenant, would be to utterly destroy the statute. It is directed against this class of promises, entailing in most instances just this character of detriment to the promisee. The position is wholly untenable." This principle was fully and distinctly recognized in *Nelson v. Shelby Mfg. & Improv. Co.* 96 Ala. 515, 11 So. 695, where the purchaser, who had not been put into possession, was allowed to recover back the purchase money he had paid to the seller. Had the seller in that case who accepted the purchase money from the plaintiff, been estopped to invoke the defense of the statute of frauds by reason of that fact, it is entirely clear that a recovery could not have been had by the plaintiff. Indeed, the main ground upon which his right to do so was placed was that his vendor had not subscribed a note or memorandum in writing, within the requirements of the statutes, and therefore the contract being void by the very terms of the statute, neither party was bound by it. The contract being unenforceable either at law or in equity, the vendor was deemed to have money which in equity and good conscience belonged to the plaintiff. See also, *Hicks Bros. v. Swift Creek Mill Co.* 133 Ala. 411, 57 L. R. A. 720, 31 So. 947; *Jenkins v. Lovelace*, 72 Ala. 303; *Browne*, Stat. Fr. 5th ed. § 461.

The decrees sustaining the demurrer must be affirmed.

COLORADO SUPREME COURT.

AJAX GOLD MINING COMPANY *et al.*,
Appts.,
v.

E. J. HILKEY *et al.*

(.....Colo.....)

The extralateral rights of the owner of a lode mining claim upon secondary veins are not limited by the fact that the discovery vein leaves the claim by crossing a side line, but he has a right to follow a secondary vein on its dip outside his side lines, although its apex is outside of a line drawn parallel with the end line through the point where the discovery vein leaves the claim.

(March 2, 1903.)

A PPEAL by plaintiffs from a judgment of the District Court for Teller County in favor of defendants in an action brought to recover the value of certain ores taken from a vein alleged to belong to plaintiffs. *Reversed.*

The facts are stated in the opinion.

Messrs. Colburn & Dudley and J. C. Helm, for appellants:

The statute says that the owner shall have all veins apexing within the surface boundaries of his claim; not the discovery vein alone, but all other veins as well; not only this but he shall have the ownership of and the right to follow such other veins on their downward course indefinitely, even though they pass beyond the vertical side lines of the location.

Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895; *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.* 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177; *King v. Amy & S. Consol. Min. Co.* 152 U. S. 222, 38 L. ed. 419, 14 Sup. Ct. Rep. 510; *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.* 63 Fed. 540.

When the end lines of a mining location are once fixed, they bound the extralateral rights to all the lodes that are thereafter found within the surface lines of the location. The end lines must be considered as the end lines of any and all other lodes or veins which lie inside of such surface lines.

Walrath v. Champion Min. Co. 19 C. C. A. 323, 44 U. S. App. 291, 72 Fed. 978, 171 U. S. 293-312, 43 L. ed. 170-178, 18 Sup. Ct. Rep. 909.

Messrs. W. O. Temple and S. D. Crump, for appellees:

There can be but one set of end lines

or bounding planes for a single location, and the end lines or vertical planes which bound the right of extralateral pursuit as to the original or discovery lode perform the same office for all secondary lodes or veins apexing within the claim. The position of the apex of the discovery lode with reference to the located side and end lines of the claim determines the extralateral rights upon all secondary veins apexing in the claim.

1 Lindley, Mines, § 367.

The end lines are such as cross the originally located lode.

2 Lindley, Mines, § 577; *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895; *Walrath v. Champion Min. Co.* 171 U. S. 293, 43 L. ed. 170, 18 Sup. Ct. Rep. 909; *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.* 63 Fed. 540; *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; *Cosmopolitan Min. Co. v. Foote*, 101 Fed. 518; *Argentine Min. Co. v. Terrible Min. Co.* 122 U. S. 478-485, 30 L. ed. 1140-1142, 7 Sup. Ct. Rep. 1356; *Empire Mill. & Min. Co. v. Tombstone Mill. & Min. Co.* 100 Fed. 910.

There can be but one set of end-line planes.

Iron Silver Min. Co. v. Elgin Min. & Smelting Co. 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177; *St. Louis Min. & Mill. Co. v. Montana Min. Co.* 44 C. C. A. 120, 104 Fed. 667; *Walrath v. Champion Min. Co.* 63 Fed. 557; Morrison, Mining Rights, p. 152; 2 Lindley, Mines, § 593.

Where the apex of the discovery vein passes through one end and one side line of a location, the extralateral right upon such vein will be bounded by a vertical plane drawn downward through the crossed end line and another vertical plane parallel thereto, operating at the point where the apex crosses the side line.

King v. Amy & S. Consol. Min. Co. 9 Mont. 543, 24 Pac. 200; *Fitzgerald v. Clark*, 17 Mont. 100, 30 L. R. A. 803, 42 Pac. 273; *Tyler Min. Co. v. Last Chance Min. Co.* 71 Fed. 733; *Carson City Gold & S. Min. Co.* 25 C. C. A. 178, 48 U. S. App. 213, 79 Fed. 733; *Carson City Gold & S. Min. Co. v. North Star Min. Co.* 73 Fed. 597; *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895; *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; *Cosmopolitan Min. Co. v. Foote*, 101 Fed. 518.

NOTE.—As to right to follow a vein or lode on its dip beyond surface lines of location, see also *Parrot Silver & Copper Co. v. Heinze*, 53 L. R. A. 491, and *note*.
62 L. R. A.

Campbell, Ch. J., delivered the opinion of the court:

This is an action by the owner of the Victor Consolidated against the owner of the Triumph mining claim to recover for the value of ores taken from a vein within the limits of the Triumph lode, of which both parties assert ownership. The defendants say the ores belong to them, because the vein from which they were extracted is within the outer boundaries of their location, while plaintiffs' ownership is based upon an apex right, under § 2322, Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1425).

Only one important question is raised by the appeal of the apex claimant, who failed below, and this arises out of the following instruction given to the jury at the instance of the defendants: "If you believe from the evidence in this case that the discovery lode of the Victor Consolidated claim passes out of either side line of that claim before reaching the northerly end line of said claim, as originally located, then the rights of the plaintiff to any ore outside the surface boundaries of said claim in any vein having its apex within such claim are limited to two parallel bounding planes, one drawn through the southerly end line of said Victor Consolidated claim as originally located, and the other passing through the said claim parallel to said southerly end line at the point where such discovery vein may have been shown to depart from its side lines, if such departure has been shown." Both parties agree that by it the jury were, in effect, told that, if the discovery vein of a lode mining claim on its strike departs through a side line, no extralateral rights attach to any other vein apexing within the claim beyond the point of such departure. The question thus presented seems not to have been expressly determined by the Supreme Court of the United States or any of the inferior Federal or state courts. In the absence of any decision at all construing the act of Congress, we would not have much, if any, doubt as to its meaning. Its language is broad enough to sustain appellant's contention that the owner of a lode mining claim has extralateral rights in and to all veins the top or apex of which lies within its surface lines extending downward vertically to the extent, at least, of the length of the apex within such boundaries, even though the discovery vein on its strike does not cross both end lines; for the statute provides that owners of such claims "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes, and ledges throughout their entire depth, the

top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." The only express limitation to this comprehensive grant is found in the proviso of the same section, which declares that the right of possession to such outside parts of veins "shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges." There does not seem to be anything ambiguous or uncertain in this language, and, indeed, appellees' counsel are disposed to concede that, taken literally, it affords some warrant, at least, for appellant's position; but they say that by numerous decisions construing the statute the courts have enunciated several propositions that somewhat restrict its apparent scope. Appellees' position cannot be better presented than in the language of their learned counsel, and a statement of their propositions serves to bring out sharply the respective contentions so ably argued on both sides. The following map will also aid in an understanding of the controversy:

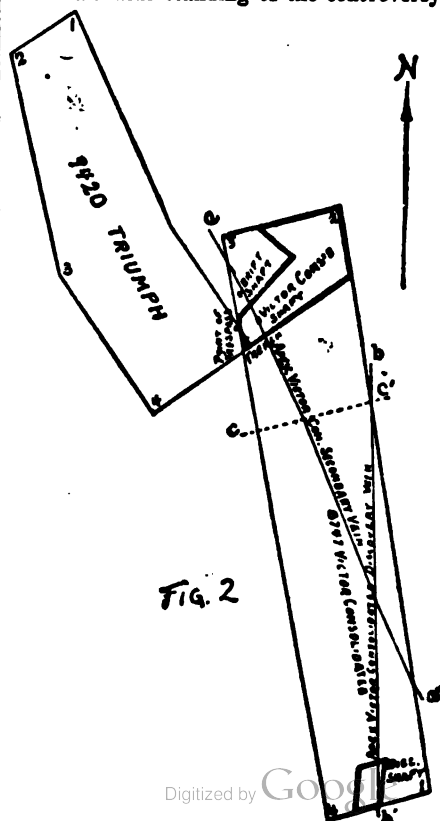


FIG. 2

The apex of the discovery vein of the Victor Consolidated is represented by b, b'. It enters the claim at the south end line, and its course in the main runs parallel with the claim as surveyed, but passes out through the east side line about 1,000 feet from the south end line, a, a', is the vein which, as contradistinguished from the discovery vein, we call the "secondary vein," which the evidence tended to show passes diagonally across the location, entering it through the west, and leaving it through the east, side line. The Triumph claim is correctly delineated on the map. If the ore taken from the underground workings of the Triumph was taken from any vein apexing within the Victor Consolidated—as some of the evidence tended to show—it was from this so-called secondary vein. Stating the contention again in a concrete form, the jury were told if the discovery vein of the Victor Consolidated crossed the east line at c', then the rights of the plaintiff to ore outside of its surface boundaries in any vein having its apex therein is limited to two parallel bounding planes, one drawn through the south end line, 1, 4, of the location, as originally established, and the other passing through the claim at the point where the discovery vein leaves the east end line, and parallel to the south end line at c, c'. The north end line, or bounding plane, of this right, is the dotted line c, c', and the south bounding plane the south end line of the location, 1, 4. Plaintiff's extralateral rights as to all veins within the surface lines were, by this instruction, restricted to that part of the claim south of the line, c, c', and in that part, between this line and the north end line of the claim he was given none whatever, though about 500 feet of the apex of the secondary vein was found in this latter segment.

The three propositions of law said to be established by the decisions, of which the fourth one stated by appellees is said to be a necessary corollary, are: (1) There can be but one set of end lines or bounding planes for a single location, and these limit the extralateral right upon all lodes or veins apexing therein. (2) These end line or bounding planes are determined by the strike of the discovery vein with reference to the located side and end lines of the claim. (3) Where the apex of the discovery vein passes through one end and one side line, the extralateral right upon such vein will be bounded by a vertical plane drawn downward through the crossed end line, and another vertical plane parallel thereto, but operating at the point where the apex leaves the side line. The fourth proposition they thus express: "The necessary, logical sequence of these propositions is that, where

the discovery vein on its strike departs through a side line, no extralateral rights attach to any other vein apexing within the claim beyond the point of such departure."

Since appellant concedes the first three propositions, there is no necessity for discussing them, or citing the authorities upon which they rest. But the alleged deduction therefrom appellant vigorously combats, and that presents the question for our decision. We first observe that that part of appellant's argument to the effect that where a location is laid across, instead of along, the discovery vein, the end lines become the side lines of the location, and the side lines become the end lines, is not pertinent to anything now before us, and, in so far as the deduction depends on such proposition, it is without support. There is no dispute between counsel as to this doctrine of shifting of side and end lines in the case supposed, but it is wholly inapplicable here, for the Victor Consolidated location is laid along the course of the discovery vein, and this vein enters the claim through the south end line, and passes out under the east side line. Besides this, the location is patented, and there is authority for saying that its end lines, as chosen by the locator and described by the patent, are, for all purposes and under all circumstances, to be taken as the fixed end lines.

But conceding the correctness of all three propositions, as to which the counsel upon both sides are in accord, we cannot agree with learned counsel for appellees in their ingenious argument that the fourth proposition, which they must establish in order to sustain the instruction complained of, is a logical sequence of either or all of the others. It is quite true that there can be but one set of end lines for one location, and these must perform that function, not only for the discovery vein, but for all other veins apexing within the surface lines. *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895; *Walrath v. Champion Min. Co.* 171 U. S. 293, 297, 308, 43 L. ed. 170, 172, 176, 18 Sup. Ct. Rep. 909. This, however, does not mean that all such veins have exactly the same extralateral rights, nor can it be said that only so much of a secondary vein as apexes within that part of the claim where the apex of the discovery vein is found has such rights. In the *Walrath Case*, 171 U. S. 293, 297, 308, 43 L. ed. 170, 172, 176, 18 Sup. Ct. Rep. 909, which was twice before the circuit court of appeals (63 Fed. 552, 19 C. C. A. 323, 44 U. S. App. 291, 72 Fed. 978) and once before the Supreme Court of the United States, there are some expressions in the opinions of the circuit court of appeals from

which, taken alone, it might be inferred that, under facts like those here present, the owner of a claim would have extralateral rights in the discovery vein even beyond the point where, on its strike, it leaves the side line; and that the bounding planes, within which such rights are to be exercised, must be drawn through the two end lines. But appellant makes no such contention here, and is content with extralateral rights in the discovery vein only up to the point of its departure from the east side line; so that, for our present argument, we assume that to be the true doctrine. The end lines constitute a barrier, beyond which a locator cannot follow a vein on its strike, whether it be a discovery or secondary vein; and they also limit the bounding planes within which his extralateral rights are to be exercised in following such vein on its dip. In exercising such extralateral rights, the locator cannot, in any case, pursue the vein on its dip beyond the bounding planes drawn through the end lines; but, as we have said, appellant is content to be restricted in the exercise of such rights in the secondary vein to planes drawn parallel to the end lines, and passing, the one through the claim at the point where the vein enters, and the other where it departs from, the surface line of the location. The extent of the right depends upon the length of the apex, and the extralateral rights are measured, not necessarily by the end lines,—and only so when the vein passes across both end lines,—but by bounding planes drawn parallel to the end lines passing through the claim at the points where it enters into and departs from the same. It would seem, therefore, necessarily to follow that the extralateral right depends, *inter alia*, upon the extent of the apex within the surface lines, and, while the end lines of the claim as fixed by the location are the end lines of all veins apexing within its exterior boundaries, the planes which bound such rights of different veins may be as different as the extent of their respective apices, though all such planes must be drawn vertically downward parallel with the end lines. It makes no difference in what portion of the patented claim the apex is. Its extralateral rights, under this rule, can easily be ascertained. The apex of a secondary vein need not be in the same portion of the claim as is the apex of the discovery vein. The statute does not say so. The decisions heretofore made certainly do not so require. The three propositions deduced from these decisions do not logically lead to that doctrine. While, as we have said, there is no decision upon the exact point, yet we think there are cases, in addition to those already cited, which necessarily lead to this conclusion, 62 L. R. A.

among which is *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.* 63 Fed. 545, 546. While this court, in *Catron v. Old*, 23 Colo. 433, 48 Pac. 687, criticised this case, it did not do so as to the point now under consideration. It was with reference to the doctrine of comparative direction of the lode which left to the jury, as a question of fact, whether a vein extends more along than across the claim, that the criticism went; and we there said this introduced an element of uncertainty, which, if possible, should be avoided. See also *Fitzgerald v. Clark*, 71 Mont. 100, 30 L. R. A. 803, 42 Pac. 273, Affirmed in 171 U. S. 92, 43 L. ed. 87, 18 Sup. Ct. Rep. 941; *Tyler Min. Co. v. Last Chance Min. Co.* 71 Fed. 848; 2 Lindley, Mines, §§ 591 *et seq.*

The language of Judge Hallett, when *Del Monte Case*, 66 Fed. 212, was before him, is pertinent to the argument of appellees that there can be but one set of end lines or bounding planes for all the veins covered by a single location, and that they must be the same for each. He thus disposes of it: "It is said that we cannot make a new end line at the point of divergence or elsewhere, because the court cannot make a new location, or in any way change that made by the parties. *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.* 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177. This, however, is not necessary. We can keep within the end lines fixed by the locator in respect to any extralateral right that may be recognized without drawing any line, and, if there be magic in the word 'line,' it will be better not to use it." The opinion of Mr. Justice Brewer, when the same case came before the Federal Supreme Court, is very instructive, and, as we read it, is authority for the conclusion which we have reached in the case in hand. In speaking of extralateral rights of a vein entering a claim through an end line, and passing out under a side line, he said: "Given a vein whose apex is within his surface limits, he can pursue that vein as far as he pleases in its downward course outside the vertical side lines." [171 U. S. 88, 43 L. ed. 85, 18 Sup. Ct. Rep. 895.] And referring to the proviso of § 2322 (U. S. Comp. Stat. 1901, p. 1425), which we have hereinabove quoted, he proceeds: "This places a limit on the length of the vein beyond which he may not go, but it does not say that he shall not go outside the vertical side lines unless the vein in its course reaches the vertical planes of the end lines. . . . Naming limits beyond which a grant does not go is not equivalent to saying that nothing is granted which does not extend to those limits. The locator is given a right to pursue any vein whose apex is within his surface limits on

its dip outside the vertical side lines, but may not, in such pursuit, go beyond the vertical end lines. And this is all that the statute provides." This reasoning applies as much to a secondary as to the discovery vein. It is a vein that apexes within the surface limits, and there is, to say the least, no more reason in denying to it extralateral rights because it does not apex within that particular part of the claim where the apex of the discovery vein is, than there is for denying to any vein extralateral rights unless in its course it reaches the vertical planes of the end lines. Justice Brewer says this latter condition is not essential to the exercise of extralateral rights, and, *a fortiori*, the former is not.

Our conclusion is that for all veins, both discovery and secondary, of a patented claim, the owner has extralateral rights, at least for so much thereof as apex within

the surface lines; that such rights as to secondary veins are not confined to such veins as apex within the same segment of the claim in which the apex of the discovery vein exists; and while the end lines of the location, as fixed and described in the patent, are the end lines of all veins apexing within the surface boundaries, and may constitute the bounding planes for such extralateral rights, and in no case can the locator pursue the vein on its dip outside the surface lines beyond such planes continued in their own direction until they intersect such veins, yet these bounding planes, which in all cases must be drawn parallel to the end lines, need not be coincident. The giving of this instruction was prejudicial error.

The judgment is therefore reversed, and the cause remanded.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

FIRST NATIONAL BANK OF CHICAGO,
App't.,
v.

Joseph W. SELDEN, Receiver, etc., of First
National Bank of Niles, Michigan.

(56 C. C. A. 532, 120 Fed. 212.)

1. The insolvency of a national bank and its passing into the hands of a receiver will destroy the right of holders of its checks to the funds called for by them, even in a state where the holder of a check is regarded as the owner of the fund and entitled to maintain an action for it against the drawee.
2. The inconvenience which will accrue to the drawee of checks of a national bank from suits by holders upon its refusal to pay them when the drawer becomes insolvent gives it no right to make the payment to the injury of the general creditors of the insolvent bank.

(January 6, 1903.)

A PPEAL by plaintiff from a judgment of the Circuit Court of the United States for the Northern Division of the Northern District of Illinois dismissing a suit to enjoin the prosecution of an action at law to recover a bank deposit. *Affirmed.*

The facts are stated in the opinion.

Argued before Jenkins, Grosscup, and Baker, Circuit Judges.

Mr. Orville Peckham, for appellant:

The rule in Illinois by which a check hold-

er has an action against the bank if it refuses payment when the account is good is firmly established in the courts of that state.

Munn v. Burch, 25 Ill. 35; *Chicago M. & F. Ins. Co. v. Stanford*, 28 Ill. 168, 81 Am. Dec. 270; *Marine Bank v. Ogden*, 29 Ill. 248; *Springfield M. & F. Ins. Co. v. Tinscher*, 30 Ill. 399; *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436; *Rounds v. Smith*, 42 Ill. 245; *Brown v. Leckie*, 43 Ill. 497; *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398; *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212, 22 Am. Rep. 185; *Ridgely Nat. Bank v. Patton*, 109 Ill. 479; *National Bank v. Indiana Bkg. Co.* 114 Ill. 483, 2 N. E. 401; *Woodburn v. Woodburn*, 115 Ill. 427, 5 N. E. 82; *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634, 12 L. R. A. 492, 27 N. E. 533; *Bank of Antigo v. Union Trust Co.* 149 Ill. 343, 23 L. R. A. 611, 36 N. E. 1029; *Abt v. American Trust & Sav. Bank*, 159 Ill. 467, 42 N. E. 856; *Niblack v. Park Nat. Bank*, 169 Ill. 517, 39 L. R. A. 159, 48 N. E. 438; *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531, 39 L. R. A. 479, 49 N. E. 420; *Wyman v. Ft. Dearborn Nat. Bank*, 181 Ill. 279, 48 L. R. A. 565, 54 N. E. 946; *First Nat. Bank v. Keith*, 183 Ill. 475, 56 N. E. 179; *Rickert v. Suddard*, 184 Ill. 149, 56 N. E. 344; *Clark v. Chicago Title & T. Co.* 186 Ill. 440, 53 L. R. A. 232, 57 N. E. 1061.

It is part of this rule, or a necessary con-

NOTE.—The decision in the above case seems to be one of first impression. While it is desirable that the Supreme Court of the United States should pass upon the question so as to settle the law upon it, the present case, as the 62 L. R. A.

attorney for the appellant announces, will not be taken further, though the controversy may hereafter reach the Federal Supreme Court through proceedings in the state court.

sequence of it, that payment of checks cannot be "stopped" against a bona fide holder.

Union Nat. Bank v. Oceana County Bank, 80 Ill. 212, 22 Am. Rep. 185; *National Bank v. Indiana Bkg. Co.* 114 Ill. 483, 2 N. E. 401; *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531, 39 L. R. A. 479, 49 N. E. 420.

The rule which is enforced in the Federal courts is exactly the opposite of the Illinois rule.

Laclede Bank v. Schuler, 120 U. S. 511, 30 L. ed. 704, 7 Sup. Ct. Rep. 644; *Florence Min. Co. v. Brown*, 124 U. S. 385, 31 L. ed. 424, 8 Sup. Ct. Rep. 531; *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439.

A garnishee cannot be made to pay a second time. If his creditor sues him, he can plead in abatement the pendency of the garnishment, and in due time can plead in bar payment on judgment and execution against him as garnishee.

Drake, Attachm. 7th ed. §§ 699 et seq.

Though the right and necessity are the same in the present case as in the case of the garnishee, the remedy must be different, since the Federal court could not sustain a plea of the pendency in the state court of suits by the check holders without surrendering its own judgment in deference to that of the state court, which, on such a question, it has no right to do. Where there is a right, however, the remedy may be sought in equity if for any reason it cannot be had at law.

1 Pom. Eq. Jur. 2d ed. §§ 423, 424.

The opposed rulings of the courts create a hard situation for the Chicago bank for which it is not responsible,—a situation relievable in equity under the head of accident.

1 Story, Eq. Jur. 13th ed. § 89; Willard, Eq. Jur. 51; Bispham, Eq. 2d ed. § 174; Brightly, Eq. Jur. § 33; *Patton v. Campbell*, 70 Ill. 72; 2 Pom. Eq. Jur. § 823; Beach, Modern Eq. Jur. § 25; *Bath v. Sherwin*, 10 Mod. 1; *Lindley v. Russell*, 16 Mo. App. 217; *Long Dock Co. v. Beutley*, 37 N. J. Eq. 15; *Northern P. R. Co. v. Hussey*, 9 C. C. A. 463, 15 U. S. App. 391, 61 Fed. 231; *Methodist Protestant Church v. Baltimore*, 6 Gill, 391, 48 Am. Dec. 540; *Macon & W. R. Co. v. Parker*, 9 Ga. 377; *Curtis v. Williams*, 35 Ill. App. 526.

The payment of the checks was not voluntary, because, according to the law of the state court, the liability of the bank to the check holders was already fixed by the presentation of the checks at times when the account was good. The bank and the check holders, therefore, were not "upon an equal footing," and the bank had no choice.

Astley v. Reynolds, 2 Strange, 916; *Swift & C. & B. Co. v. United States*, 111 U. S. 22, 62 L. R. A.

28 L. ed. 341, 4 Sup. Ct. Rep. 244; *De La Cuesta v. Insurance Co.* 136 Pa. 62, 9 L. R. A. 631, 20 Atl. 505; *Joannin v. Ogilvie*, 49 Minn. 564, 16 L. R. A. 376, 52 N. W. 217; *Preston v. Boston*, 12 Pick. 7; *Christ Church Hospital v. Philadelphia County*, 24 Pa. 229; *Beckwith v. Frisbie*, 32 Vt. 559.

Since judgments in the state courts in favor of the check holders would be foregone conclusions, damaging the bank while settling nothing for the receiver or the Federal court, there was no reason why the Chicago bank should wait for them or submit to them. The law never imposes useless conditions.

Broom, Legal Maxims, 8th ed. p. 252; *Swift & C. & B. Co. v. United States*, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244; *Ward 2d v. Fuller*, 15 Pick. 185; *Weld v. Rees*, 48 Ill. 434; *Joliet & C. R. Co. v. Healy*, 94 Ill. 424; *Kennedy v. Northup*, 15 Ill. 148.

The receiver stands exactly in the bank's shoes.

Casey v. Credit Mobilier, 2 Woods, 77, Fed. Cas. No. 2,496; *Winters v. Armstrong*, 37 Fed. 508; *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148; *High, Receivers*, 2d ed. §§ 204, 205 359.

Messrs. Rufus S. Simmons and Frank H. Kemper for appellee.

Grosscup, Circuit Judge, delivered the opinion of the court:

The bill in the circuit court was to enjoin the prosecution by appellee of a certain action at law, against the appellant, pending in the United States circuit court for the northern district of Illinois. The cause came on for hearing, upon demurrer to the bill, and upon a motion for a preliminary injunction; whereupon a decree was entered, refusing the motion, sustaining the demurrer, and dismissing the bill for want of equity. From this decree this appeal is prosecuted.

The bill in substance alleges: That the complainant and the First National Bank of Niles were both national banking associations, the former located at Chicago, in the state of Illinois, and the latter at Niles, in the state of Michigan; that the latter had long kept an account as a depositor with the former on which it had been accustomed to draw and issue checks; that on the 9th day of March, 1901, the Niles bank was insolvent, and on or about that date it failed to redeem its circulating notes; whereupon it was on that date closed under the authority of the Comptroller of the Currency, and the defendant herein, Joseph W. Selden, was, by the Comptroller, appointed as its receiver, and took charge of its affairs and entered upon the discharge of his duties as such re-

ceiver; that of these facts the Chicago bank had notice on said 9th day of March, 1901, but not before; that on that date also the receiver notified the Chicago bank not to pay any drafts or checks theretofore issued by the Niles bank.

The amended bill further alleges that at the close of business on March 9, 1901, the Niles bank had a balance of account standing to its credit on the books of the Chicago bank of \$9,179.39. Thereafter the Chicago bank credited certain items, and incurred certain expenses, and made certain remittances, on account of the Niles bank or its receiver, none of which is questioned, which reduced the balance to \$5,792.21; that prior to March 9, 1901, twenty-seven checks, amounting in the aggregate to \$5,792.21 had been drawn and issued by the Niles bank on the Chicago bank in the regular course of business, all of which were outstanding when the receiver was appointed, as aforesaid. After that date and before April 4, 1901, all of said checks, at times respectively when the balance aforesaid was sufficient in amount for their payment, were presented for payment to, and payment was refused by, the Chicago bank, pending an inquiry into the rights of the various parties interested. All of said twenty-seven checks or drafts were issued to, and held by, bona fide holders thereof for value. Afterwards eighteen of them, to a total amount of \$4,910, were again presented, and on such second presentation were paid by the Chicago bank and charged, when paid, against the Niles bank, thus further reducing the balance standing to the credit of the Niles bank as aforesaid; that the remaining nine checks, being those only once presented as aforesaid, and not paid, amount to \$882.21; and eight of these, amounting to \$878.30, have, since the Chicago bank refused to pay them as aforesaid, been presented by the holders to and allowed by the receiver as claims against the Niles bank; and these eight the Chicago bank, prior to the 4th day of April, 1901, offered to pay to the receiver if he would present them for payment as the holder and owner thereof.

On April 4, 1901, the receiver demanded of the Chicago bank payment of \$5,792.21; being the amount which would be the balance to which the receiver as such would be entitled, if none of the twenty-seven drafts had been presented for payment as aforesaid. The Chicago bank refused to comply with this demand, and thereupon the receiver brought the action in the United States circuit court for the northern district of Illinois, northern division, the prosecution of which this bill was brought to restrain. In that action the receiver sought to recover the amount of said twenty-seven drafts, being

\$5,792.21, notwithstanding the payment by said Chicago bank as aforesaid of eighteen of said checks, and the presentation of the remaining nine thereof for payment, at times, respectively, when the Chicago bank had funds sufficient for the payment thereof standing to the credit of said Niles bank in its account as depositor.

The bill further alleges that, under the law of Illinois, a bona fide holder of a check or draft on a bank may, if payment thereof be refused when the bank has funds of the drawer subject to check sufficient in amount to pay it, bring an action at law on such check, immediately against such bank; the check, as between drawer and bona fide holder, being regarded as an assignment in law, *pro tanto*, of the balance which the bank owes to its depositor, the drawer of the check. And such seems to be the settled law of Illinois. *Munn v. Burch*, 25 Ill. 35; *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634, 12 L. R. A. 492, 27 N. E. 533; *Bank of Antigo v. Union Trust Co.* 149 Ill. 343, 23 L. R. A. 611, 36 N. E. 1029.

The bill further alleges that the law as declared and administered in the Federal courts is opposed to, and irreconcilable with, the Illinois law as stated above; that in the Federal courts a check holder, as such, cannot maintain either an action at law or a suit in equity against the bank on which the check is drawn; the check being held, as between maker and payee, not to be an assignment *pro tanto*, even in equity, of the indebtedness owing by the bank upon which the check has been drawn. This averment of the law, under the Federal rule, is supported in the cases of *Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. ed. 704, 7 Sup. Ct. Rep. 644; *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439, and other cases.

The bill then avers that the Chicago bank as a citizen of Illinois, doing business there, was subject to the processes of both the state and Federal courts; that it could not have successfully defended, in the state courts, against actions by the check holders, and that the pendency of such actions or judgments therein would have given it no defense in the Federal court against the receiver; that it would have been a serious injury to appellant in its business of banking, and would in no way have benefited the Niles bank, or its receiver, to allow such actions to be brought and prosecuted in the state courts; wherefore, the appellant was justified in preventing such actions, by paying the checks presented for payment as aforesaid, and asking the Federal court, as in the bill presented, to restrain a suit by the receiver, that would in substance compel the bank to pay the same debt a second

time, and to virtually the same party who got the benefit of the first payment.

In *Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. ed. 704, 7 Sup. Ct. Rep. 644, it was decided that, as between the right of general creditors in a fund received from a bank by an assignee under a general assignment for the benefit of creditors, and the payee of an outstanding check or draft, there was no such equitable assignment *pro tanto* of the funds in the drawee's possession, as gave to such payee a priority over the general creditors. This, unquestionably, is the law, also, respecting funds in the hands of a receiver of a national bank, appointed by the Comptroller. In each case the purpose is to obtain a ratable distribution of the insolvent bank's assets. In neither case, in the absence of an assignment more effective than the drawing of a check, will the Federal law allow one set of creditors to obtain an advantage over another set.

The Niles bank, as an insolvent, in the hands of the receiver appointed by the Comptroller, in the interest of creditors, stands toward the Chicago bank in a relation different from the relation between the Niles bank, solvent, and the Chicago bank. In the latter, the creditors of the Niles bank would have no immediate interest in any ratable distribution of the funds; in the former, the interest is immediate and urgent.

Now, while it may be questioned whether, as against the Niles bank, solvent, the Illinois bank might not, as to the payment of check and draft holders, act under the Illinois law as against the law prevailing in Federal courts, and, thus acting, defend, even in the Federal court, against an effort

to compel a second payment, it is clear that, as against the receiver, executing his trust, the Federal law alone is applicable. In such a case the Federal trust must be administered according to the mandate of Federal law. The moment the Niles bank went into the hands of the receiver, the Federal law became the law of the distribution of its assets. In no other way could there be unity of administration, and a carrying out of the Federal mandate of equality. All this the Chicago bank is bound to have known, and the rule for distribution prescribed, the Chicago bank was bound to observe. That the Illinois law on the subject of checks and drafts, and their effect as assignments at law, was different, is no excuse; for, in the winding up of national banks by the Federal authorities, the Illinois law cannot be allowed to displace the Federal law looking to a ratable distribution among the creditors.

Nor was the situation of the Chicago bank, upon presentation of the checks by the check holders, an intolerable one. It could have defended, even in the state courts, by pleading the insolvency of the Niles bank and the Federal law that controls the administration of such affairs. The state courts, as well as the Federal courts, enforce Federal law, and are bound thereby, and from any decision adverse to the Federal law, an appeal could have been taken to the Supreme Court of the United States. Of course this meant lawsuits,—or possibly, by bill of interpleader, a lawsuit,—but inconveniences thus occasioned are not defenses against the substantial rights of the creditors of the insolvent Michigan bank.

The decree of the Circuit Court dismissing the bill is affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

G. B. MCNEELEY *et al.*, *Appts.*,
v.

SOUTH PENN OIL COMPANY *et al.*

(52 W. Va. 616.)

***1. Husband and wife being seised as joint tenants of land, her interest being separate estate, the husband alone, during coverture, sells the whole tract by executory contract, and the purchaser goes into possession during the coverture, and later the wife dies, leaving the husband and children sur-**

*Headnotes by BRANNON, J.

NOTE.—As to adverse possession and the statute of limitations in respect to estates by the entirety, see cases in note to Robinson's Appeal, 30 L. R. A. 335.
62 L. R. A.

viving her, and later the husband conveys the whole tract to the purchaser by deed. The possession of the purchaser is not adverse to the wife in her lifetime, and right of entry or action does not accrue to her children until the husband's death, and the statute of limitations begins to run against them first at his death.

2. Survivorship in estates by entirety was abolished 1st July, 1850, by § 18, chap. 116, of the Virginia Code of 1849, continued in the West Virginia Code of 1868, chap. 71, § 18.

3. Curtesy in a wife's separate estate vests in her husband first upon her death.

4. Quære: Where man and wife are jointly seised of land, her interest being separate, and adverse possession under a distinct hostile title begins during the coverture, but, before the period fixed as a bar by the

statute of limitations has run out, the wife dies, leaving children and husband surviving her: Does the statute stop running as to the heirs until the close of the curtesy by the death of the husband? Does his failure to sue affect them? Is there a second or separate right of entry or action accruing to the heirs at the husband's death? How when the husband during coverture has conveyed to the occupant by deed purporting to pass in fee the whole tract? Does the statute run against the heirs before the husband's death?

5. **The conveyance of land to husband and wife since 1st April, 1869, does not create an estate by entirety, but a joint tenancy, and the wife's interest is separate estate.** The joint effect of § 18, chap. 71, abolishing survivorship in estates by entirety, and of chapter 66, relating to separate estates of married women, of the Code of 1868, is to abolish estates by entirety. The husband is not entitled to sole possession during coverture, but has curtesy in his wife's half after her death.

6. **Possession by a purchaser under an executory contract of sale, made by the husband alone, of land owned in joint tenancy by husband and wife, is not adverse to the wife.**

7. **When a husband, by executory contract during coverture, sells land owned by him and his wife as joint tenants, and the purchaser takes possession, and then the wife dies, and then the husband conveys to the purchaser the whole tract by deed, the possession is not adverse to the heirs of the wife until the husband's death, as until then they have no right of entry or action, and the statute of limitations does not run against them until then.**

8. **An executory contract for the sale of land, stipulating for the future conveyance of legal title, the purchase money payable in future, is color of title under the statute of limitations as to hostile claimant.**

9. **There can be no constructive actual adverse possession of land by reason of possession of part of the occupant's land, where there has been no actual possession of some part of the land of another person which he might treat as a trespass and sue for.**

10. **Where an occupant's boundary covers adjoining lands of separate owners, his possession on land of one of them will not be adverse possession of land of the other, without actual possession of such other's land, on the theory that possession of part is possession of the whole.**

11. **Chapter 61, p. 152, Acts 1872-73, fixing three years' limitation for suits to recover land leased for oil or other minerals, was repealed by chapter 102, p. 298, Acts 1882, re-enacting chapter 104 of the Code of 1868.**

12. **The said chapter 61, p. 152, Acts 1872, 1873, is unconstitutional and void because of failure in its title to express the object of the act.**

13. **A married woman will not, by reason of estoppel in pais, lose her right to land owned jointly by her and her husband simply by knowledge that her husband is negotiating an exchange of the whole land in**

his name, or has exchanged it as his sole land, or by expressing, casually, satisfaction with the exchange after it has been made. Silence does not bar her right. Nor will her heirs be so barred by mere silence, though they know of improvements put upon the land by or under the other party to the exchange.

(March 28, 1903.)

A PPEAL by plaintiff from a decree of the Circuit Court for Wetzel County in favor of defendants in an action brought to recover the value of oil which had been taken from certain property. *Reversed.*

Statement by **Brannon, J.:**

(a) By deed, 4th April, 1873, Edgell conveyed to Nathan Higgins and Mary Higgins, his wife, a tract of 100 acres of land. By a written agreement, 23d September, 1873, between Nathan Higgins and John W. Starkey, they exchanged lands; Higgins agreeing to convey to Starkey said tract of 100 acres, and Starkey agreeing to convey to Higgins a tract of 50 acres. Mary Higgins was not a party to this agreement. She died 12th February, 1875, and her husband in April, 1898. The agreement recited that the land was the Allen Edgell farm. It provided that Starkey should pay Higgins \$125 boot, payable in future by instalments. By deed 26th July, 1875, Nathan Higgins conveyed to Starkey the 100 acres, reserving a lien for unpaid purchase money. The agreement provided for immediate delivery of possession of the two tracts under the exchange, and a son of Nathan Higgins, living on the 100 acres, moved from it, and another son moved on the 50 acres, and Starkey moved from the 50 acres, and took actual possession of the 100 acres, 3d October, 1873. The deed from Higgins to Starkey referred to date and record of the deed from Edgell to Starkey and wife.

(b) By certain conveyances the Corning Oil Company and others, derivatively from Starkey, became lessees of 26 acres of the 100 acres under a lease for oil and gas purposes, and the South Penn Oil Company became lessee of the residue 74 acres. About 11th February, 1897, the Corning Oil Company and others, jointly owning with it the lease of the 26 acres, went into possession and bored several producing oil wells on the 26 acres. On 21st August, 1895, the South Penn Oil Company, under its lease of the 74 acres, took actual possession, and bored several producing wells. G. B. McNeely and others, having acquired the interests of certain children and heirs of Mary Higgins, together with certain other heirs, in January, 1899, filed a bill in chancery against the South Penn Oil Company and others, calling for an account of all oil taken

from said land, and payment to the plaintiffs for it.

(c) The case resulted in a decree dismissing the bill, from which decree the plaintiffs took an appeal.

Messrs. Edward A. Brannon, Thomas R. Horner, and Thomas P. Jacobs, for appellants:

No married woman's acts in West Virginia affect the doctrine or estates of tenancy by the entirety. As to such estates the legal unity of husband and wife exists on the grounds and principles of public policy. So long as the relation of husband and wife exists in such tenancy neither can hold adversely the land of the other, and, it follows, neither can confer that power on a stranger.

Stephens v. McCormick, 5 Bush, 181; *Vandevoort v. Gould*, 36 N. Y. 639; *First Nat. Bank v. Guerra*, 61 Cal. 109; *Hendricks v. Rason*, 53 Mich. 575, 19 N. W. 102.

The alienation or conveyance by the husband of the wife's inheritance or freehold during coverture makes no discontinuance thereof, but she or her heirs may enter according to their respective rights, notwithstanding such alienation or conveyance.

2 Cord, Married Women, § 1041; *Miller v. Shackelford*, 3 Dana, 296; *Farmers' Bank v. Corder*, 32 W. Va. 232, 9 S. E. 220; *Farmers' & M. Bank v. Gregory*, 49 Barb. 155; *Goclet v. Gori*, 31 Barb. 314.

The legislature could only have intended to abrogate the common-law word depriving the wife of the use and control of her separate estate, which, therefore, leaves the estate intact with all its necessary ingredients.

Rogers v. Grider, 1 Dana, 242; *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462, 4 N. E. 824; *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 363; *Kerr*, Real Prop. § 1976.

So long as the contract is executory the possession could not be adverse in any respect.

Parkersburg Nat. Bank v. Neal, 28 W. Va. 744; *Ketchum v. Spurlock*, 34 W. Va. 597, 12 S. E. 832; *Hutchinson, Land Titles*, § 360; *High v. Pancake*, 42 W. Va. 607, 26 S. E. 536; *Delaplain v. Grubb*, 44 W. Va. 617, 30 S. E. 201; *Lucas v. Clafflin*, 76 Va. 280; *Rosenour v. Rosenour*, 47 W. Va. 554, 35 S. E. 918.

The remainder-man is not bound to enter for a forfeiture of the preceding life estate, for a new right of entry accrues on the death of the life tenant.

Stevens v. Winship, 1 Pick. 318, 11 Am. Dec. 178; *Culver v. Rhodes*, 87 N. Y. 348; *Jackson ex dem. Hardenbergh v. Schoonmaker*, 4 Johns. 390; *Constantine v. Van Winkle*, 6 Hill, 177; *Jackson ex dem. Swartwout v. Johnson*, 5 Cow. 95, 15 Am. Dec. 62 L. R. A.

433; *Miller v. Shackelford*, 3 Dana, 289; *Meraman v. Caldwell*, 8 B. Mon. 32, 46 Am. Dec. 537; *Buswell, Limitations & Adverse Possession*, § 271.

The heirs had no remedy during the currency of the life estate, and therefore the statute could not run. Limitations operate on the right of entry, and there was and could be none in the heirs as long as their father lived.

Fisher v. Provin, 25 Mich. 350; *Diver v. Diver*, 56 Pa. 106; *McDuff v. Beauchamp*, 50 Miss. 531; *Robinson v. Eagle*, 29 Ark. 202; *Bennett v. Child*, 19 Wis. 365; *Garner v. Jones*, 52 Mo. 68; *Buck v. Milford*, 90 Ind. 292; *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 52, 9 Atl. 695; *Speier v. Opfer*, 73 Mich. 35, 2 L. R. A. 345, 40 N. W. 909; *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 363; *Hiles v. Fisher*, 144 N. Y. 306, 30 L. R. A. 305, 39 N. E. 337.

If Nathan and Mary Higgins were joint tenants, or tenants in common, even then the statute of limitations would not have been started against Mary Higgins or her heirs.

Core v. Faupel, 24 W. Va. 238; *Hutchinson, Land Titles*, 350; *Salter v. Salter*, 80 Ga. 178, 4 S. E. 391; *Meraman v. Caldwell*, 8 B. Mon. 32, 46 Am. Dec. 537; *Wood, Limitations of Actions*, 536.

Possession under an agreement to convey does not become adverse to the cotenant until the date of the deed executed.

Phelan v. Smith, 100 Cal. 158, 34 Pac. 667; 1 Am. & Eng. Enc. Law, 2d ed. p. 807; *Pickett v. Doe ex dem. Pope*, 74 Ala. 122; *McKeely v. Terry*, 61 Ark. 527, 33 S. W. 953.

There must be some notorious act of ouster or adverse possessions by the party entering, brought home to the knowledge or notice of the others,—a clear, positive, and continuous disclaimer or disavowal of the cotenant's title, and assertion of an adverse right.

1 Am. & Eng. Enc. Law, 2d ed. p. 803; *Boggess v. Meredith*, 16 W. Va. 1; *Rust v. Rust*, 17 W. Va. 901; *Cooley v. Porter*, 22 W. Va. 120; *Tiedeman, Real Prop.* 251; *Tyler, Ejectment*, 877.

Starkey's entry and possession under the alleged contract were not an ouster and disseisin of Mary Higgins.

1 Cyc. Law & Proc. p. 1078; *Phelan v. Smith*, 100 Cal. 158, 34 Pac. 667; *Hauer's Estate*, 140 Pa. 420, 21 Atl. 445; *Elys v. Wynne*, 22 Gratt. 229.

The execution by the joint tenant, Nathan Higgins, of the executory contract did not start the statute against the cotenant, Mary Higgins, for Starkey held under and subject to both.

Phelan v. Smith, 100 Cal. 158, 34 Pac.

667; *Core v. Faupel*, 24 W. Va. 238; *Hudson v. Putney*, 14 W. Va. 561; *Nowlin v. Reynolds*, 25 Gratt. 137; 1 Cyc. Law & Proc. pp. 1049, 1058; *Austin v. Brown*, 37 W. Va. 634, 17 S. E. 207; *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56.

Starkey did not bring notice home to her that he was going to hold adversely to her, and when she died he could not do so, for he was a life tenant and estopped to prejudice the reversioners.

Justice v. Lawson, 46 W. Va. 163, 33 S. E. 102; *Pillow v. Southwest Virginia Improv. Co.* 92 Va. 144, 23 S. E. 32; *Cooley v. Porter*, 22 W. Va. 120; *Parker v. Brast*, 45 W. Va. 399, 32 S. E. 269; *Worthington v. Staunton*, 16 W. Va. 208.

Even after deed from Nathan Higgins to Starkey, Starkey, or his grantees, could not hold adversely to Mary Higgins' heirs, as Starkey was tenant in common with them and holder of Nathan Higgins' life estate by the curtesy, as the statute does not begin to run until the expiration of the life estate or other estate in possession, which was after Nathan Higgins' death in 1898.

Merritt v. Hughes, 36 W. Va. 362, 15 S. E. 56; *Hutchinson, Land Titles*, § 352; *Angell, Limitations of Actions*, §§ 371, 372; *Wood, Limitations of Actions*, 527; *Tyler, Ejectment*, 923, 945; *Ball v. Johnson*, 8 Gratt. 285; *Merritt v. Smith*, 6 Leigh, 493; 1 Rob. New Pr. 508, 510; *Austin v. Brown*, 37 W. Va. 635, 17 S. E. 207; 1 Am. & Eng. Enc. Law, 2d ed. pp. 807, 808; *Arnold v. Bunnell*, 42 W. Va. 473, 26 S. E. 359; *Jackson ex dem. Beekman v. Sellick*, 8 Johns. 262; *Jackson ex dem. Corson v. Cairns*, 20 Johns. 301; *Central Land Co. v. Laidley*, 32 W. Va. 135, 3 L. R. A. 826, 9 S. E. 61; *Jones v. Freed*, 42 Ark. 357; *Banks v. Green*, 35 Ark. 84; *Meruman v. Caldwell*, 8 B. Mon. 32, 46 Am. Dec. 537; *Cecil v. Clark*, 44 W. Va. 669, 30 S. E. 216; *Bolling v. Teel*, 76 Va. 487; *Avent v. Arrington*, 105 N. C. 377, 10 S. E. 991; *Parker v. Brast*, 45 W. Va. 399, 32 S. E. 269.

Messrs. Erskine & Allison and Arnold, Morton, & Irvine, for appellee Corning Oil Company:

The two essential characteristics of estates by the entirety at common law—seisin of the entirety *per tout*, *et non per my*, and the right of survivorship,—were based on the unity of husband and wife in legal indentment, and were the natural consequences of that principle. But the common-law doctrine of estates by entireties was abrogated by the enactment, in 1849, of the provision now found in § 18, chap. 71, of the Code.

2 Minor, Inst. p. 410; *Beekham v. Duncan* (Va.) 5 S. E. 694; *Bushong v. Rector*, 32 W. Va. 311, 9 S. E. 225; *Hiles v. Fisher*, 144 N. 62 L. R. A.

Y. 306, 30 L. R. A. 312, 39 N. E. 337; *Buttler v. Rosenblath*, 42 N. J. Eq. 653, 59 Am. Rep. 52, 9 Atl. 695; *Randolph v. Casey*, 43 W. Va. 289, 27 S. E. 231.

The survivor held the estate, not by right of survivorship, but simply as one holding over or continuing to hold in his own right that which was already his own, and yet, while coverture lasted, that which was also another's, but that other, one with him, in contemplation of law. The estate did not descend upon the death of either, but the surviving consort, being already seised of the entire estate, became sole owner of it.

Corinth v. Emery, 63 Vt. 505, 22 Atl. 618.

The entry by Starkey and the possession taken by him October 3d, 1873, under claim of title to the whole in severalty, were adverse to Mary Higgins, and constituted an ouster of her interest or estate.

The contract is color of title showing the extent of the vendee's claim, and the possession is expressly taken under the contract, with the permission of the vendor and subservient to his rights.

Ketchum v. Spurlock, 34 W. Va. 597, 12 S. E. 832; *Howland v. Newark Cemetery Asso.* 66 Barb. 366; *Vrooman v. Shepherd*, 14 Barb. 441; *Elliott v. Mitchell*, 47 Tex. 445; *Bank of the State v. Smyers*, 2 Strobb. L. 24; *Whitney v. Wright*, 15 Wend. 171; *Walker v. Crawford*, 70 Ala. 568; *Long v. Kansas City Stock-Yards Co.* 107 Mo. 298, 17 S. W. 556; *Tyler, Ejectment*, p. 879; 1 Am. & Eng. Enc. Law, 2d ed. p. 800; 1 Cyc. Law & Proc. p. 1098; *Avent v. Arrington*, 105 N. C. 377, 10 S. E. 991.

The possession of Starkey before the execution of the deed and his possession after the agreement was fully consummated may be coupled to make his adverse possession against Mary Higgins and her heirs complete.

Bank of the State v. Smyers, 2 Strobb. L. 24; *Brown v. Brown*, 106 N. C. 451, 11 S. E. 647; *Valentine v. Cooley*, Meigs, 613, 33 Am. Dec. 166; 1 Cyc. Law & Proc. p. 1004.

It is not necessary to an assertion of adverse possession that the party should be ignorant of the defects of his own title, and have no knowledge of the rights of those against whom he claims.

Jones v. Lemon, 26 W. Va. 629; *Sands v. Hughes*, 63 N. Y. 287.

There was an actual ouster of Mary Higgins.

3 Bl. Com. 169; Co. Litt. 153; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Jones v. Lemon*, 26 W. Va. 629.

Starkey cannot be presumed to have entered as a cotenant or a joint tenant with Mary Higgins. The evidence overwhelms the presumption.

Elder v. McClaskey, 17 C. C. A. 251, 37 U.

S. App. 1, 70 Fed. 529; *Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. 580; *Whitney v. Wright*, 15 Wend. 171.

Actual possession of a part with a claim to the whole was sufficient under such circumstances.

Oney v. Clendenin, 28 W. Va. 34; *Core v. Faupel*, 24 W. Va. 238; *Angell, Limitations of Actions*, 6th ed. ¶ 400, p. 413.

Mary Higgins' right of action accrued immediately upon such ouster, and the statute then commenced to run against her.

Kader v. Neal, 13 W. Va. 373; *Mathews v. Greer*, 21 W. Va. 697; *Bushong v. Rector*, 32 W. Va. 314, 9 S. E. 225; *Farmers' Bank v. Corder*, 32 W. Va. 232, 9 S. E. 220; *Randolph v. Casey*, 43 W. Va. 293, 27 S. E. 231; *Jones, Real Prop. in Conveyancing*, ¶ 1816; *Tyler, Ejectment*, p. 151; *Hopson v. Foulkes*, 92 Tenn. 697, 23 L. R. A. 805, 23 S. W. 55; *Bains v. Bullock*, 129 Mo. 117, 31 S. W. 342; *Austin v. Brown*, 37 W. Va. 634, 17 S. E. 207; *Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. 580.

The statute once in operation continued to run against the heirs of Mary Higgins.

Talbott v. Woodford, 48 W. Va. 449, 37 S. E. 580; *Randolph v. Casey*, 43 W. Va. 289, 27 S. E. 231; *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56; *Jones v. Lemon*, 26 W. Va. 629; *Wilson v. Harper*, 25 W. Va. 179; *Hogan v. Kurtz*, 94 U. S. 773, 24 L. ed. 317; *Austin v. Brown*, 37 W. Va. 634, 17 S. E. 207; *Meraman v. Caldwell*, 8 B. Mon. 32, 46 Am. Dec. 537; *Vanarsdall v. Fauntleroy*, 7 B. Mon. 401; *Medlock v. Suter*, 80 Ky. 101; *Beattie v. Whipple*, 154 Ill. 273, 40 N. E. 340.

Mr. R. W. McCoy also for Corning Oil Company.

On petition for rehearing.

Messrs. M. F. Elliott, U. N. Arnett, A. B. Fleming, and R. F. Fleming, for appellee South Penn Oil Company:

We have never been able to find a single case in which the courts have assumed to say that, because there was no right of entry during a part of the time after the statute was set in motion, such time should not be counted as a part of the limitation period, when the statute says that the suit must be brought within ten years next after the cause of action first accrued.

Wood, Limitations of Actions, 3d ed. § 4, p. 6; *Rhodes v. Smethurst*, 6 Mees. & W. 351; *Tyler, Ejectment*, p. 929; *Murray v. Chicago & N. W. R. Co.* 35 C. C. A. 62, 92 Fed. 868; *Newell, Ejectment*, p. 709; *Jones v. Lemon*, 26 W. Va. 629.

A married woman may be estopped by her fraud. A party may be guilty of fraud by keeping silent when he or she ought to speak.

Bigelow, Estoppel, 5th ed. p. 453; *Chap-*

man v. Chapman, 59 Pa. 214; *Morgan v. Snodgrass*, 49 W. Va. 392, 38 S. E. 695.

Messrs. Cornett & Newman and **W. S. Haymond** for other appellees.

Brannon, J., delivered the opinion of the court:

A vital question in this case arises on the statute of limitations. Is the right of the plaintiffs to that half of the tract of 100 acres vested in Mary Higgins lost to them by reason of the statute of limitations? The defendant oil companies say that when Starkey, under the executory contract of exchange between him and Nathan Higgins, took actual possession of the 100 acres, in October, 1873, the statute at once began to run, and had run the limitation period of ten years long before the commencement of this suit. That depends upon the question whether that possession was adversary to Mary Higgins. Counsel for plaintiffs say that it was not adversary, for the reason first, that the conveyance to Nathan and Mary Higgins created, not a joint tenancy, but an estate by entirety, and that he could not sell either his own or his wife's estate in the land, and his contract of sale would constitute no color of title, but was nugatory for all purposes, and, besides, that Nathan had the right to the control, possession, and rents and profits of his wife's share,—in short, a life estate therein, just as by common law a husband had a life estate in the sole land of a wife,—and under settled principles the statute would not begin against her or her heirs until the death of the husband. The defense says that the conveyance of the land did not create an estate by entirety, but simply a joint tenancy, by the law ruling at the date of such conveyance. By common law, land conveyed simply to a husband and wife did not, as in the case of a conveyance to two persons not husband and wife, create a joint tenancy, but an estate by entirety. "It is a sole, not a joint, tenancy. Each holds the entirety. They are one in law, and their estate one and indivisible. If the husband alien, if he suffer a recovery, if he be attainted, none of these will affect the right of the wife, if she survive him. Nor is this by the *jus accrescendi*. There is no such thing between them. That takes place where, by the death of one joint tenant, the survivor receives an accession; something which he had not before; the right of the deceased. But husband and wife have the whole from the moment of the conveyance to them, and the death of either cannot give the survivor more." This statement of the nature of this ancient estate in land, dating far back in time, in *Thornton v. Thornton*, 3 Rand. (Va.) 179, is supported by all the authorities. No partition, voluntary or in-

voluntary, can be made between husband and wife of such an estate. 11 Am. & Eng. Enc. Law, p. 49; 2 Minor, Inst. p. 471. One dying, the survivor gets the whole. In such land the husband had at least an estate for his life, and if he outlived his wife he simply retained the whole. His conveyance of the whole would operate to confer on his grantee an estate during his life, and, if he survived, it would pass the fee to the whole. 1 Washb. Real Prop. § 913; Bl. Com. bk. 2, p. 182; *Gray v. Bailey*, 117 N. C. 439, 23 S. E. 318.

If Nathan and Mary Higgins did take an estate in entirety, and she had outlived him, on common-law principles the statute would not count against her in favor of Starkey until his death, because until then Nathan's marital right of possession would not expire. Until then she could not recover of Starkey either her own or his interest, but, as she died first, there could not be, by common law, any question of the statute, as his contract with Starkey would upon her death confer right of possession upon Starkey. But this could not be the case, because at the date of the contract the statute found in Code 1868, chap. 71, § 18, was in force, providing that "if hereafter an estate of inheritance be conveyed or devised to a husband and his wife, one moiety of such estate shall, on the death of either, descend to his or her heirs, subject to debts, curtesy, or dower as the case may be." This enactment has been in force since the Virginia Code of 1849 took effect, 1st July, 1850; and therefore Nathan and Mary Higgins took subject to it, and Nathan could not take the fee upon his wife's death, as he would have done by common law, and his exchange with Starkey did not confer a fee in his wife's moiety upon her death, as the fee in reversion went to her heirs. But the statute says that he shall have curtesy in his wife's moiety, and it is settled that the heirs would not be subject to the statute until the close of the curtesy estate by the death of Nathan Higgins, the life tenant by curtesy. *Arnold v. Bunnell*, 42 W. Va. 473, 26 S. E. 359; *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56; *Austin v. Brown*, 37 W. Va. 634, 17 S. E. 207. But here a question of nicety arises, on which I but one case has been cited, and on which I have been able to find but little authority. Say that, as the right of Mary Higgins was separate estate, the statute began to run against her in her lifetime. *Randolph v. Casey*, 43 W. Va. 289, 27 S. E. 231. If it had run out during her life, she would have been barred, and her heirs would have been barred, as they derived only from her; and, if her right had been lost and passed by the statute, so would theirs have been. But the statute had not barred her right before her

death. All authority does say that, if the statute begins to run against an ancestor, it goes on against his heirs, even though infants. *Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. 580. That is because they can sue. How is it where the husband has made a deed conveying all his right to a third party, carrying with it his curtesy, which curtesy in her separate estate first vests at her death? *Guernsey v. Lazcar*, 51 W. Va. 328, 41 S. E. 405; 15 Am. & Eng. Enc. Law, p. 819. Does that rule apply then, or does the statute stop until the close of the curtesy? It is an axiom of the law of statutes of limitations that, to apply them to bar title to land, there must be a right of entry. Citations in *Merritt v. Hughes*, 36 W. Va. 362, 15 S. E. 56. Nobody can maintain ejectment unless he have a right of entry. *Adkins v. Spurlock*, 46 W. Va. 139, 33 S. E. 121; Code 1899, chap. 90, § 4. From the last breath of Mary Higgins to the last breath of Nathan Higgins, there was no right of entry in her children. They could maintain no suit to recover possession from Starkey. How, then, can the period of duration of the curtesy estate be counted against her children? Bar a right when there is no right of suit for it! Counsel for the Corning Oil Company, seeing this trouble, argues that the children could have maintained a suit in equity to remove cloud from title, and cite *Austin v. Brown*, 37 W. Va. 634, 17 S. E. 207. I do not see that they could do so, as they were not in possession. *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682, and *Christian v. Vance*, 41 W. Va. 754, 24 S. E. 596. *Austin v. Brown* does not say that one who is neither in or entitled to possession can maintain such a bill. It cannot be cited to uphold the proposition that the Higgins heirs could sustain a chancery suit to impeach Starkey's right to the curtesy estate or to get possession while it existed. If they could have maintained a suit for an injunction against extraction of oil, or for an account of oil taken from the land, that would not give possession. They could have no partition during the curtesy. *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56. To bar their legal title, you must prove that, when the right vested by descent in them, they could maintain ejectment to vindicate their title and admit them to full actual possession. They held legal title, but only as reversioners, and that title had no force to give them possession in a law or equity forum during the life of Nathan Higgins. We are talking of full common-law remedy giving full possession. It cannot be unqualifiedly asserted that, when once the statute starts, it stops for no after event. If a statute suspends its operation, it stops for the period of suspension because of the mandate of the law. 1 Cyc. Law & Proc. 1023;

1 Rob. Pr. 624. Now, when the law creates an estate by curtesy, operating to suspend entry and action, why should not the statute of limitation stop? More so because infants can sue, but a reversioner or remainder-man cannot. The law commands it to cease running in consideration that it tolls for a time the right of entry. We are told of that rule that disabilities arising after the start of the statute do not stop its currency, but the vesting of the estate by curtesy is not a disability. This argument was made in *Jackson ex dem. Stuart v. Johnson*, 5 Cow. 74, 15 Am. Dec. 434, 447. There were two disabilities—infancy and coverture—when adverse occupation began, and they were both removed by death; but then curtesy began, and it was held that the curtesy suspended the statute, and that the intervention of a particular estate was not a disability; that is, it could not be pleaded like a supervenient disability arising after the accrual of cause of action; in short, that the intervention of the curtesy operated a suspension of the statute; that in fact the land did not descend during curtesy so as to give right of entry. The opposite has been held in *Beattie v. Whipple*, 154 Ill. 273, 40 N. E. 340. The decision there was that, when adverse possession begins in the wife's life, her death does not suspend it, notwithstanding the husband's curtesy. There being no right of entry, I consider the New York case the more logical.

In our case the husband sold and later conveyed his curtesy to Starkey, and Starkey had right, as against the children of Mary Higgins, to occupy the whole land during curtesy. The possession of a life tenant is not adverse to the remainder-man, as the life and the remainder estates are consistent, not adverse. *Austin v. Brown*, 37 W. Va. 634, 17 S. E. 207, and authorities in *Merritt v. Hughes*, 36 W. Va. 362, 15 S. E. 56; 1 Cyc. Law & Proc. 1056. But as Starkey purchased in fee, and was expressly a life tenant, I will treat the possession as adverse, for argument's sake, and make the intervention of the tenancy by curtesy beginning with the death of Mary Higgins as working a suspension of the statute. Or may we not say that there were two rights of entry,—one to Mary Higgins, and the other to her children at her death? As the coming of the life estate ended her right of entry, a new and distinct right of entry first arose upon the death of Starkey in favor of her children. Judge Holt, in *Austin v. Brown*, 37 W. Va. 639, 17 S. E. 207, using the words of *Stevens v. Winship*, 1 Pick. 318, 11 Am. Dec. 178, said: A remainder-man is not obliged to enter for a forfeiture by tenant for life, and a new right of entry accrues to him at 62 L. R. A.

the death of the tenant for life. In *Tilson v. Thompson*, 10 Pick. 359, it is held that "a reversioner is not obliged to enter during the life of tenant for life for a disseisin of such tenant or a forfeiture for waste, but a new right of entry accrues to him at the death of such tenant." Tyler, Ejectment, 117. If such is the law, no right of entry was born to these heirs until the death of Nathan Higgins. If the ouster occurs during the curtesy after the wife's death, who would deny that the statute only runs from the death of the tenant by curtesy? What in reason differentiates the case where the ouster was in the wife's life?

I have been considering the case, not of an occupant under distinct adverse title, hostile to both husband's and wife's rights, but of one who has a conveyance from the husband passing his curtesy. In the former case it may be well said that the statute, having begun to run in the wife's lifetime, keeps on against her heirs. It does surely if she leaves no husband, but if she leaves a husband entitled to curtesy, and he does not sue the intruder for himself to vindicate his curtesy and the reversion, does the statute go on while the curtesy lasts, and bar the heirs, even in the case of possession under such distinct title? Only the husband can sue while he lives. It seems hard that his default should detriment the heirs after his death. The law protects the heirs from the statute. "The right of entry in the person in remainder can in no case be affected by the statute of limitations during the existence of the particular estate, and the laches of a tenant for life will not, as a general rule, affect the party entitled." Angell, Limitations of Actions, §§ 371, 415; Buswell, Limitations & Adverse Possessions, § 271. How can the remainder-man or reversioner be protected against such laches in failing to sue, except by holding either that the statute commencing in the woman's life is suspended, if there is but one right of entry, or that the heirs have a new right of entry born on the death of the tenant by curtesy? But the question of a hostile stranger entering is not the question in this case. We have the case of one buying from the woman's husband the whole tract, by conveyance passing the whole right, including curtesy. Nathan Higgins could not sue the purchaser, and the heirs could not, because, to sustain ejectment, there must be a right to present possession, under Code 1899, chap. 90, § 4, and *Adkins v. Spurlock*, 46 W. Va. 139, 33 S. E. 121.

Another question is this: Did the conveyance to Higgins and wife create an estate by entirety, or had that estate been then abolished? If that estate was then exist-

ent, the contract of exchange between Higgins and Starkey gave Starkey lawful right to hold during the joint lives of Higgins and wife, and also during the life of Nathan Higgins, after the wife's death, by reason of curtesy; and the statute of limitations did not begin in the lifetime of Mary Higgins, as she had no right of entry, and could not sue Starkey, nor could her husband, and there could be no color to say that a right of entry or suit vested in her heirs until his death. Subject to survivorship, the husband "is entitled during the coverture to the full control and usufruct of the land, to the exclusion of the wife, and has, according to the weight of authorities, the power to sell, mortgage, or lease for the same period, and his life interest is subject to the claims of creditors." 15 Am. & Eng. Enc. Law, 2d ed. p. 849; *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 465, 4 N. E. 824. When we read that neither can sell, that only means that they cannot thus destroy the right of survivorship. *Den ex dem. Hardenbergh v. Hardenbergh*, 10 N. J. L. 42, 18 Am. Dec. 386. It would be the same as a sale by the husband of a wife's land, not separate estate, in which he had present right of possession, in which case adverse possession affecting her right would not exist until the husband's death. *Central Land Co. v. Laidley*, 32 W. Va. 134, 3 L. R. A. 828, 9 S. E. 61; *Kerr*, Real Prop. § 1976. But when this land was conveyed to Higgins and wife, § 3 of chapter 66, Code 1868, was in force, giving the wife power to take and to hold to her separate use land, and its rents and profits, as if unmarried, and denying power in the husband to dispose of the land, or its rents and profits. This would give the wife sole possession, and it would seem to prevent estates by entirety from arising thereafter as they did before that statute. In a few states it has been held that the separate estate acts do operate to abolish estates by entirety. Those cases hold that such estates spring from the old common-law rule that man and wife are one person, and therefore an estate conveyed to them is a unit of indivisible parts; they hold *per tout*, *et non per my* (by the all, and not by the moiety), while a conveyance to two persons, not man and wife, makes a joint tenancy, making a unit of divisible parts,—joint tenants holding *per tout et per my*; and that separate estate acts were designed to do away with the legal rule that, as to property, man and wife are one. Those decisions say that, as these acts provide that the wife shall hold the land and its profits as if single, that excludes all idea that the husband can have possession of his wife's half, take its profits, lease it, convey for his life, as he could do with his wife's

62 L. R. A.

maiden land by the common law, since the new acts were passed to destroy the common-law right *in toto*, and to hold that estates by entirety still exist would defeat that object. Separate estate acts mean, I think, not simply to give the wife possession of her half and its profits, free from her husband's control and disposal, but also to take away his right to retain his wife's interest by survivorship on her death, because the acts say that she shall take and hold "in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts." I would think that this is the plain import of our separate estate act. *Re Robinson*, 88 Me. 17, 30 L. R. A. 331, 33 Atl. 652; *Den ex dem. Hardenbergh v. Hardenbergh*, 18 Am. Dec. 388, note [10 N. J. L. 42]; *Chandler v. Cheney*, 37 Ind. 413; *McCurdy v. Canning*, 64 Pa. 41; *Cooper v. Cooper*, 76 Ill. 57.

But it will be found that the very decided weight of authority from other states is to the effect that the married women's acts do not abolish estates by entirety. Our own act comes from New York, and there the holding has been that it was not the effect of the section, and plainly was not its purpose, to change the force and operation of a conveyance to a wife. It does not enlarge the estate which a wife would otherwise take in land conveyed to her, and, whatever the effect of a conveyance to a husband and wife was prior to that statute, so it remains. If the operation of such conveyance was to pass the entire estate to each of the grantees, so that each became seised of the entirety, there is nothing in the force or effect of the language used to change the operation of such a deed as to make the grantees tenants in common. The section gives the wife no greater right to receive conveyances than she had at common law, but its sole purpose was to secure to her during coverture what she did not have at common law,—the use, benefit, and control of her own real estate, and the right to convey and devise it as if unmarried. *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361. A mass of law sustains this position. *Marbury v. Cole*, 49 Md. 402, 33 Am. Rep. 266; *Baker v. Stewart*, 40 Kan. 442, 2 L. R. A. 434, 19 Pac. 904; and note to *Enyeart v. Kepler*, 10 Am. St. Rep. page 99; *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462, 4 N. E. 824; *Robinson v. Eagle*, 29 Ark. 202; *McDuff v. Beauchamp*, 50 Miss. 531; 2 Jones, Conv. § 1793; 15 Am. & Eng. Enc. Law, 2d ed. p. 850; 1 Washb. Real Prop. § 915; 3 Kerr, Real Prop. § 1976. The case of *Farmers' Bank v. Corder*, 32 W. Va. 232, 9 S. E. 220, has no bearing on the point in hand, because in it the land was con-

veyed to the man and wife before the separate estate act. In the case of *Bertles v. Nunan*, cited, the court did not consider what effect the separate estate act had on entirety estates as to use and control by the husband during coverture in the wife's interest; but in a later case (*Hiles v. Fisher*, 144 N. Y. 306, 30 L. R. A. 305, 39 N. E. 337), it is again held that the separate estate act does not destroy estates by entirety, yet it deprives the husband of the sole control of the wife's interest during their joint lives,—takes away his power to lease,—because, as the court said, this right in the husband was not a quality of an estate by entirety, and did not arise from it, as, if it did, it would not be abrogated by the separate estate act, but that such power in the husband was a power in him by common law as to the wife's maiden land, and the separate estate act took that from him. She was held entitled, like a joint tenant, to half the rents and profits with him. The case followed *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 52, 9 Atl. 695. But I do not regard these decisions in other states as controlling in this state. They were based materially on the fact that a cardinal quality of an estate by entirety was the right of survivorship. They did not consider that the separate estate acts intended to abolish that element in conveyances operating by common law to vest an entirety estate. Survivorship in joint tenancy had been abolished, but it was not considered that statutes turning joint tenancies into tenancies in common, and thus abolishing survivorship, touched estates by entirety. *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 363; *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462, 4 N. E. 824; *Robinson v. Eagle*, 29 Ark. 206. So it was held that the act abolishing survivorship between joint tenants did not apply to that peculiar estate known as an "estate by entirety." *Thornton v. Thornton*, 3 Rand. (Va.) 179. Therefore, in estates by entirety, the unfair rule that on the death of the husband or the wife the survivor took the whole still prevailed; but by a provision in the Virginia Code of 1849, going into force 1st July, 1850 (chap. 116, § 18), it was enacted that "if hereafter an estate of inheritance be conveyed or devised to a husband and his wife, one moiety of such estate shall, on the death of either, descend to his or her heirs, subject to debts, curtesy, or dower, as the case may be." This destroyed survivorship in estates by entirety. This statute is found in W. Va. Code 1868, chap. 71, § 18. A reason exists, from this, in this state, for saying that estates by entirety have ceased since the married woman's act, that does not exist in other states. Survivorship has per-

ished under the Code of 1849. The right of the husband to control and take the profits of and convey for his life the interest of the wife in entirety estates has been taken away by the separate estate act. What is left of an estate by entirety? Is its indivisibility or impartibility still left? I think not, as I think the statute of partition applies to it. From these considerations, I conclude that we cannot say that the statute of limitations does not apply because Higgins and wife had an estate by entirety, since I think that, by the joint operation of the act abolishing survivorship between husband and wife and the separate estate act, Higgins and wife held the land as joint tenants, not an estate by entirety. But Higgins had curtesy after his wife's death.

There is a second reason why the plaintiffs' right is not barred by the ten-year limitation. Nathan Higgins, in the lifetime of his wife, sold to Starkey the whole tract, as if he were sole owner, by an executory contract in terms providing for a future deed to convey the legal title, the purchase money also payable in future, and then Starkey went into possession; and later Mary Higgins died, and still later Nathan Higgins made such deed to Starkey. The burden of the argument for the defense is that the statute, having begun to run in the lifetime of Mary Higgins, had run out its ten years before this suit began. An answer is that Starkey's possession began and continued during the life of Mary Higgins, under that executory contract, and was never for one moment adverse to her, and never, in any view, could become adverse until the death of the husband. No cause of action accrued in the lifetime of Mary Higgins. Some authority from a few states is cited to show that the possession of a purchaser under an executory contract is adverse, not only to a stranger title, but as to the vendor also. We cannot so hold in the face of so much binding authority at home, which authority holds that possession is not adverse to the vendor. *Ketchum v. Spurlock*, 34 W. Va. 597, 12 S. E. 832; *Core v. Faupel*, 24 W. Va. 239; *Hudson v. Putney*, 14 W. Va. 561; *Clarke v. McClure*, 10 Gratt. 310; *Williams v. Snidow*, 4 Leigh, 14. The defense would reply to this position that, whilst Starkey's possession was not adverse to Nathan Higgins, Mary Higgins was another person,—she and her heirs,—and that the law is that possession, even under an executory contract, is adversary to strangers, and so it was as to Mary Higgins and her heirs. This is a very refined distinction,—to say that when one of two joint tenants sells by a contract the whole land, so that the holding under it is not adverse to him, it is as to his

fellow. He sells a unit. How can we thus split it? Higgins and Starkey treated it as a unit, but still it is not a unit as to Mrs. Higgins. They contemplated no bisection. The possession could not bear one hue or character as to one joint tenant, and another as to the other. Starkey entered that tract in recognition of the title of Nathan Higgins to the whole tract as an entire thing, recognized a still subsisting title in Nathan Higgins for the whole, as the cases cited say that when a purchaser enters under an executory contract, as a matter of law, whatever his real mind, he thus recognizes a still subsisting title in the vendor to the tract sold; and this being so, and the sale being one of the whole tract, that entry imports a still subsisting title in Higgins for the whole tract, and that would inure to the benefit of the cotenant, Mary Higgins, and, the possession not having the quality of adverse-ness to Higgins, neither had it as to his wife. This character of nonadverseness continued, from the character of the writing, until Higgins made a deed after his wife's death. If one tenant in common convey the whole by deed passing a legal title, it is an ouster of his cotenant; but not if it is only a contract for title, for it is not adverse then to either owner. There had been no partition between Higgins and wife. They claimed and held possession as joint tenants, *per my et per tout*. The physical possession by Starkey, of each and every acre was the same as that of each and every other acre.

The possession of one joint tenant or tenant in common or parcener is the possession of the other, and the possession of Starkey being under one cotenant, and not adverse to him, it was the friendly possession of the other. It bore the same cast as to Mary Higgins that it bore to Nathan. She was a joint tenant with him. I find a case bearing on this feature of the present case. *Ormond v. Martin*, 37 Ala. 598. A purchaser under a bond conditioned to make a deed took possession. The bond was made by an agent who had authority from several joint owners, but not from others. The court held the possession not adverse to any of the owners, saying: "The character of the possession is the same as to all the owners;"—that is, it not being adverse to some, it was not adverse as to other co-owners.

When possession under the executory contract ceased with the execution of the deed by Higgins to Starkey, then the possession became adverse to Higgins, but not to the heirs of Mary Higgins, for the reason that an estate by curtesy was at that date actually vested in Nathan Higgins, and Starkey was entitled by his deed to hold the half of Mary Higgins until her husband's death, 62 L. R. A.

and right of entry and action never accrued to the heirs until his death. *Central Land Co. v. Laidley*, 32 W. Va. 134, 3 L. R. A. 828, 9 S. E. 61; *Arnold v. Bunnell*, 42 W. Va. 473, 26 S. E. 359; *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56; *Austin v. Brown*, 37 W. Va. 634, 17 S. E. 207.

But let us separate Mary Higgins from her husband, and say that the fact that possession was not adverse to Nathan Higgins would not protect her right from limitation. Treat her as a stranger with a stranger title, not in privity with her husband's title. In reading up this case, this question occurred to me: Is the executory contract, not purporting to convey legal title, but stipulating for future conveyance of title, good color of title to sustain adversary possession? I do not find that the question has been pointedly considered and decided in the Virginias, and it is of some importance that it be discussed. Color of title is essential to give adverse possession to the whole boundary claimed, so as to apply the statute of limitations. *Jarvis v. Grafton*, 44 W. Va. 453, 30 S. E. 178; *Core v. Faupel*, 24 W. Va. 242. A writing must, to give color of title, show an apparent transfer of title. "Consequently, as a mere executory contract or bond to convey does not itself purport to transfer title, but only promises a conveyance in the future, such instrument does not ordinarily confer color of title." 1 Am. & Eng. Enc. Law, 2d ed. p. 859. In addition to cases there cited, I note *Isaacks v. Edwards*, 7 Humph. 465, 46 Am. Dec. 86, and *Rigor v. Frye*, 62 Ill. 507; the latter case holding that a "bond conditioned for execution of a deed on compliance with its terms in future is not color of title." 3 Washb. Real Prop. § 1981, so states the law. In *Osterman v. Baldwin*, 6 Wall. 116, 18 L. ed. 730, a land company issued a certificate of purchase showing that it had sold a lot, received payment for it, and promising to make a deed in future. The act involved required possession for three years under "title or color of title." The Supreme Court held: "If this writing, upon its face, professed to pass title, but failed to do it, either because the city company had no title, or for want of proper execution, it could be used as color of title. But an agreement to convey title at some future period is not color of title, within the meaning of the law." I am surprised to find so much law to this effect. I have made patient search, and, though innumerable instances of papers making color of title are found, I have not found many making contracts for title color of title, though it must be that innumerable cases of their use have occurred. It will be noticed that in our own cases language is used in-

porting that any claim of title, "legal or equitable," will do. *Swann v. Thayer*, 36 W. Va. 46, 14 S. E. 423, following cases there cited; *Bennett v. Pierce*, 50 W. Va. 604, 40 S. E. 395. From this language it might seem that a title bond or a contract would furnish color of title; but a deed purporting to pass title instantly would be good color, though in fact its maker had no legal title, but only in equity, as where one having right only under a title bond makes a deed purporting to presently convey legal title. I have found no case where the point was actually considered. In our cases, except *Adkins v. Spurlock*, 46 W. Va. 139, 33 S. E. 121, showing such liberality as to instruments giving color, the documents were those purporting to pass then and there actual title. Liberal as is the holding in the cases just cited, the general law seems to call for a paper giving "semblance or appearance of title,"—"any instrument, however defective, no matter from what cause invalid, purporting to pass or convey title to land."

In *Adkins v. Spurlock* the question is not considered, though, as it was directly involved, the adverse possession resting on an executory contract, we must count that case as authority for the proposition that such a contract is good color of title. For reasons about to be given, I think that decision is sound law. The profession in the Virginias has, I would say, generally regarded an executory contract as good color for adversary possession against strangers to the contract, and I have been surprised to find so much law to the contrary. The law elsewhere is based on the theory that a mere contract to convey confers no present estate, and in a court of common law is utterly unknown as a muniment of title, and is known only in equity, where it gives only an equity. It does not purport to pass even present semblance of title. By the common law, one purchasing by executory contract has no right to possession until he gets his deed, unless the contract so provides, but is only a tenant, if in possession. It is different where a deed is made, passing legal title. That gives instant right to possession as following the legal title, the title drawing with it right of entry. Under an executory contract the vendor could turn the purchaser out of possession by entry or ejectment. So little does such a mere contract avail at law the vendor retaining legal title which vests him still with the right of possession. *Newell, Ejectment*, § 18; 2 Minor, Inst. 229. There are some cases elsewhere holding an executory contract sufficient color of title against all persons except the vendor. *La Frombois v. Jackson*, 8 Cow. 589, 18 Am. 62 L. R. A.

Dec. 463; Elliott v. Mitchell, 47 Tex. 445; *Bell v. Coats*, 56 Miss. 776; *Power v. Kitching*, 10 N. D. 254, 86 N. W. 737. The *La Frombois Case*, 8 Cow. 589, 18 Am. Dec. 463, makes the fact that purchase money has been paid, entitling the purchaser to a deed, essential to constitute the contract color of title; but the Texas case says, as I say, that is immaterial. Between the parties the possession is not adverse, and, as to strangers, what is it to them that the contract has or has not been complied with? It is none the less a holding hostile to them. So we find respectable authorities holding under the common law that such a contract is good color for adverse possession, and where is the substantial soundness for a contrary position? If I sell to A a boundary of land, and put him in possession, under written contract binding me to convey that boundary, where is the sense in allowing a hostile claimant, against whom A has held for the statutory period, to say to A, "You have no legal title or semblance of title?" A should be allowed to present his actual possession, and impute it to his vendor's title for color. And, viewing him only as a tenant,—and surely the writing would give him that character at law,—why could he not defeat the adversary claimant?

But if this position be not sound, then I refer to Code 1899, § 20, chap. 90, providing that "a vendor, or any person claiming under him, shall not at law recover against a vendee, or those claiming under him, lands sold by such vendor to such vendee, when there is a writing stating the purchase, and the terms thereof, signed by the vendor or his agent." And then, too, I may refer to Code 1899, chap. 98, cl. 6, saying that no one shall without a writing be chargeable "upon any contract for the sale of real estate, or of the lease thereof for more than a year." These statutes give an executory contract for the sale of land validity, operation, and effect in all courts,—law or equity. The first utterly changes the rule that a vendor can turn out his purchaser. He must now go into equity to enforce his rights according to the contract, and can no longer recover possession at law, whether the purchaser owes for the land or not. *Suttle v. Richmond, F. & P. R. Co.* 76 Va. 284; *Dobson v. Culpepper*, 23 Gratt. 354; *Williamson v. Patton*, 18 Gratt. 475; *Hutchinson, Land Titles*, § 476; 2 Minor, Inst. 229.

Upon these statutes, I hold that such a contract is recognized at law, even against the vendor, to defend the vendee's possession, though not as color of title; and for a stronger reason has it virtue against a stranger, to show color of title and give bounds to the possession.

I have considered the effect of possession by Starkey during the life of Mary Higgins, and up to the date of the deed from Nathan Higgins to Starkey under the executory contract; but what is the effect of Starkey's possession after that deed? I have virtually answered this question above. Counsel argue that the heirs of Mary Higgins were cotenants with their father, and that the conveyance by him to Starkey of the whole tract was an ouster of the heirs, and the statute commenced to run at latest from the date of that deed. There are two reasons why this cannot be so. One is that the tenancy by the curtesy was then vested in Nathan Higgins, and his deed gave it to Starkey. If no sale or conveyance had been made by Higgins, he would have had for his life sole and exclusive possession of his wife's half of the tract, and the law is that the life tenant's possession is in harmony with, not adverse to, the reversioner or remainder-man. The heirs had no right of entry against their father or one claiming under him. *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56; *Austin v. Brown*, 37 W. Va. 634, 17 S. E. 207. So, when the father conveyed, he conveyed that life estate, and the holding of Starkey during its continuance was not adverse to the heirs. Section 3 of *Austin v. Brown*, 37 W. Va. 634, 17 S. E. 207, so holds. But it is asserted that such possession was adverse, because the father conveyed the fee to the whole tract, and that this was an ouster of the heirs. We admit that if one joint tenant convey the whole, and the grantee takes possession under his deed, claiming the whole, the conveyance is an ouster of the cotenant, and the possession adverse to him, and the statute runs against him. *Bennett v. Pierce*, 50 W. Va. 604, 40 S. E. 395; *Talbot v. Woodford*, 48 W. Va. 449, 37 S. E. 580; 1 Cyc. Law & Proc. 1078; 1 Am. & Eng. Enc. Law, p. 806. That is the case of simple cotenants, where each is, at the instant of the conveyance, entitled to immediate possession; but it is not so in a case like this, where one of the joint tenants has a right to possession, not only of his own half, but also of that of his cotenant for the former's life, so that the cotenant's right of possession is deferred by law until the close of the life estate. These heirs of Mary Higgins had no right of entry for one moment from the last breath of their mother to the last breath of their father, because of that estate by the curtesy. It is that curtesy which makes the difference. That brings in the rule that the statute does not run against the reversioner or remainder-man until the life estate ends. *Arnold v. Bunnell*, 42 W. Va. 473, 28 S. E. 359; *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56; *Austin v. Brown*, 37 W. Va. 634, 17 S. E. 207. 62 L. R. A.

It is not material that the conveyance was of the whole from Higgins to Starkey, and that Starkey claimed in denial of any title in the heirs, because neither Nathan could sue Starkey by reason of his deed, nor could the heirs by reason of that same deed conveying an estate good against the heirs until the death of Nathan Higgins. If it be said that after the deed Starkey's possession was adverse to Nathan Higgins, and therefore also adverse to the heirs, the reply is that, if the life tenant suffer an ouster, those vested with subsequent estate need not sue, even if they can, as in case of distinct adverse title, but may wait until the end of the life estate, on principles and authorities given above, as a new right of entry comes to them for the first time at the close of the life estate. Buswell, Limitations & Adverse Possession, § 270, says: "Rights of reversioner preserved. It was a general rule of the common law that an undisturbed and uninterrupted possession for sixty years created a complete title in the possessor, as against every other person; but this is only true when the claimant or demandant not in possession might have asserted his right to enter at any time during the sixty years. Thus, an estate for life or years may continue for upwards of sixty years, and yet the reversioner may at the expiration of such estate prosecute his right of entry by ejectment. As, in theory, the remedy only, and not the right, is barred by the statute, it is possible that an intervening estate might be enjoyed for centuries, and then be at last recovered." That was the case even where the titles are distinct; but in this instance there is but one title, and the hands of the heirs were tied by imperative law until the close of the curtesy estate. I find the case of *Adkins v. Spurlock*, 46 W. Va. 139, 33 S. E. 121, sustaining this position. Two heirs of a mother held her estate subject to their father's curtesy. He conveyed his interest to them, but a claimant under another title had been in possession for the statutory period. In a suit by the heirs while the father yet lived, we held that his deed passed nothing to the heirs, as his life estate had, by the statute of limitations, passed to the hostile occupant, and the heirs could not sustain ejectment while the father lived, but we recognized their right to sue when the life estate should come to an end. Equally—more so—is such the case in the present instance, where the father has conveyed his life estate to Starkey, and Starkey was in by right until the end of the life of Higgins.

The other of the two reasons mentioned above why the deed from Higgins to Starkey is not an ouster of the heirs, starting the statute against them, is that, to make a con-

veyance of the whole tract by one joint tenant to a stranger so operate, there must be a possession taken under that deed, attributable to it alone. *Freeman, Cotenancy*, § 226; *Hannon v. Hannah*, 9 Gratt. 146. "The making of a deed for the whole property by a cotenant to a stranger is not such act of ouster, unless actual adverse possession is taken thereunder." *Parker v. Brast*, 45 W. Va. 309, 32 S. E. 269 (syl., point 5). It is, on similar principles, held that, if one asks to enforce an oral contract for purchase of land, he must show entry into possession under it in execution of it. *Gallagher v. Gallagher*, 31 W. Va. 9, 5 S. E. 297. In the case in hand, Starkey was already in possession lawfully under the executory contract, and he made no change, but simply continued on under it,—did no fresh act of assumption of possession,—and we cannot say that his possession is ascribable to the deed. Rather should we say that his continuance in possession is to be ascribed to the executory contract.

The South Penn Oil Company says that, even if Starkey's possession does not bar the plaintiffs under the ten-year statute, it cannot be ousted of possession or called to account, because it leased the land for oil, and developed the same, and under its lease had held possession for more than three years before this suit was brought, and is protected by chapter 61, p. 152, Acts 1872-73, which reads as follows: "That any person or persons, in peaceable possession of lands claiming title under a lease of the same for the purpose of operating for oil or minerals, and who may have continuously remained in such possession for the space of three years, and have bored for, and in good faith expended money in such boring and operating, shall be entitled to plead said facts in bar, and said facts shall be a bar to any action at law, or in equity, instituted to establish title to recover possession of said lease, or to recover the profits received therefrom: provided, that nothing in this act contained shall be so construed as to authorize a tenant to set up as a bar to a recovery an adversary possession against his landlord, and that this act shall not affect any suit brought within twelve months after the passage of this act." It may be questioned whether this act at all enters into this case. It may be questioned whether it applies at all between a claimant in fee of the land and a lessee,—between one claiming the land in opposition to the lease and the lessee. It may be applicable only in a contest between claimants of the lease. It is indefinite and badly drawn, but let us say that it has the broader application. Several questions occur under it.

Is this act still in force, or was it repealed 62 L. R. A.

by the act of 16th March, 1882, p. 298, chap. 102, found in chapter 104 of the Code? Its object was to amend and re-enact chapter 104 of the Code as it had before existed. Its general comprehensive subject is, "Limitation of suits." I may say that the act gives periods of limitation for suits generally. One of its subjects is, "Limitation of entry on, or action for, land." This is very broad. It covers right to recover land by one claiming in fee, for life, for years; actions to recover possession, that being an essential element of title. So the act of 1873 is an act to limit a suit to recover possession of land. Both acts therefore limit the time for recovery of possession. One gives ten, the other three, years, and they seem inconsistent. But for the act of 1873, I suppose that an action against one in possession under an oil lease would be ten years, as it would be against any other occupant, under chapter 104, but after the act of 1873 it would be three years. This fact shows inconsistency between the two acts; in other words, the act of 1873 by strong implication amended § 1 of chapter 104 as it had before been. Afterwards, in 1882, the legislature re-enacts § 1, chap. 104, in the very words it contained before the act of 1873, making the future law, and making no exception of oil leases; giving them no shorter limitation than actions for recovery of possession in other cases, but bringing them under the ten-year limit, unless the act of 1873 still stands out alive, unaffected by the act of 1882. The act of 1882 closes with the section: "All acts and parts of acts inconsistent with the provisions of this act, and coming within the purview thereof, are hereby repealed." This repealing section has great import and force.

I have stated that the act of 1873 is inconsistent with Code 1868, chap. 104, § 1. It is also within its purview, for the purview is all the act after the preamble,—the whole scope of its enactment. "Where a statute repeals all former laws within its purview, the intention is obvious . . . to sweep away all existing laws upon the subjects with which the repealing act deals. The purview is the enacting part of a statute, in contradistinction to the preamble, and a repeal of all acts within the purview of the repealing statute should be understood as including all acts or parts of acts in relation to all cases which are provided for by the repealing act, and no more." *Sutherland, Stat. Constr.* § 137. Now, the act of 1882 surely legislates on the same matter covered by the act of 1873, as it gives a limitation to actions for the recovery of the possession of land. To repeal an act under it, that act must not be merely within its purview, but must also be inconsistent. So I think the repeal of the act of 1873 is expressed in the act of 1882.

The act of 1873 was regarded as necessary to take oil leases out of § 1, chap. 104, of the Code. If so, why does not the literal re-enactment of Code, § 1, not saving oil leases, put them back as before the act of 1873?

The opinion by Judge Dent in *Totten v. Nighbert*, 41 W. Va. 800, 24 S. E. 627, sustains the positions above stated as to repeal by expression. And an act in 1871 (Acts 1871, chap. 194, p. 247) provided that a tax sale should confer all the state's title acquired by sale for taxes upon anyone who should buy the land afterwards at a tax sale. Later an act was passed (chapter 31 of the Code), a general statute covering the whole subject of tax sales and the title vested in purchasers thereby, just as chapter 104 covers the whole subject of limitations of actions for recovery of land, and it repealed all acts inconsistent with it. The court held that the act of 1871 was repealed by the expression of the act of 1882, and also that of 1872-73, by reason of said repealing clause. The later act made full provision as to what title should pass by a tax sale, but contained nothing to give the sale force to pass the state's title, and thus impliedly, if not expressly, repealed the act of 1871. There is a consideration lending decided support to the view that it was not likely the intent of the legislature, and it should not be understood as meaning, to keep alive the act of 1873. That act makes a discrimination between persons not very readily approvable. Here is a person, occupying land, engaged in farming. He must be in peril from a hostile title for ten years before time gives him peace. On adjoining land is an occupant of an oil lease. He is kept in suspense only three years. The better title had the advantage of ten years in one case, and another of only three years. Against this view it is argued that the act of 1873 is a special act applying a special limitation for oil leases, shorter because oil developers spend large sums in development, and the act tends to improvement of the country to favor them; but men that fell the forest and build fences and homes spend labor and money. Many others than oil lessees spend large sums in improvement.

But it is said that the act of 1873 being thus special, and chapter 104 of the Code general, the former is not repealed by the latter. There is some law to support this claim. *Sturm v. Fleming*, 31 W. Va. 701, 8 S. E. 263, may be cited for this purpose. An act provided that the time during which the seller's test oath prevailed should be excluded from computation under the statute of limitations, in favor of one who could not take that oath; and it was held that the re-enactment of chapter 104 on limitations, though it did not except such cases, did not

repeal the special act. But there is the later case of *Totten v. Nighbert*, 41 W. Va. 800, 24 S. E. 627. The argument is made that § 1, chap. 104, of the Code of 1868, is literally the same as its re-enactment by the act of 1882, and that its re-enactment did not make it a new law; that there was never a moment since 1st April, 1869, when it was not law, by reason of the principle that, when a statute continues former statute law, that law common to both acts dates from its first adoption, and only such provisions of the old act as are left out of the new one are gone, and only new provisions are new laws. *State v. Mines*, 38 W. Va. 125, 18 S. E. 470 (syll., point 7); *Burns v. Hays*, 44 W. Va. 503, 30 S. E. 101. I suppose the idea is that there was the Code of 1868; then the act of 1873, operating as an exception to its generality; then the act of 1882, repeating the very words of the Code of 1868, leaving the act of 1873 as if standing aside unharmed. But I would say that it is more logical to hold that, as the legislature knew of the act of 1873, and did not insert in 1882 the exception made by it, the intention was to repeal it.

There is another reason why the three-year statute does not protect the South Penn Company. It has not proved that it entered upon and bored for oil on the Higgins land three years before suit. It must so show. Starkey and wife leased to that company a tract of 104 acres, made up of 74 acres, part of the 100 acres conveyed by Edgell to Higgins and wife, and the balance of other and distinct land. In August, 1895, the company went upon the land and began work of development, but that was not on the 74 acres. The second well was on this Higgins land, but that well was not begun until December, 1895. The company claims that its possession and work on that part of the lease outside the 74 acres was possession and work on the whole. Generally possession of part under a color of title is possession of the whole; but where the land within the boundary given by the instrument includes land of two separate owners, and the actual *pedis possessio* is only on land claimed by one of those persons, and there is no actual *pedis possessio* on land of the other, there is no constructive actual possession as to the claimant whose land has never been invaded by actual physical possession. He cannot sue until the foot of his adversary is planted on his land. The mere claim of that adversary does not call his adversary into action. The South Carolina court said: "There can be no constructive adverse possession of land against the owner where there has been no actual possession which he could treat as a trespass, and bring an action for." *Steedman v. Hil-*

liard, 3 Rich. L. 101; *Buswell, Limitations & Adverse Possessions*, § 256; 1 Am. & Eng. Enc. Law, note 3, p. 865. Moreover, the curtesy did not end so the heirs could sue until 1898, when Nathan Higgins died, and that would protect the heirs against the three-year statute as well as the ten-year statute.

Another important question has presented itself to my mind: Is the title of the act of 1873 sufficient, under § 30, art. 6, of the Constitution, reading: "No act hereafter passed shall embrace more than one object, and that shall be expressed in the title?" The title of the act is, "An Act Concerning the Limitation of Actions in Certain Cases." This is very general and indefinite. It concerns the limitation of actions, but what actions, and how or wherein it concerns them, it does not indicate or hint. For what actions does it propose a limitation, or in what cases or character of cases, it does not indicate. It is true that the title of an act need not be a detail or index of the contents of the act, but it must reasonably and fairly indicate its object and subject, as stated in *State v. Mines*, 38 W. Va. on page 139, 18 S. E. 470, on the authority of *Montclair Twp. v. Ramsdell*, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. Rep. 391. See *Crookston v. Polk County*, 79 Minn. 283, 82 N. W. 586; *McEldowney v. Wyatt*, 44 W. Va. 711, 45 L. R. A. 609, 30 S. E. 239. The "object" of an act is the aim or purpose of the enactment, while the "subject" is the matter to which it relates and with which it deals. *State v. Ferguson*, 104 La. 249, 28 So. 917. This does indefinitely give the subject of the legislation (that is, legislation concerning limitations), but does it indicate the aim, object, purpose? It does not indicate an intent to fix a limitation of suits to recover oil and mineral leases. It is not a general act of limitations, but only in certain cases, and those not indicated. Its aim is not given, further than it imports legislation touching the statute of limitations in certain cases. What cases, is not indicated; and there are dozens of subjects to which limitations apply, and those of diverse nature. I think "An Act to Prescribe the Limitations of Actions and Suits" would be a good title, but here it is not such. It says it is an act concerning limitations, but, not stopping there, it confines such limitations to "certain cases," and those it fails to give; those words seeming to me to call for a specification. The act does not intimate that it concerns oil leases. You could not learn that without reading the act. The title does not tell you so. I grant, as a rule necessary to avoid unreasonably hampering the legislature, that it is only necessary that the title should not detail, but merely indicate the object in a general way. *Montclair Twp. v.* 62 L. R. A.

Ramsdell, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. Rep. 391; *Bobel v. People*, 173 Ill. 19, 50 N. E. 322. It is not required that the title detail the items of the object of the act, or every enactment that is germane and cognate to the title, for, if it be not germane, the enactment is bad, both because not germane to the title, and there is a distinct object not expressed. But our point is whether there is a sufficient title. The reason for requiring the object to be expressed is that the members of the legislature and the people shall not be misled by the title; to prevent surprise in legislation; to attract the attention of both to the particular object. It must not be so general as to conceal the real enactment,—the real aim. *Brown's Case*, 91 Va. 772, 28 L. R. A. 110, 21 S. E. 357. It may be general, but must be specific enough to fairly give notice of the actual enactment. *Sutherland, Stat. Constr.* § 88. *Cooley, Const. Lim.* 173, says that the title must point to the enactment so far as to prevent fraud or surprise by means of provisions of which the title gives no intimation, and which might be overlooked and carelessly and unintentionally adopted, and to fairly apprise the people, through the publication of legislative proceedings usually made, of the subjects of legislation, in order that they may be heard by petition or otherwise. If the title "clearly and distinctly expresses the whole object of the legislation," it is sufficient, is the rule put in *Carter County v. Sinton*, 120 U. S. 617, 30 L. ed. 701, 7 Sup. Ct. Rep. 650. Does the title in question do this? I think not. Counsel for the South Penn Company cite *Perdue v. Caswell Creek Coal & Coke Co.* 40 W. Va. 372, 21 S. E. 870. It did not at all consider whether the act of 1873 had been repealed or was constitutional, but simply held that a plea setting up an oil lease as protected by it was not a good plea, for failure to specify the lease; that is, the plea did not raise the question of the act in any wise.

The subject of the validity of the act of 1873 when tried by Amendment 14 of the national Constitution is not passed on, as it is not relied upon by counsel for the plaintiffs. So we conclude that the act of 1873 does not bar the right of the plaintiffs against the oil companies.

It is claimed that the plaintiffs are barred of recovery by estoppel *in pais*, from conduct of Mary Higgins and those claiming under her. When asked what constitutes the estoppel, a brief answer is that Mary Higgins knew that Starkey was negotiating the exchange of tracts with her husband, or must have known, and that it had been consummated and carried into effect by removal of their son from the 100-acre tract, and by

the taking of possession by another son of the 50-acre tract received by Nathan Higgins in the exchange, and the delivery of possession of the 100 acres to Starkey, and of the 50-acre tract to a son of Mary Higgins, and her knowledge that Starkey was claiming the land as his own, and that she said that she was glad of the exchange. The utmost that we can find to operate against Mary Higgins and her children is silence, except that a witness says he heard her say in a casual conversation that she was glad of the exchange, as her son, who lived on the 100 acres, could not get along with a neighbor. This was after the exchange. It did not cause or further the trade. It did not induce Starkey to change his condition, or induce the oil companies to spend money. To constitute an estoppel, it must have so operated. *Norfolk & W. R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *Bettman v. Harness*, 42 W. Va. 433, 36 L. R. A. 566, 26 S. E. 271. Starkey was not present, and it is not shown that he ever heard of this remark of Mary Higgins. It was only a remark. It has not the gravity necessary to make an estoppel. As to Mary Higgins' knowing of the exchange, it is not claimed that she had any active participation in it. She simply was silent. That is not enough. In *Heavener v. Godfrey*, 3 W. Va. 426, it was held that a wife had not lost her right to a fair partition by the fraudulent acts of her husband, nor by her explicit participation in and consent to a partition made by her husband with another. Mrs. Godfrey was active; Mrs. Higgins, only silent and passive. We all know, from our knowledge of human nature and experience in human affairs, that married women are not alert to assert their rights or dissent from the action of their husbands. In fact, Mary Higgins was then in a late stage of consumption, and very soon died. She was in no condition to be charged with full knowledge and acquiescence in this transaction, so far as to charge her with an estoppel. But she did nothing but maintain silence. She is guilty of no act of fraud. The Code allows a woman to pass her land only by a deed joined in by her husband, and acknowledged by both. Can she convey by mere silence, as is claimed in this case? Can she thus lose her land? This subject is discussed in *Williamson v. Jones*, 43 W. Va. 571, 578, 38 L. R. A. 694, 27 S. E. 411, and it is there held that by even fraudulent conduct she cannot lose her land. She may make a void deed, afterwards admit its validity, and see her grantee make valuable improvements, yet is not thereby barred of her right to her land. Positive fraud is essential to bar, if even that will take away her land by estoppel *in pais*. 15 Am. & Eng. Enc. Law, 2d ed. 62 L. R. A.

p. 802. There is nothing shown against the plaintiff to work an estoppel by conduct, except silence. There must be some overt act to show intent to mislead. *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874. A man is not bound to speak, unless he is so situated as to the rights of others that the law calls upon him to speak out. *Greer v. Mitchell*, 42 W. Va. 494, 26 S. E. 302. The true owner need not seek an adverse claimant and tell him of his rights. *Williamson v. Jones*, 43 W. Va. 562, 38 L. R. A. 694, 27 S. E. 411 (syl., point 8), 64 Am. St. Rep. 891, note p. 920. A clear, strong case of estoppel must be made out where a clear legal title to land, requiring written conveyance to pass it, is to be divested out of its owners and vested in others as if a conveyance had been made. *Williamson v. Jones*, 43 W. Va. 571, 578, 38 L. R. A. 694, 27 S. E. 411. The mere expression of satisfaction with the exchange made by Mary Higgins is utterly abortive to lose her title, for, if she had expressly admitted that Starkey had her title, that would not divest her of it, even if she had been single; and much less she being married, in the face of the statute requiring a deed. *Suttle v. Richmond, F. & P. R. Co.* 76 Va. 284; *Jackson v. Davis*, 5 Cow. 123, 15 Am. Dec. 451, 459, cited in *Delaplain v. Grubb*, 44 W. Va. 617, 30 S. E. 201, to this point. There is no ground to bar the plaintiffs on the basis of estoppel. It is not shown that Starkey or the oil companies, in reliance upon that casual expression of Mary Higgins (it does not appear that they ever heard of it), spent money or changed conditions; and without this, even as to persons *sui juris*, there is no estoppel. *Western Min. & Mfg. Co. v. Peytona Cannel Coal Co.* 8 W. Va. 406 (syl., point 12); *Norfolk & W. R. v. Perdue*, 40 W. Va. 442, 21 S. E. 755, and the person must have a purpose to mislead.

This decision may, in its results, bear hard on the defendants, but they have to blame themselves. The deed of joint estate in Higgins and wife was on record, open to all. Nothing but neglect to take the simplest usual course to know the condition of title is the source of the trouble. A purchaser should look a little to see whether his grantor has good right. And, as just occurs to me, the very deed between Higgins and Starkey, in words, recited that the 100 acres had been conveyed to Higgins by the Edgell deed, by date and page of record, thus warning him of that deed; and the exchange agreement called it the Allen Edgell land. Starkey simply risked good title, or bad, rather.

We reverse the decree of the Circuit Court, and send the case back to it to be further proceeded in according to principles above stated, and further according to the rules

and principles governing courts of equity in such cases.

Note by **Brannon, J.:**

Upon a petition for rehearing, the court carefully examined the case, and saw no ground for rehearing. It occurs to me to add this note, to present a further view for the position taken in the above opinion that never for a moment was there any adverse possession until after the death of Nathan Higgins. I have stated above that it is impossible to say that, as the possession under the executory contract was not hostile to Nathan Higgins, it was nevertheless hostile to his wife; and I say again that there could not be a possession adverse to half the tract, half the acre, half the pebble, half the molecule. But reflect further that nobody will say that as to Nathan Higgins the possession as to the whole tract was adverse. Everyone must admit that it was friendly. This being so, we then bring in the fact that between Higgins and his wife there was a relation of privity and unity,—that of joint tenancy,—and the same character the possession bore to Nathan Higgins it bore to his wife. The possession being by executory contract while the wife lived, and not being adverse to him, neither was it adverse to her. He was her tenant, as well as his tenant. Dry law views them as such. A court of law views them as such, and adverse possession is governed by this view. Had Higgins made a deed, instead of a contract, the possession would have been adverse to him; and, being adverse to him, so it would have been as to her.

But even if the possession had been adverse to Mrs. Higgins while she lived, at her last breath the law cut off that adverse possession because of her husband's curtesy. Her heirs were instantly barred from suit by an act of God, for which they are not responsible, and they should not suffer therefrom. Upon her death the law gave their father curtesy, and that prevented their suit, and they had to obey the law. So far as disability of infancy is concerned, the statute did not stop. As to it they could sue; but then that curtesy stood in their way, and it prevented them from suing until the last breath of their father. That was not a dis-

62 L. R. A.

ability, and is not tested by the law of disability. How can it be said, with reason or justice, that, when only two years of adverse possession had passed, the heirs are barred? They are entitled to that full period given by the statute. It is immaterial to say whether the statute was suspended during curtesy, so as to allow possession before the death of the wife to be tacked to that after the death of the husband, or whether the possession during her life was tolled—taken away—and a new cause of action accrued after the husband's death. The case of *Steele v. Gellatly*, 41 Ill. 39, supports the position taken in the above opinion as the import of *Jackson v. Johnson*, in saying that the statute cannot view until there is a person who can sue, and that "so decided have the courts been on this point that, although it is a general rule, when the statute has begun to run, it shall continue to run in spite of supervening disability. Yet in the case of *Jackson ex dem. Stuarticout v. Johnson*, 5 Cow. 74, 15 Am. Dec. 433, the court held that the statute having commenced to run actually ceased during the period when the person having the right had no legal power to enforce it. This question is, of course, wholly distinct from that of mere disabilities. Whether married women or infants, or any other class of persons having an estate, shall be considered as under disabilities, and therefore excused from bringing suit, or what time shall be allowed them after such disabilities are removed, are questions for the legislature, and the courts have only to obey its behests. But the case we are considering is not one of technical disability in the ordinary sense of the term, where the persons having the right have also the legal power to assert it in the courts, but are excused on account of infancy or coverture; but it is one where the claim sought to be barred has been in such a position that it could not be asserted by anyone. If a claim of this character could be barred, it would be simple confiscation, without crime, fault, or laches on the part of the owner, and we cannot suppose the legislature so intended."

The law cannot deny action and yet confiscate property for failure to sue. So applied the statute would be unconstitutional.

WISCONSIN SUPREME COURT.

GREEN BAY & MISSISSIPPI CANAL
COMPANY, *Appt.*,

v.

KAUKAUNA WATER POWER COM-
PANY, *Respt.*

(112 Wis. 323.)

1. An action for wrongfully appropriating water from a reservoir created by plaintiff's dam is one in tort.
2. Direct allegation of damages for wrongful withdrawal of water from plaintiff's power reservoir is not necessary, since it is implied by the law.
3. That the owner of a dam and pond on a flowing stream has no facilities for using the power created thereby does not prevent his recovery of substantial damages from one who wrongfully withdraws

water from the pond to the injury of the power.

4. Money received as rents for water wrongfully taken from plaintiff's pond cannot be recovered in an action to recover for the wrongful taking of the water.
5. The measure of damages to be recovered by the owner of a dam and pond from one who wilfully diverts water from the pond without right is the market value of the power actually taken, with annual interest, notwithstanding the owner had no facilities for using the power, so that it would have gone to waste had it not been taken and used by the wrongdoer.

(November 5, 1901.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Outagamie County

NOTE.—Liability for withdrawing water from reservoir.

GREEN BAY & M. CANAL CO. v. KAUKAUNA WATER POWER CO. presents a question which does not seem to have been before decided by any court. The courts have held that equity may enjoin the letting off of water from a reservoir after it has been accumulated by facilities which give it a potential value. *Ballou v. Hopkinton*, 4 Gray, 324; *Emerson v. Bergin*, 71 Cal. 335, 12 Pac. 242.

And that the right of one in possession and enjoyment of such a water privilege cannot be questioned by a stranger who shows no title thereto. *Howard v. Ingersoll*, 17 Ala. 780.

So, the owner of water stored in such a reservoir cannot recover for the use by another of water escaping from the reservoir by a waste way which he is powerless to reclaim. *Washbaugh v. Oyster*, 18 Pa. 497.

But it seems to have been reserved for the KAUKAUNA WATER POWER CASE to settle the fact that an action of tort can be maintained for the wrongful taking of water from the reservoir, and that the measure of damages is the actual value of the power, whether the owner has present facilities for utilizing it or not.

The rights which exist in stored water are illustrated by the following decisions:

In *Butman v. Hussey*, 12 Me. 407, in which the owner of a right to take a certain quantity of water from a common reservoir made an excessive use of his privilege, the court said that, if a stranger had inserted a flume in the dam, and had thus withdrawn a portion of the water, when called upon by the owner for this invasion of his rights it would be no sufficient answer for him to prove that the owner had still enough left to work his mills. And the court said that it was satisfied that it is, and must be, a damage to the owner of the mill pond to abstract water power therefrom of which he is the owner, and which he is at liberty either to use or sell. In that case the jury found a verdict for nominal damages only, and judgment was entered upon the verdict so found.

The upper owner cannot tap the pond which has been thrown back upon his land by the lower owner to secure water to run his machinery. *Merritt v. Parker*, 1 N. J. L. 400.
62 L. R. A.

Case will lie for consequential damages from an alleged diversion of water caused by one who wrongfully enters upon the mill premises and removes a flash board. *Meyer v. Horst*, 106 Pa., 552.

A person having a right to a certain portion of the water of the stream at a particular dam has no right to draw off the same portion at a considerable distance above the dam, without the consent of the owner of the other mills on the same dam. *Webb v. Portland Mfg. Co. v. Sumn.* 180, Fed. Cas. No. 17,322.

A change of place in the use of water power presents no cause of complaint to the owner of a water privilege at one end of the dam, so long as a mill owner on the other bank of the river, who opens the gates of his end of the dam and allows the water to flow down to be used in mills owned by him situated lower down, does not use a greater quantity of water than he is entitled to. *Whittier v. Cochecho Mfg. Co.* 9 N. H. 454, 32 Am. Dec. 382.

A mere verbal claim of the right to use water from another's race way, unaccompanied with acts of ownership, may not amount to adverse user or enjoyment. *Fox River Flour & Paper Co. v. Kelley*, 70 Wis. 287, 35 N. W. 542.

A lower mill owner who claims, and for the prescriptive term actually enjoys, a continuous use of water from a dam and flume upon another's lands, is not prevented from acquiring a vested right thereto by prescription, by mere verbal objections and denials by the upper proprietor, who, having the power and opportunity, does nothing to interrupt the user. *Kimball v. Ladd*, 42 Vt. 747.

When there is no privity between them, the uninterrupted adverse enjoyment of the right to take water from a milldam and flume by one mill owner does not inure to the benefit of another mill owner on the same stream, served from the same dam and flume. *Perrin v. Garfield*, 37 Vt. 304.

When, as between two mills served from the same dam, a paramount right to use the water for one has been claimed and enjoyed for more than fifteen years when and to whatever extent it was required, leaving only the surplus for the other, any equal or superior water privilege, which theretofore may have appertained to the mill thus made servient, is extinguished. *Rogers v. Bancroft*, 20 Vt. 250.

in favor of defendant in an action brought to recover the value of the water alleged to have been wrongfully abstracted from plaintiff's power reservoir. *Reversed.*

Statement by Bardeen, J.:

This action was commenced in August, 1896, to recover the value of the use of plaintiff's water power wrongfully appropriated by the defendant. The complaint sets out plaintiff's ownership of the water power on the Fox river furnished by the upper dam at Kaukauna; that on May 9, 1896, the defendant "wrongfully entered into possession of, and wrongfully took and appropriated" to its use, one half of said hydraulic power, stating the manner in which it was done; that an action was commenced by plaintiff against defendant to determine the title to said power and to restrain defendant from its use, and on May 9, 1888, a judgment was duly entered by the circuit court of Outagamie county that the plaintiff was the owner of said power, which judgment was duly affirmed by this court and the United States Supreme Court; that since May 9, 1888, and until May 9, 1895, the defendant and its tenants "wrongfully continued to draw about one half of the Fox river from said pond," and has thereby "wrongfully appropriated to its own use the one half of the hydraulic power furnished by said dam," to

the damage of plaintiff as herein set forth; that defendant had wrongfully availed itself of the use of about 1,500 horse power of water power, of the annual value of \$5 per horse power. The answer alleged the building of the dam by the United States; the defendant's ownership of land on the south side of the river, above and below the dam; denies, with some qualifications, plaintiff's ownership of land on the north side of the river; admits the former litigation and judgment, but denies the plaintiff's ownership or possession of "any valuable water power created by said government dam, for the reason that it had no land, head race, canal, or other instrumentalities for utilizing the power of the water as it fell from the crest to the foot of said dam;" alleges the building by defendant of a canal at large expense to utilize the water power, through which canal it drew water, used it for power, and discharged it below said dam, during a part of the time mentioned in the complaint, and that said power, "independent of said canal, would have been of no practical value; that . . . the only right of the plaintiff which was involved was the valueless right to have the water flow over said dam;" and denied that defendant had appropriated or used any valuable water power of the plaintiff, as alleged in the complaint. The answer then set up the statute of limitations as

Although a grant to one, not a tenant, of the right to take water from a mill flume owned by another, not his landlord, is presumed from its uninterrupted exercise for more than fifteen years, whether under a claim derived from a third party, or the flume owner accompanied by his continued acquiescence, such presumption is rebutted, when it is shown that the claimant, within the time, acknowledged the superior right of the owner, even though he did so under a mistake as to his own rights. *Mitchell v. Walker*, 2 Aik. (Vt.) 266, 16 Am. Dec. 710.

Where there has been an adverse use of water for twenty years from a dam owned during the beginning and the end of the period by parties who were of full age, but there was an intervening period of three or four years when the title was held by a minor, such intervening disability will not defeat the presumption of title resulting from the twenty years' possession. *Wallace v. Fletcher*, 30 N. H. 434.

Equity has jurisdiction of a suit by the owner of a mill pond to restrain the drawing of water therefrom by a third person, who claims a right to do so under a deed which requires construction, where the anticipated injury will be continuing and its extent is doubtful. *Lyon v. McLaughlin*, 32 Vt. 423.

But an injunction will not be granted to restrain interference with the plaintiff's alleged right to draw water for the use of his mill from the defendant's reservoir, where the right is controverted, has not been established at law, and it does not appear that there is danger of irreparable mischief, or that the plaintiff has not an adequate remedy at law. *Perkins v. Foye*, 60 N. H. 496.

62 L. R. A.

A purchaser from the state of surplus water power created by a dam in aid of navigation, and which is reserved to the state by the statute authorizing the improvement, is entitled to an injunction restraining riparian proprietors, who have cut through an embankment built in front of their land for the purpose of utilizing the water power of the pond by means of a canal constructed by them, from drawing water therefrom for such purpose. *Green Bay & M. Canal Co. v. Kaukauna Water Power Co.* 70 Wis. 635, 35 N. W. 529, 36 N. W. 828.

One who has the right to take the surplus water from a pond made by a dam and embankment owned by the United States may, in the discretion of the court, be refused a mandatory injunction to compel one who, without right, has cut through the embankment for the purpose of utilizing the power, to restore such embankment where the gates erected at such point stop the water as effectually as the bank would if restored. *Ibid.*

Persons who keep, maintain, and continue an outlet cut by a third person, which drains the water from a pond, may be liable for the injuries thereby caused if such conduct necessitates direct and positive efforts to keep the outlet open. *Smith v. Moodus Water Power Co.* 33 Conn. 463.

Several owners on the same stream may unite in a bill to enjoin the drawing of water from a reservoir used by them jointly for the benefit of their mills. *Ballou v. Hopkinton*, 4 Gray, 324.

One tenant in common of a water right may sue alone to protect or recover the water from a trespasser or one using it without right. *Spanish Fork City v. Hopper*, 7 Utah, 235, 26 Pac. 293.

against any water used prior to August 1, 1890. The case was tried by the court without a jury. Many of the facts were stipulated. The stipulation covered the circumstances of building of the dam, and its location, its height, the right of plaintiff to the water power as determined by the judgments of this court and of the United States Supreme Court, the riparian rights of defendant, the building of the canal by the defendant, certain leases of the right to draw water from said canal by defendant to its tenants, and the prices per horse power or rentals reserved thereby. It also provided for use in evidence of the judgments referred to in the complaint. Plaintiff's other evidence showed its title and right to the dam and power created thereby, subject to the rights of navigation, the flow of the river, the rental value of water per horse power, and that the apportionment between use of canal and lot and water was at the rate of one fifth to the former and four fifths to the latter. It was also shown that a canal could be built at a cost of \$12,000 to \$15,000 of sufficient capacity to use 70,000 cubic feet of water per minute, and that the value of land on the south side of the river upon which to build a canal of the capacity, including sites for mills, would not exceed \$10,000. It was verbally stipulated that the tenants of defendant drew from the pond under their leases 60,385 cubic feet of water per minute, which, on a head of 8 feet, furnished 914 horse power.

The court made the following findings: "(1) That at Kaukauna, Wisconsin, there is a fall or rapids in the Fox river, near the head of which a dam was constructed more than twenty years ago, under authority of the state of Wisconsin, for the purpose of improving the navigation of the Fox river, extending from lot five (5) of section twenty-two (22) south of the river to fractional section twenty-four (24) in town twenty-one (21) north, of range eighteen (18) east, north of the river, and that more than twenty years since there was constructed under the authority of said state, for slack-water navigation, a canal on the north side of said river, leading from the pond held by said dam to slack water below the rapids. (2) That said dam obstructed the flow of the water of said Fox river, and raised the same about 8 feet at the south end of said dam, and about 9 feet at the north end of said dam. (3) That for more than twenty years last past plaintiff has been and is the owner of the water power incidentally created by said dam, with the right to withdraw from the pond made by said dam all of the surplus water not necessary for navigation, either through the canal or directly from the pond, subject to any and all rights of

the United States with reference thereto.

(4) That defendant is now, and at all times since 1883 has been, the owner of all the land bordering on the south bank of Fox river from a point above the upstream end of its canal hereinafter mentioned, to slack water below the rapids in said river at said Kaukauna, subject to the right of the plaintiff and the United States to land and maintain the end of said dam thereon. (5) That in or about the year 1882 defendant, being advised by its attorneys, and in good faith believing, that it owned the undivided one half of the water power of said river, constructed on its own land, at a cost of about \$114,000, an hydraulic canal on the south side of said river, extending from the pond created by said dam, around the south end thereof, to a point about 2,400 feet below said dam, and divided a part of its land between said canal and said river into certain mill lots. (6) That from May 9, 1888, to May 13, 1895, the defendant drew through its said canal on the south side of said Fox river and from the pond created by said dam a substantial part of the flow of said river, not exceeding two fifths of the whole flow of said river in the ordinary low-water stage, and returned the same into said river below said dam. (7) That in defendant's said drawing of said water from said pond through its said canal, it did not in any way trespass upon the lands or property of the plaintiff. (8) That said plaintiff did not suffer any actual pecuniary loss by reason of said drawing of said water by said defendant. And the court finds as conclusions of law: (1) That the said drawing of said water by said defendant did no legal injury to the said plaintiff. (2) That defendant is entitled to a judgment dismissing the complaint herein upon the merits with costs to be taxed. Let judgment be entered accordingly."

Judgment dismissing the complaint on the merits and for costs was duly entered, from which the the plaintiff brings this appeal.

Mr. Lyman E. Barnes, for appellant:

A water course is parcel of the land; it is not an easement, but a corporeal hereditament.

Johnson v. Jordan, 2 Met. 234, 37 Am. Dec. 85; *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391; *McEvoy v. Gallagher*, 107 Wis. 331, 83 N. W. 633; *Elliot v. Fitchburg R. Co.* 10 Cush. 193, 57 Am. Dec. 85; *Brace v. Yale*, 10 Allen, 443; *Angell*, Water Courses, 7th ed. § 5, note 4; p. 8; *Goodrich v. Burbank*, 12 Allen, 459, 90 Am. Dec. 161; *Ex parte Jennings*, 6 Cow. 340, 16 Am. Dec. 447; *Vansickle v. Haines*, 7 Nev. 249; *Gardner v. Newburgh*, 2 Johns. Ch. 161, 7 Am. Dec. 526; *Hall v. Ionia*, 38

Mich. 493; *State v. Pottmeyer*, 33 Ind. 402, 5 Am. Rep. 224; *Reysen v. Roate*, 92 Wis. 543, 66 N. W. 599; *Campbell v. Smith*, 8 N. J. L. 140, 14 Am. Dec. 400.

Ejectment will lie for a water power, because the term includes both land and water.

Gould, Waters, 3d ed. § 471; *Integral Quicksilver Min. Co. v. Altoona Quicksilver Min. Co.* 21 C. C. A. 409, 44 U. S. App. 566, 75 Fed. 379; Adams, Ejectment, 4th ed. p. 22; *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760; *Jackson ex dem. Loux v. Buel*, 9 Johns. 298.

The action of trespass for mesne profits rests upon the plain principle that he who occupies the land of another shall compensate the owner therefor.

Trubee v. Miller, 48 Conn. 347, 40 Am. Rep. 177; *Green v. Biddle*, 8 Wheat. 1, 5 L. ed. 547; Sedgw. & W. Trial of Title to Land, 2d ed. § 648.

The action for mesne profits differs from an action for use and occupation in this,—that the latter is founded upon a promise, express or implied, while the former springs from a trespass, and entry *vi et armis* upon premises, and a tortious holding.

Sedgw. & W. Trial of Title to Land, 2d ed. § 652.

Trespass for mesne profits is maintainable without a previous action of ejectment.

Sedgw. & W. Trial of Title to Land, 2d ed. §§ 656, 657; *Leland v. Tousey*, 6 Hill, 328; *Chirac v. Reinicker*, 11 Wheat. 280, 6 L. ed. 474; *Trubee v. Miller*, 48 Conn. 347, 40 Am. Rep. 177; 3 Sutherland, Damages, 1883 ed. pp. 350, 351.

An action of assumpsit for use and occupation is maintainable on an implied promise arising from the use and occupation of real estate by permission of the rightful owner, without an express promise to pay rent.

Gunn v. Scovil, 4 Day, 228, 4 Am. Dec. 208.

One who has made a tortious entry cannot be rendered liable as a tenant for the time during which he remained in possession, by merely showing that the plaintiff assented to such continued possession.

Ackerman v. Lyman, 20 Wis. 455; *Wittman v. Milwaukee, L. S. & W. R. Co.* 51 Wis. 89, 8 N. W. 6; *De Pere Co. v. Reynen*, 65 Wis. 271, 22 N. W. 761, 27 N. W. 155; *Jordan v. Jordan*, 4 Me. 175, 16 Am. Dec. 249.

The action for money had and received is in the nature of an equitable action or suit, and lies, as a general rule, wherever the defendant in the action has in his hands money of the plaintiff which he has no right *ex æquo et bono* to retain, but which he ought, 62 L. R. A.

in equity and good conscience, immediately to pay to the owner.

Wells v. Brigham, 6 Cush. 6, 52 Am. Dec. 750; *Woodward v. Hill*, 6 Wis. 143; *Bleuett v. McRae*, 88 Wis. 280, 60 N. W. 258; *Quimby v. Lyon*, 63 Cal. 394; *Huganir v. Cotter*, 102 Wis. 323, 78 N. W. 423; *Limited Invest. Asso. v. Glendale Invest. Asso.* 99 Wis. 54, 74 N. W. 633; *Barth v. Graf*, 101 Wis. 27, 76 N. W. 1100; *Terry v. Munger*, 121 N. Y. 161, 8 L. R. A. 216, 24 N. E. 272.

The complaint is good on any theory of the case.

It is competent for the plaintiff to waive the tort and sue on contract in assumpsit for use and occupation, or money had and received.

Norden v. Jones, 33 Wis. 600, 14 Am. Rep. 782; *Smith v. Schulenberg*, 34 Wis. 41; *Putnam v. Wise*, 1 Hill. 240, 37 Am. Dec. 309; *Berty v. Taylor*, 5 Hill, 584; *Limited Invest. Asso. v. Glendale Invest. Asso.* 99 Wis. 54, 74 N. W. 633; *Barth v. Graf*, 101 Wis. 27, 76 N. W. 1100; *Huganir v. Cotter*, 102 Wis. 323, 78 N. W. 423; *Dow v. Deissner*, 105 Wis. 385, 80 N. W. 940, 81 N. W. 671; *Terry v. Munger*, 121 N. Y. 161, 8 L. R. A. 216, 24 N. E. 272; *Fratt v. Clark*, 12 Cal. 89; *Roberts v. Evans*, 43 Cal. 380; *Lehmann v. Schmidt*, 87 Cal. 15, 25 Pac. 161; *Gunn v. Scovil*, 4 Day, 228, 4 Am. Dec. 208.

The measure of damages in trespass for mesne profits is that which would obtain in assumpsit for use and occupation. The compensation is to be adjusted as upon contract, and not on the footing of a tort.

Holmes v. Davis, 19 N. Y. 488; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Noble v. Fairs*, 58 Mich. 637, 26 N. W. 157; Sedgw. & W. Trial of Title to Land, 2d ed. § 614; 6 Wait, Act. & Def. p. 227; *Wallace v. Berdell*, 101 N. Y. 13, 3 N. E. 769.

Whether this action be considered as one sounding in tort or contract, the plaintiff is entitled to recover not only mesne profits, but annual interest on the same.

Shaw v. Gilbert, 111 Wis. 165, 86 N. W. 188; 3 Sutherland, Damages, 1883 ed. p. 348; *Jackson ex dem. Genet v. Wood*, 24 Wend. 443.

Assumpsit for use and occupation is maintainable for water power.

Davis v. Morgan, 4 Barn. & C. 8; *Williams v. Ladew*, 171 Pa. 369, 33 Atl. 329.

The rightful owner is always entitled to recover at least nominal damages, and any special damages he may sustain for the diversion or obstruction of water.

McEvoy v. Gallagher, 107 Wis. 331, 83 N. W. 633.

The adjudicated cases relating to diversion or obstruction of water are readily sep-

arable into two general classes: (1) Where the prime object of the action is to vindicate the plaintiff's right; (2) where the vindication of the plaintiff's right is a matter of secondary importance,—possibly of no importance at all, because previously vindicated,—and the prime object is to recover substantial damages.

Cases belonging to the first class are entitled to little, or no, weight on the question of measure of damages.

Cases typical of the first class are *Newhall v. Ireson*, 8 Cush. 595, 54 Am. Dec. 790; *Plumleigh v. Dawson*, 6 Ill. 544, 41 Am. Dec. 199; *Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 739.

The use or nonuse of the water power by the rightful owner at the time of an unlawful diversion or obstruction does not call for different rules of law as to measure of damages, in an action for such diversion or obstruction.

Plumleigh v. Dawson, 6 Ill. 544, 41 Am. Dec. 199; *Holden v. Winnepiscogee Lake Cotton & W. Mfg. Co.* 53 N. H. 552.

The measure of damages is the amount of the loss the injured party has sustained by the wrongful diversion; in short, compensation.

Merritt v. Brinkerhoff, 17 Johns. 306, 8 Am. Dec. 404; *Bliss v. Rice*, 17 Pick. 23; *Hatch v. Dwight*, 17 Mass. 289, 9 Am. Dec. 145; *Pollitt v. Long*, 58 Barb. 20; *Baltimore & O. R. Co. v. Boyd*, 67 Md. 32, 10 Atl. 315; *De Camp v. Bullard*, 159 N. Y. 450, 54 N. E. 26.

Mr. Moses Hooper, also for appellant:

A plaintiff is entitled to nominal damages, at least, for any violation of his right.

Farr v. State Bank, 87 Wis. 223, 58 N. W. 377; *Sayles v. Bemis*, 57 Wis. 315, 15 N. W. 432; *Benson v. Waukesha*, 74 Wis. 31, 41 N. W. 1017; *Drummond v. Eau Claire*, 85 Wis. 556, 55 N. W. 1028; *Hibbard v. Western U. Tel. Co.* 33 Wis. 558, 14 Am. Rep. 775; *Murphy v. Fond du Lac*, 23 Wis. 365, 99 Am. Dec. 181; *Eaton v. Lyman*, 30 Wis. 41.

Ordinarily, when one uses the property of another without right he is required to pay at least the market value of the use. The wrongdoer may not make profit from his wrongdoing.

Ackerman v. Lyman, 20 Wis. 454; *Roach v. Heffernan*, 65 Vt. 485, 27 Atl. 71; *Jackson ex dem. Genet v. Wood*, 24 Wend. 443; *New Orleans v. Gaines*, 15 Wall. 624, 21 L. ed. 215; *Wallace v. Berdell*, 101 N. Y. 13, 3 N. E. 769; *Nash v. Sullivan*, 32 Minn. 189, 20 N. W. 144; *McJahan v. Bouce*, 114 Mass. 140, 19 Am. Rep. 321; *Bolling v. Lersner*, 26 Gratt. 36; *Worthington v. Hiss*, 70 Md. 172, 16 Atl. 534, 17 Atl. 1026.

Property is not to be deemed worthless 62 L. R. A.

because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use.

Mississippi & R. River Boom Co. v. Paterson, 98 U. S. 403, 25 L. ed. 206; *Keys v. Pittsburg & W. Coal Co.* 58 Ohio St. 246, 41 L. R. A. 681, 50 N. E. 911; *Hilton v. Woods*, L. R. 4 Eq. 432; *Wood v. Morewood*, 3 Q. B. 440, note; *Bliss v. Rice*, 17 Pick. 23; *Hatch v. Dwight*, 17 Mass. 288, 9 Am. Dec. 145; *Locks & Canals v. Nashua & L. R. Co.* 104 Mass. 1, 6 Am. Rep. 181; *De Camp v. Bullard*, 159 N. Y. 450, 54 N. E. 26.

Mr. Charles Quarles, with *Messrs. Fish, Cary, Upham, & Black*, for respondent:

The complaint does not state a cause of action.

The acts of the defendant complained of are expressly alleged to have been wrongful. This negatives any promise on the part of the defendant in relation thereto.

Webster v. Drinkwater, 5 Me. 319, 17 Am. Dec. 238; *Whiting v. Sullivan*, 7 Mass. 107; *Graham v. Chicago, M. & St. P. R. Co.* 53 Wis. 473, 10 N. W. 609.

The complaint fails to state a complete cause of action *ex delicto* in that it does not allege that the plaintiff has suffered any direct or consequential damages by reason of the alleged wrongful acts of the defendant.

The water alleged to have been wrongfully taken and appropriated by the defendant was from a flowing stream. There can be no property in flowing water.

2 Bl. Com. p. 18; 3 Kent, Com. 439; *Gould, Waters, & Sucet v. Syracuse*, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289; *Williams v. Morland*, 2 Barn. & C. 910; *Doud v. Wisconsin, P. & S. R. Co.* 65 Wis. 108, 56 Am. Rep. 620, 25 N. W. 533; *Joseph Dessert Lumber Co. v. Wadleigh*, 103 Wis. 318, 79 N. W. 237.

The complaint does not state a case in which the tort can be waived and recovery had as upon an implied contract.

Kelty v. Owens, 3 Pinney (Wis.) 372; *El-liott v. Jackson*, 3 Wis. 649; *Jones v. Hoar*, 5 Pick. 285; *Norden v. Jones*, 33 Wis. 600, 14 Am. Rep. 782; *Smith v. Schulenberg*, 34 Wis. 41; *Western Assur. Co. v. Toule*, 65 Wis. 247, 26 N. W. 104; *Walker v. Duncan*, 68 Wis. 624, 32 N. W. 689; *Lee v. Campbell*, 77 Wis. 340, 46 N. W. 497; *Barth v. Graf*, 101 Wis. 27, 76 N. W. 1100; *Gould, Waters, & Sucet*, 129 N. W. 1100; *Gould, Waters, & Sucet*, 129 N. W. 1100; *Manning v. Wasdale*, 5 Ad. & El. 758; *Owen v. Field*, 102 Mass. 90.

The complaint does not state a case of trespass for mesne profits; neither does it state one for use and occupation.

The common-law action of trespass for mesne profits was consequent upon and supplemental to the action of ejectment, and

was only maintainable after there had been a recovery in ejectment.

1 Chitty, Pl. 16th Am. ed. pp. 194, 215; *Benson v. Mutsdorf*, 2 Johns. 369, 1 Cooley's Bl. Com. 3d ed. bk. 2, note 11, p. 36; *Challenor v. Thomas*, Yelv. 143; Cooley, Torts, 2d ed. p. 437; *Raymond v. Andrews*, 6 Cush. 265.

Ejectment will not lie to recover an easement,—an incorporeal hereditament.

Racine v. Crotsenberg, 61 Wis. 481, 50 Am. Rep. 149, 21 N. W. 520; *Fritsche v. Fritsche*, 77 Wis. 270, 45 N. W. 1089; *Pinkum v. Eau Claire*, 81 Wis. 301, 51 N. W. 550; *Maurer v. Stiner*, 82 Wis. 90, 51 N. W. 1101; *Buckner v. Hutchings*, 83 Wis. 299, 53 N. W. 505.

To maintain an action for use and occupation the conventional relation of landlord and tenant must have existed between the parties.

Thomas v. Parrott, 106 Wis. 605, 82 N. W. 554; *Preston v. Hawley*, 101 N. Y. 580, 5 N. E. 770; *Central Mills Co. v. Hart*, 124 Mass. 123; *Kirchgassner v. Rodick*, 170 Mass. 543, 49 N. E. 1015; *Henderson v. Detroit*, 61 Mich. 378, 28 N. W. 133.

The nature of the action sought to be stated is clearly trespass on the case for the diversion of water from a flowing stream.

No action to recover substantial damages can be maintained for the diversion of water unless the party complaining alleges and proves that some existing mill has been injured and the use made less valuable by reason of the diversion.

Williams v. Morland, 2 Barn. & C. 910; *Mason v. Hill*, 3 Barn. & Ad. 304; *Mason v. Hill*, 5 Barn. & Ad. 1; 2 Bl. Com. p. 18; *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312; *Webb l. Portland Mfg. Co.* 3 Sumn. 189, Fed. Cas. No. 17,322; Gould, Waters, § 214; *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85; *Palmer v. Mulligan*, 3 Caines, 307, 2 Am. Dec. 270; *Pratt v. Lamson*, 2 Allen, 275; *Kensit v. Great Eastern R. Co.* L. R. 23 Ch. Div. 566; *Bliss v. Rice*, 17 Pick. 23; *Ingram v. Rankin*, 47 Wis. 406, 32 Am. Rep. 762, 2 N. W. 755.

The law gives protection only against substantial injury.

Janesville v. Carpenter, 77 Wis. 288, 8 L. R. A. 808, 46 N. W. 128.

The facts proved do not make a case in which the tort can be waived and recovery had as upon an implied contract.

Norden v. Jones, 33 Wis. 600, 14 Am. Rep. 782; *Webster v. Drinkwater*, 5 Me. 322, 17 Am. Dec. 238; *Limited Invest. Asso. v. Glendale Invest. Asso.* 99 Wis. 54, 74 N. W. 633; *Huganir v. Cotter*, 102 Wis. 323, 78 N. W. 423; 1 Addison, Torts, Wood's ed. ¶ 52, p. 59.

62 L. R. A.

The right of appellant is strictly a privilege and no more, and is not invaded unless the exercise of the right is prevented or hindered.

Vansickle v. Haines, 7 Nev. 249.

In cases involving the invasion of real property or interference with tangible property a wrong is presumed to damnify, or, as it is phrased, injury imports damage. But in case of interference with intangible rights this is by no means a general, or even a prevailing, rule.

1 Sutherland, Damages, pp. 3-6; *McAllister v. Clement*, 75 Cal. 182, 16 Pac. 775; *Pollard v. Lyon*, 91 U. S. 237, 23 L. ed. 314; *Pennoyer v. Allen*, 56 Wis. 502, 43 Am. Rep. 728, 14 N. W. 609.

Bardeen, J., delivered the opinion of the court:

We cannot resist the conclusion that this case has been swamped by a multitude of contentions. On the one side, we are told that this is either a case in the nature of "trespass for mesne profits," "assumpsit for use and occupation," "assumpsit for money had and received," or "trespass on the case for diversion of water." On the other, we are informed that the complaint does not state a cause of action; that it does not state a case in which the tort can be waived, and a recovery permitted on implied contract; that it does not state a case for mesne profits, or one for use and occupation, but is one for diversion of water from a flowing stream; and that the facts do not make out a case in which a recovery can be permitted. These questions are most learnedly discussed in briefs covering nearly 200 pages, and the positions assumed are fortified by authorities from the Year Books down to the present time. The importance of the case and the novelty of the questions assumed to be involved are a sufficient excuse for the fertile research of counsel, and for their great industry in presenting every possible phase of the litigation. But with it all we are persuaded that the actual issue involved is comparatively simple, and must be determined according to well-recognized legal principles.

First, what is the cause of action stated? Unquestionably, one in tort. The plaintiff is alleged to be the owner of the hydraulic power furnished by the fall in the Fox river at a dam in the city of Kaukauna. The defendant wrongfully entered into possession of, and wrongfully took and appropriated to its own use, one half of such power, being about 1,500 horse power, of the annual value of \$5 per horse power. The complaint contains a "plain and concise statement of the facts constituting each cause of action," as prescribed by § 2046, Rev. Stat. 1898. By

apt allegation it charges that the acts of defendant were wrongful, thus recognizing the rule that a cause of action must be so stated that the court may determine its character, —whether *ex contractu* or *ex delicto*. *Joseph Dessert Lumber Co. v. Wadleigh*, 103 Wis. 318, 79 N. W. 237. The requirements of the statute and of the rules of practice having been complied with, we need not give the complaint baptism, or christen it, as under the old practice. It is enough when the facts are stated, and so stated that the character of the action can be gathered therefrom. We agree with defendant's counsel that the cause of action is in tort, and bears some resemblance to the ancient action of trespass on the case. Passing this point, we come to the claim that the complaint fails to state a cause of action. It is said that the "complaint fails to state a complete cause of action *ex delicto*, in that it does not allege that the plaintiff has suffered any direct or consequential damage by reason of the wrongful acts of the defendant." Also, it being alleged that the water had been wrongfully taken from the flowing stream, the inference is that as fast as the water was withdrawn it was instantly replaced by the natural flow of the river, "and plaintiff therefore was not deprived of any valuable use which it could or might make of the water power which it owned." We met a contention very similar to the first in its legal results in the recent case of *Luesen v. Oshkosh Electric Light & P. Co.* 109 Wis. 94, 85 N. W. 124. There, as here, it was argued that there was no allegation of direct pecuniary injury, and hence no cause of action was stated. Here as there, we hold that, when the facts are stated from which the law raises the inference of damages, they are necessarily implied, and no direct allegation of the conclusion is necessary. Waiving for the instant the question of whether one may have such a property right in water as entitles him to damages for its conversion, we will test the complaint by the rule stated. It alleges that the plaintiff was the owner of a certain water power. The law implies that it was entitled to its free and unobstructed use. The defendant wrongfully entered, and wrongfully appropriated to its own use one half of said power, or about 1,500 horse power of the same, which was of the annual rental value of \$5 per horse power, "to the damage of this plaintiff as herein set forth." Conceding the right of property to exist, what inference or implication does the law draw from those facts? Using an illustration used on the argument: Suppose plaintiff's horse was running in its pasture, and the defendant wrongfully entered, and took the horse, and used it for a season, the value of such use

being 50 cents per day, would any one contend that the plaintiff must allege that it was deprived of the use of the horse so that it was unable to plow its corn field, or market its potatoes, in order to state a "complete cause of action *ex delicto*?" When the facts are stated from which loss or injury may be implied, the law draws that implication, and formal allegation of injury is not necessary. Since the determination of the litigation between the parties to this action as shown by the opinion of the United States Supreme Court (172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97), this court cannot, nor will it permit the defendant to, question the rights of the plaintiff with reference to the water power in question as there determined. That decision settled those rights to be absolute ownership, subject only to the rights of the government in aid of navigation. As we understand it, subject to those rights the plaintiff might do as it pleased with the entire body of water stored in the pond. It might allow it to run to waste or rent it to its tenants, or divert it to its own use. We know of no limitation upon that right, save that before mentioned. We cannot, if we would, surround it by new or different limitations. As it was adjudicated, so must it stand. According to the defendant's contention, that right was a mere abstraction; a mental conception without reality or substance; "a barren right" of no property value; a mere right to have the surplus water not needed for navigation flow over the dam, of no value to plaintiff unless it had facilities for using it as it passed,—a most specious contention, finding some support in loose expressions and random remarks found in some of the cases. In support of their position they say: "The law is well settled, both in England and in this country, that no action to recover substantial damages can be maintained for the diversion of water unless the party complaining alleges and proves that some existing mill has been injured, and the use made less valuable, by reason of the diversion." They refer us to the cases of *Williams v. Morland*, 2 Barn. & C. 910, and *Mason v. Hill*, 3 Barn. & Ad. 304, and 5 Barn. & Ad. 1, as establishing the rule in England. The first case was an action by a down-stream landowner against his neighbor on the stream above, who had built a dam, and thereby prevented the water from running in its usual course, in its usual calm and smooth manner, and thereby the water ran in a different channel, and with great violence, and injured the banks and premises of the plaintiff. The jury found the banks were not injured. Bayley, J., says: "Flowing water is originally *publici juris*. So soon as it is appro-

priated by an individual, his right is coextensive with the beneficial use to which he appropriates it. Subject to that right, all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water does so in derogation of the primitive right of the public. Now, if this be the true character of the right to water, a party complaining of the breach of such a right ought to show that he is prevented from having water which he has acquired a right to use for some beneficial purpose. Here the declaration states a right to the use of this water at all times; but still, if the plaintiff had as much water as could be necessary for his purposes, the defendant would have been guilty of no wrong by preventing additional water from coming to the plaintiff's premises." Another judge said: "The mere obstruction of the water which had been used to flow through his lands does not give any right of action. In order to entitle him to recover, he should show the loss of some benefit, or the deterioration of the value of his premises." *Mason v. Hill* was a similar action, except that the water diverted by the up-river owner was not returned to the original channel, but was suffered to pass away on a level below the plaintiff's works. The opinion by Denman, Ch. J., contains an interesting discussion of the question involved, and holds that the lower owner, having shown actual damage, was entitled to judgment. It requires but a casual glance at the cases to disclose that the questions discussed and decided are in no way parallel with the ones here involved. The plaintiff here is not seeking to recover damages for water merely diverted from its premises, or for damages for water thrown on its premises in such a manner as to injure them. It is seeking to recover the market value of water which it had legally impounded, and which was unlawfully taken by defendant. But it is said the plaintiff had no mill. It had no means of using the water. It has suffered no substantial damage. It had but a "barren right" of no property value unless it had facilities for using the water, and hence cannot maintain this action. We do not consider this an action merely for diverting water, within the principle of the cases cited by defendant. It is rather an action for taking water which had legally been gathered in a pond, and capable of producing potential energy. True, the plaintiff did not thereby secure a property interest in any particular particle of water. Water is a movable and wandering thing, and when it runs out of my pond into another man's I have no right to reclaim it. But when I have built a dam, and created a reservoir, kept full by the natural flow of the stream.

62 L. R. A.

I have created for myself a property right to use the stored water, just as valuable and just as substantial in point of law as would be the right to use my horse. It may be subject to some limitations not surrounding other species of property, but they are not material to the questions here involved. To say that because I have no mill, or no facilities to use the energy so stored up, I am not injured when someone comes along and wrongfully appropriates it to his use, would be a solecism in the law without parallel. As well might the defendant say, when sued for the use of the horse in the case supposed: "You were not using the horse. You had no work for him to do. He was running idle in the pasture. You have lost nothing, hence I should not be required to pay." A similar suggestion was thus disposed of in the *Luessen Case*: "If one deprive a person of anything of value, the loss to the latter in a legal sense is not lessened at all by the circumstance, if it exist, that he intended never to enjoy it, or to bestow it as a gratuity upon another." One of the counsel likened the defendant's alleged trespass in taking the water to the tapping of a wire charged with electricity, and diverting therefrom a given quantity of electric current or power. Defendant's counsel answer: "There is no likeness between the two. The wire is only charged with electricity by the expenditure of force or power which costs money, and the electrical current in that sense is private property to at least the value to the owner of what it has cost to produce it. The current of water, on the other hand, is furnished by nature without cost, is *publici juris*, and is not property until appropriated and used." Counsel for plaintiff aptly reply that electricity is *publici juris* until impounded on a wire. The natural flow of a river is in some sense *publici juris*, but, when impounded, and a head raised by a dam by one having authority to dam, and having incurred the expense of building and maintaining the dam, the fall of the water due to the dam is not *publici juris* any more than the impounded electric current, and herein lies the distinction. The water itself may belong to the public in a sense, but the force—the energy—produced by it when stored in bulk no more belongs to the public than the banks and dam surrounding it. The storing costs money, and within the line of defendant's argument the force so impounded becomes property in the owner. The major contention of defendant rests upon the question of whether plaintiff's right to the water is to be considered a thing of value, and, if so, what is the proper measure of damages. That plaintiff's right is of value follows as necessary corollary from the decisions of

this court and of the United States Supreme Court. 70 Wis. 635, 35 N. W. 529, 36 N. W. 828; 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173, 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97. That value rests upon the right of plaintiff to the free and constant use of the water in the pond, subject only to the rights of navigation. It makes no difference, so far as we can see, whether it is called "the right to use the surplus water created by the dam," or by some other name. Under the reservation in its deed to the United States, as we understand it, it had the right to use all the water created by the dam not required for purposes of navigation, "with the rights of protection and preservation appurtenant thereto." As to the effect of this reservation we need only refer to the language of Mr. Justice Shiras in this litigation. 172 U. S. 80, 43 L. ed. 373, 19 Sup. Ct. Rep. 105. From any point of view, the judgment of the court below was erroneous. The title to the thing in question was clearly established. Under any theory of the case, plaintiff was entitled to at least nominal damages. Testimony was offered showing that defendant had rented to tenants 914 horse power at an annual rent averaging \$5 per horse power. It is suggested that, if the other theory of recovery is denied, plaintiff was entitled to recover the money so received. That, however, would be contrary to the theory of the complaint. No doubt plaintiff might have brought the action for money had and received, waiving the tort; but that is not this action. The complaint alleges a tortious taking and conversion of impounded water of a certain market value. This is inconsistent with a claim to have defendant disgorge money it had received. The complaint, being in tort, cannot be changed to one on implied contract for the mere convenience of assessing damages.

As we have already seen, it was no answer for defendant to say that plaintiff was not in a position to use the water if it had not taken it. The question now is, What damages does the law imply from the situation presented? The defendant seeks to apply the rule applied in many cases for the mere diversion of the water of a running stream. *Kensit v. Great Eastern R. Co.* L. R. 23 Ch. Div. 566, is one of a class of cases confidently relied on to support this view. But the facts in that and kindred cases are so entirely different from the case at bar that they furnish little aid in the solution of the question before us. As we view it, there is a vast difference, in point of legal consequences, between the case of where an up-river owner diverts the water in a flowing stream, and the one where a stranger without right taps the dam, and takes the

water from another's mill pond. The cases above referred to hold that the owner from whose land water has been wrongfully diverted may recover general damages,—that is, such as the law implies from the violation of a legal right,—and such special damages as he is able to show. See *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Ulbricht v. Eufaula Water Co.* 86 Ala. 587, 4 L. R. A. 572, 6 So. 78; *Webb v. Portland Mfg. Co.* 3 Sumn. 189, Fed. Cas. No. 17, 322; *Bliss v. Rice*, 17 Pick. 23. Many of the cases are somewhat misleading on the question of damages for the reason that the real point in controversy was the vindication of the act or right, and little or no attention was given to the amount of the recovery, the latter being treated as of secondary importance. The cases bearing upon the point at issue are not numerous. *Bliss v. Rice*, 17 Pick. 23, was a case where the plaintiff and defendant were tenants in common of a mill on one side of a river and of the milldam and water power. They occupied the mill by agreement, alternately, each for several days at a time, in proportion to his interest. The defendant owned the land on the opposite side of the river, and cut a channel from the pond above the dam, on his own land, and used a portion of the water to drive machinery. In a suit to enjoin the defendant from diverting the water from the pond, the court held that during the time each was entitled to use the mill he was entitled to use all the water stored in the pond, and gave plaintiff judgment for \$24 per year for the unlawful use of the water by defendant, and required him to close his channel during the time plaintiff was entitled to use the mill. The court directly recognized the right of property in water and the liability for damages when that right had been invaded. *De Camp v. Bullard*, 159 N. Y. 450, 54 N. E. 26, was a case where the court was called upon to determine the measure of damages for the use of a stream by trespassers for floating logs. In the discussion the court uses the following language: "The defendants insist that the measure of damages is not what the privilege of trespassing was worth to the trespassers, but what the plaintiff actually lost through interference with his business, loss of rent, and the like. As there was no proof of actual loss of this character, they further insist that the plaintiff is entitled to nominal damages only. This position would place a premium on trespassing, because it makes the position of the trespasser more favorable than that of the one lawfully contracting. If a man's house is vacant, with no prospect of a tenant, and no intention on his part of occupying it himself, and a trespasser occupies it, he must pay,

as damages for the trespass, the value of the use and occupation; for this would be the duty of the tenant contracting upon a *quantum meruit* for the use, by consent, of that which the trespasser uses without consent. In cases of involuntary trespass the damages are restricted as much as possible; but, when the trespass is deliberate, intentional, and continuous, they include at least the value of the use of the premises for the period that the owner is kept out of possession." A verdict for \$500 for the use of the stream was sustained. *Powers v. Hibbard*, 114 Mich. 533, 72 N. W. 339, is said to be a suit "to restrain the wrongful diversion of water for power, and an accounting." The defendants were entitled to use 105 horse power, but at times used from 150 to 175 horse power. A recovery for \$7,000 damages was sustained, but the case is barren of any discussion of the basis upon which damages were allowed. Neither does it appear that the plaintiff had mills, or lost rents or sales. As near as we can determine, the recovery was allowed on the basis of value of the use in excess of the grant. These cases indicate that the value of the use of water is sometimes regarded as the proper measure of damages where it has been wrongfully taken and used. No rule of law of which we are aware, and no case that has been found, go to the extent of declaring that impounded water is of no value unless the owner has a mill built and ready for use. Water, when so stored, is capable of producing power. It represents the expenditure of labor and money. The question of value is not affected by the actual cost of the improvements. It depends, in the first instance, upon the number of feet of head, and the means and facilities which may be at hand for its use; not what the owner then actually possesses, but what he may be able to secure under ordinary circumstances. A dam without any adjacent land or conveniences for the use of stored water might not be very valuable. But suppose the owner of the dam and the adjacent land proprietor unite, and the water is then used. Could the landowner refuse to pay for the water, or deny recompense for its use, on the ground that it was of no value without the use of his land? Is a trespasser in a better position than as if he had contracted? Can he be heard to urge that, "except for my canal, your power was valueless? You have but a 'barren right,' and, although I have appropriated that right, and it has become valuable to me, yet you have no remedy, because you have lost nothing. The water was *publici juris*, and would have gone to waste if I had not turned it to use; hence, as you have lost nothing, you cannot expect me to pay you anything." 62 L. R. A.

This is virtually the position of defendants. While it may be true that the stored water, by itself, or by reason of the surrounding circumstances, may be of little value, it becomes valuable when its energy becomes applied to turn wheels and to move machinery. When the right to use becomes merged in an actual use through canals and wheels, it reaches the summit of value. The head of water on the one side, and the canals, machinery, and land on the other, make complete that which, considered separately, may be comparatively insignificant. The union or joinder of the two elements being wrongful cannot be allowed to affect the question, otherwise the defendant would be in a better position than it would have been had it lawfully contracted with plaintiff. The facts surrounding this litigation indicate that this will result in a great hardship to defendant, but that fact cannot be permitted to prevail over well-recognized legal principles. The defendant's persistent use of water after it had been determined that such use was unlawful puts it in a position where it must respond to the rigorous exactions of the law, without extenuation or diminution on the ground of good faith. As we view the situation, the law implies a liability on its part to pay the actual value of the thing taken, when considered in connection with the manner of use, and that the defendant cannot be heard to say that plaintiff might not have used or had no present facilities for its use. The positive character of the right involved and the quality of plaintiff's ownership being established, we see no escape from the conclusion that defendant is liable for the market value of the horse power actually taken, with annual interest. Defendant's acts suspended and impaired the enjoyment of the rights possessed by plaintiff. Those rights had a definite market value, which cannot be depreciated or affected by the assertion that plaintiff was not in a position to utilize them. To permit this to be done would, as remarked by the New York court, "place a premium on trespassing, because it makes the position of the trespasser more favorable than that of one lawfully contracting." We therefore hold that the proper measure of damages is the rental value each year of the actual amount of horse power taken at the dam, with simple interest computed from the close of each year. Ordinarily, the case, having been tried by the court, would be sent back, with directions to enter judgment; but the case was not tried on the theory suggested, and we are not prepared, from the evidence presented, to determine the exact number of horse power actually taken, or the price that should be paid for the same. The defendant offered no evidence as to value, and

the lower court made no finding on the subject. Neither are we prepared to say just what proportion of the rental value should be ascribed to the use of the canal and land in utilizing the water taken, although there is some evidence on the subject. In view of the situation, we deem it advisable to send the case back, with directions to the court below to take such additional testimony as either party may desire to offer as to the amount of water taken, and its net value per horse power as suggested, and to enter judgment for the plaintiff for that amount. Of course, the recovery must be limited to the water taken during the six years next preceding the commencement of the action. We do not think the circumstances of the case are such as would permit the allowance of exemplary damages, or any damages beyond the net market value of the water taken, with interest.

The judgment is reversed, and the cause is remanded for further proceedings as indicated in the opinion.

Rehearing denied December 17, 1901.

Ulrich HUBER, *Respl.*,

v.

Andrew MERKEL, *Appt.*

(.....Wis.....)

1. **No definite subterranean stream which supplies artesian wells is shown** by the facts that such wells may be obtained over a space $2\frac{1}{2}$ by 5 miles; that water is struck in a stratum of lime or sandstone; and when it is found the drill bit rests on the bottom of the well and makes no sudden drop.
2. **Courts may take judicial notice** of neighboring proprietors.
3. **A landowner has a right to sink a well** on his land and use the water therefrom as he chooses, or allow it to flow away regardless of the effect of such use upon his neighbor's wells; and such right is not affected by malicious intent.
4. **The right of a landowner to sink wells and gather and use percolating waters** as he will, even though the flow of his neighbor's well be diminished, cannot be taken away from him or impaired by legislation, unless by the exercise of the eminent domain or the police power.
5. **The police power does not justify legislation** prohibiting the waste of water from artesian wells to the injury of the wells of neighboring proprietors.

(April 17, 1903.)

A PPEAL by defendant from a judgment of the Circuit Court for Waukesha County in favor of plaintiff in a suit to enjoin wasting and unreasonably using water from artesian wells on defendant's land to plaintiff's injury. *Reversed.*

Statement by Winslow, J.:

This is an action in equity, brought by the owner of certain real estate, to restrain the defendant, who owns real estate in the vicinity, from wasting or unreasonably using the water from certain artesian wells upon the defendant's land, on the ground that such use interfered with the flow of water from the plaintiff's artesian well, situated on his land. The action was tried by the court, and findings were made, in substance, as follows: That plaintiff and defendant are farmers, and reside upon and own farms within half a mile of each other in the town of Germantown; the plaintiff's farm being about 20 feet higher in elevation than the defendant's. That the plaintiff has an artesian well on his farm, bored in the year 1899, and the defendant has two such wells upon his farm, bored in 1899 and 1900, respectively, which he allows to flow continuously. That within the immediate vicinity of plaintiff's and defendant's farms, and within an area of $2\frac{1}{2}$ miles wide by 5 miles in length, which is the only area within which such wells can be obtained, there are 30 such wells, which are owned by farmers, and which receive their supply from the same subterranean stream of water, and that each of such wells gave an ample supply of flowing water for ordinary household, domestic, and farm purposes until the defendant maliciously allowed his wells to flow to their full capacity. That the defendant uses some of the water from his wells to supply a fishpond on his land. That he sells some, and intentionally and maliciously wastes the remainder by allowing it to flow and soak into the ground. That the water in the plaintiff's well is affected by the use which the defendant makes of his well; rising when defendant's wells are stopped, and falling when they flow. That the water in all of said wells stands at the same level when they are in a state of rest, and that said subterranean stream is only capable of furnishing sufficient water for ordinary household, domestic, and farm purposes to those who own the said wells. That the defendant has rendered it impossible for the plaintiff to have any reasonable use of his well, and has com-

NOTE.—As to rights in percolating or underground waters, see also, in this series, *note* to Southern P. R. Co. v. Dufour, 19 L. R. A. 92; Case v. Hoffman, 20 L. R. A. 40; Sullivan v. Northern Spy Min. Co. 30 L. R. A. 186; Tampa Waterworks Co. v. Cline, 33 L. R. A. 376; 62 L. R. A.

Bruening v. Dorr, 35 L. R. A. 640; Wheelock v. Jacobs, 43 L. R. A. 105; Smith v. Brooklyn, 45 L. R. A. 664; Vineland Irrig. Dist. v. Azusa Irrig. Co. 46 L. R. A. 820; Willow Creek Irrig. Co. v. Michaelsen, 51 L. R. A. 280; and Forbell v. New York, 51 L. R. A. 695.

pelled him to pump water for his ordinary needs, and that all of the artesian well owners in the vicinity, except the defendant, have so arranged their wells as to regulate their flow. Upon these facts the court adjudged that the defendant be restrained from wasting the water from his wells and using the same for other than ordinary household, domestic, and farm purposes, and that he so arrange his wells as to prevent the escape of water above the surface of the ground, except when in actual use, and so manage them as not to permit the escape of any more water than is necessary for ordinary household and farm purposes. From this judgment the defendant appeals.

Mr. G. D. Goff, with **Messrs. Nathaniel Perelles & Sons** and **Charles E. Robinson**, for appellant:

There are no correlative rights between the owners of adjoining lands with reference to water percolating beneath the surface of the ground.

Elliott v. Fitchburg R. Co. 10 Cush. 193, 57 Am. Dec. 85; Gould, Waters, 280.

A person may lawfully dig a well on his own land although he destroys the subterranean undefined sources of his neighbor's well.

Mosier v. Caldwell, 7 Nev. 363; *Delhi v. Youmans*, 45 N. Y. 362, 6 Am. Rep. 100; *Greenleaf v. Francis*, 18 Pick. 117; *Bloodgood v. Ayers*, 108 N. Y. 400, 15 N. E. 433; *Coleman v. Chadwick*, 80 Pa. 81, 21 Am. Rep. 93; *Acton v. Blundell*, 12 Mees. & W. 324.

The defendant's right to the water which flows in undefined channels through his soil is an absolute right of property.

Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; *Frazier v. Brown*, 12 Ohio St. 294; *Dickinson v. Grand Junction Canal Co.* 7 Exch. 282; *Broadbent v. Ramsbotham*, 11 Exch. 602; *Chasemore v. Richards*, 7 H. L. Cas. 349; *New River Co. v. Johnson*, 2 El. & El. 435; *Reg. v. Metropolitan Bd. of Works*, 3 Best & S. 710; Gould, Waters, 280; *Pizley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Case v. Hoffman*, 100 Wis. 314, 44 L. R. A. 728, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945; *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511.

Even if the defendant had interrupted the underground sources of the plaintiff's well, this action would not lie. The plaintiff's remedy would be to sink his well deeper.

Gould, Waters, 280; *Metcalf v. Nelson*, 8 S. D. 87, 65 N. W. 911; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Farwell v. Sturgis Water Co.* 10 S. D. 421, 73 N. W. 916; *Hale v. McLea*, 53 Cal. 578; *Burroughs v. Saterlee*, 67 Iowa, 396, 56 Am. Rep. 350, 25 N. W. 808; *Willis v. Perry*, 92 Iowa, 297, 26 L. R. A. 124, 60 N. W. 727; *Chase v. Silver-*

stone, 62 Me. 175, 16 Am. Rep. 419; *Taylor v. Welch*, 6 Or. 200.

This is not a case in which the state of mind of the person doing the act can affect the right to do it.

Bradford v. Pickles [1895] A. C. 587; *Jenkins v. Fowler*, 24 Pa. 308; *Metzger v. Hochrein*, 107 Wis. 267, 50 L. R. A. 305, 83 N. W. 308; *Marshfield Land & Lumber Co. v. John Weck Lumber Co.* 108 Wis. 268, 84 N. W. 434; *McDonald v. Provident Sav. Life Assur. Soc.* 108 Wis. 213, 84 N. W. 154; *Mahan v. Brown*, 13 Wend. 261, 28 Am. Dec. 461; *Old Colony R. Co. v. Miller*, 125 Mass. 1, 28 Am. Rep. 194.

The statute seeks to limit or restrain the defendant in the use of water flowing from his artesian wells. This defendant, by the common law of Wisconsin, owns absolutely the water percolating beneath his soil. To pass a law depriving him of this right without compensation is to deprive him of his property without due process of law.

Eaton v. Boston, C. & M. River R. Co. 51 N. H. 504, 12 Am. Rep. 147; *Wynchamer v. People*, 13 N. Y. 378; *People v. Kerr*, 37 Barb. 357; *Co. Litt.* 46.

The legislature cannot take private property for private uses upon making compensation, even though the public be incidentally benefited.

Pratt v. Brown, 3 Wis. 603; *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557.

The act under consideration is open to criticism, that it does not refer to all owners of Artesian wells as a class, but relates only to those who have Artesian wells in the immediate vicinity of other wells. It is a special, as contradistinguished from a general, law.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Re Lee Sing*, 43 Fed. 359; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

This act cannot be sustained as a regulation of property under the police power of the state.

Ellis v. Duncan, 21 Barb. 230; *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 58 L. R. A. 748, 90 N. W. 1098; *Turner v. Nye*, 154 Mass. 579, 14 L. R. A. 487, 28 N. E. 1048; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

Messrs. Barney & Kuechenmeister, for respondent:

As to percolating water, the landowner's right is limited to what is a necessary and reasonable use of his own land, and he cannot by an unnecessary and unreasonable use of such water injure his neighbor in its use.

Bassett v. Salisbury Mfg. Co. 43 N. H. 569, 82 Am. Dec. 179; *Sicett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Forbell v. New York*, 164 N. Y. 522, 51 L. R. A. 695, 58 N. E. 644; *Hart v. Jamaica Pond Aqueduct Corp.* 133 Mass. 488; *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569.

The owner of the soil has the right to the use of the percolating water beneath it.

Kinney, Irrigation, § 60; *Metcalf v. Nelson*, 8 S. D. 87, 65 N. W. 911.

While the owner of the soil has the ownership of percolating waters within the soil, if he is actuated by malice or guilty of negligence in its waste, to the damage of others, he is liable in an action for damages or to be enjoined, and if, by due care, he can prevent the injury, he must do so.

Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; *Greenleaf v. Francis*, 18 Pick. 117; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569; *Tiedeman, Real Prop.* § 615; *Collins v. Charters Valley Gas Co.* 131 Pa. 143, 6 L. R. A. 280, 18 Atl. 1012.

The owners of neighboring flowing artesian wells may be restrained from a misuse of the same; in other words, the owners of the same are restricted in the use of the water therefrom exactly the same as in the use of water from surface streams.

Burroughs v. Saterlee, 67 Iowa, 396, 56 Am. Rep. 350, 25 N. W. 808; *Willis v. Perry*, 92 Iowa, 297, 26 L. R. A. 124, 60 N. W. 727; *Collins v. Charters Valley Gas Co.* 131 Pa. 143, 6 L. R. A. 280, 18 Atl. 1012; *Metcalf v. Nelson*, 8 S. D. 87, 65 N. W. 911; *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 33 L. R. A. 376, 20 So. 780.

Drainage laws which take all of the percolating waters from the owners of the soil are held to be constitutional.

Cooley, Const. Lim. 733; *Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389; *Winslow v. Winslow*, 95 N. C. 24; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086.

The most of the semiarid states in this country have changed very many of the common-law rules relating to waters, and their constitutionality has never been seriously questioned.

Cooley, Const. Lim. 704 *et seq.*; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 296, 14 L. R. A. 755, 28 Pac. 272, 675; *Reno Smelting Mill & Reduction Works v. Stevenson*, 20 Nev. 269, 4 L. R. A. 60, 21 Pac. 317; *Jones v. Adams*, 10 Nev. 78, 6 Pac. 442; *Kinney, Irrigation*, § 390; *Sturr v. Beck*, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350.

The enactment of this statute was only a proper exercise of the police power of this state.

62 L. R. A.

Cooley, Const. Lim. 436-438, 732, 733; *Munn v. Illinois*, 94 U. S. 113, 4 L. ed. 77; *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 24 L. ed. 734; *Gould, Waters*, §§ 205-208; *Burroughs v. Saterlee*, 67 Iowa, 396, 56 Am. Rep. 350, 25 N. W. 808; *Willis v. Perry*, 92 Iowa, 297, 26 L. R. A. 124, 60 N. W. 727.

Winslow, J., delivered the opinion of the court:

The principles of the common law regulating the rights of landowners in subterranean waters are well understood. If the waters simply percolate through the ground, without definite channel, they belong to the realty in which they are found, and the owner of the soil may divert, consume, or cut them off with impunity. If, on the other hand, the subterranean waters flow in a defined channel, the rules which govern the use of surface streams apply; but the presumption is that the waters are percolating waters until it is shown that they are supplied by a definite, flowing stream. *Gould, Waters*, §§ 280, 281, and cases cited. In the present case the trial court found that the water which supplies the plaintiff's and defendant's wells comes from a "subsurface supply and stream of water," or, as it is called in another place in the findings, "a subterranean stream of water." If, as we assume, this finding means a subterranean stream with defined channel, as distinguished from mere percolations through a porous stratum of earth or rock, then the judgment may be sustained upon this ground alone, if such finding is sufficiently supported by the evidence. This, therefore, is the first question to be considered.

It appears by the evidence that in the town of Germantown, Washington county, there is an area about 2½ miles in width by 5 miles in length, within which artesian wells may be successfully drilled, and flowing water reached at a depth of about 200 feet, and in which there are now about 25 such wells, including the wells of the parties; that most, if not all, of these wells, when first drilled, were flowing wells, but that, as more wells have been bored, the flow of wells located on higher ground (of which the plaintiff's is one) has become irregular, but that water can always be obtained by pumping; that defendant's wells are in the lower part of the basin, and hence will flow when those on higher ground will not; that nearly or quite all the well owners have caps or plugs on their wells, so arranged as to check the flow when the well is not in use, but that the defendant allows the water to flow freely for the greater part of the time; that, when one of the wells in the region is allowed to

flow continuously, no perceptible effect is immediately observed upon the plaintiff's well, but that after about twenty-four hours of flowing the water begins to recede materially; that when water was struck in defendant's second well the plaintiff's supply began to fall off, and in about three weeks it ceased to flow over the top. From the testimony of a number of experienced artesian-well drillers in the region, one of whom drilled the wells of the parties to this action, it appeared that in most, if not in all, of the wells, water was obtained either in a stratum of limestone or a stratum of sandstone, and that when water was struck the drill bit rested upon the bottom of the well. There was no evidence that there was any sudden drop of the drill when water was reached.

The foregoing statement covers all the material facts in evidence which tend to throw light upon the sources or nature of the water supply in the Germantown wells. It is impossible for us to see how these facts justify the conclusion that there is any defined subterranean stream which supplies the wells of the parties. The conclusion is irresistible from the facts stated that all the wells draw their supply from a stratum of porous rock, either of limestone or sandstone, which lies in an inclined position, and comes to the surface at some distant point, where it receives its water supply; that this porous rock is located between impervious rocks above and below, and probably ends or is cut off at one edge of the Germantown district, thus forming a basin or pocket, which when pierced by the drill, sends water to the surface in obedience to natural laws too well known to require statement. Were there any doubt of this conclusion from the evidence, scientific knowledge on the subject of the sources of artesian wells in general, and the artesian wells of Wisconsin in particular, is now so complete and certain as to leave no room for doubt, and of such facts courts may take judicial notice. It has long since become a matter of common scientific knowledge that the ordinary artesian well derives its supply from a pervious stratum of rock imprisoned between two impervious strata of earth or rock, the water-bearing stratum being inclined, and coming to the surface at some distant and higher point, called the "intake," where it receives the water, and that the water percolates with greater or less rapidity along and through the inclined stratum, obedient to the law of gravity, until it reaches some obstruction so as to be imprisoned, in which event, if the stratum be pierced, water will rise in a tube by hydrostatic pressure, due to the greater height of the intake. The idea that there are vast subterranean channels or caverns,

62 L. R. A.

in which artesian waters flow like a river, has been long since abandoned. These are matters of common scientific knowledge. Vol. 1, *Geology of Wisconsin*; Chamberlain, p. 689; U. S. Geological Survey 1885, pp. 125 to 173; vol. 6, *Iowa Geological Survey*, p. 127.

Thus in the present case both the evidence and well-established scientific knowledge agree as to the source of the water supply of the wells in question. That source is not a stream or river, with defined channel, but an inclined stratum of porous rock, which may be many miles in extent, saturated with water which percolates gradually from the intake along and through the stratum until stopped by the termination of the porous formation, where it forms an accumulation. In no proper sense can such water be called a stream with a defined channel. The word "defined" here means a contracted and bounded channel. Kinney, *Irrigation*, § 48. It is not meant by this that there must be an open channel or fissure in the rock, through which water flows freely and rapidly, in order that there may be a defined subterranean stream (such channels are rare, if in fact they ever exist), but simply that the water, whether moving slowly or rapidly, and whether passing through sand or gravel or porous rock, must have the characteristics of a stream, in that it has a course, and a channel with definite bounds. Such subterranean streams doubtless exist, especially in sandy regions, where surface streams at times disappear and pursue their courses under ground for long distances, and finally return to the surface again; but the waters in question in the present case have none of these characteristics, and hence must be held to be strictly percolating waters. An exhaustive discussion of the general subject of the distinction between subterranean streams with defined channels and mere percolating waters will be found in 67 Am. St. Rep. 659, as a note to the case of *Wheelock v. Jacobs*, 70 Vt. 162, 43 L. R. A. 105, 40 Atl. 41, and may be consulted with profit.

Counsel for the plaintiff frankly admit that the weight of authority is that the owner of soil may deal with percolating water as he may see fit, but they claim that there are some modifications of the rule applicable to the present case, and the cases cited in support of this contention will be briefly noticed. First among those cases are *Bassett v. Salisbury Mfg. Co.* 43 N. H. 569, 82 Am. Dec. 179, and *Sweet v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276. These cases, indeed, reject the principle that a landowner may dispose of percolating water as he chooses, and adopt the principle that the landowner's right in percolating waters is no greater than his right in running streams; but they stand

nearly or quite alone in that position, and it is admitted in the opinion in the first case cited that the great weight of authority is the other way. We cannot follow them, in the face of the well-nigh universal consensus of judicial opinion to the contrary. The cases of *Hart v. Jamaica Pond Aqueduct Corp.* 133 Mass. 488, and *Forbell v. New York*, 164 N. Y. 522, 51 L. R. A. 695, 58 N. E. 644, are also relied on as modifying the general rule. In the first of these cases a bill in equity was filed, in which it was charged that the defendant, which was a corporation authorized by law to condemn land to enlarge a pond upon its own land, and construct a dam thereon for the purpose of accumulating water in the pond for aqueduct purposes, had condemned for that purpose a parcel of the plaintiff's land, the plaintiff still remaining, however, the owner in fee of the parcel, and also of adjoining lands, and of valuable water rights and privileges immediately below the land so taken; that the corporation had commenced to sink a well and erect powerful pumping machinery upon the land condemned, for the purpose of supplying water to its customers; and that by these acts the plaintiff's lands and water rights would be seriously impaired in value, by the tapping and drawing off of the underground sources of supply of said water rights and privileges. Upon demurrer the bill was held to state a good cause of action. The court said, in substance, that the question was not what might be the rights of the plaintiff as against an owner of adjoining lands, who by digging wells or by lawful use of his land, intercepts underground currents of water to plaintiff's injury. This may be *damnum absque injuria*. The defendant is not the owner of adjoining land, but has only an easement therein for certain purposes, the title being in the plaintiff; and its threatened acts are illegal, because they exceed its powers, and hence it stands in no better position than a stranger creating a permanent nuisance on the plaintiff's land. In the second case named it appeared that the city owned 2 acres of land adjoining certain agricultural lands of the plaintiff, and that it sunk wells and pumped and sold water therefrom, thereby draining the plaintiff's land of its natural water supply, and thereby made it unfit for cultivation, and destroyed plaintiff's business. It was held that the rule that the extraction of percolating water was not actionable would be adhered to, but that where adjoining land is impaired for agricultural purposes an injunction should be granted. It will be noticed that in each of the above cases the court is careful to recognize the principle that the owner of lands may use percolating waters without liability to an adjoining owner. The 62 L. R. A.

Massachusetts case, in effect, holds that the defendant there was not an owner of land, and had no right to use the land in that manner, and hence was liable, while the New York case seems to hold that the extraction of underground percolating waters, which simply affects the flow of such waters on adjoining lands, is lawful, but, if it impairs the land itself for use in agriculture, it is wrongful. Whether the reasoning in the latter case is entirely satisfactory or logical may be doubted, but, in any event, it is plain that neither case in any way touches the case at bar. In the present case the defendant has sunk a well on land which he owns in fee, and there is no claim that it in any way affects the quality of the plaintiff's land for use in agriculture. Again, the respondent cites the case of *Greenleaf v. Francis*, 18 Pick. 117, where the principle stated was that a man may lawfully dig a well on his own land where convenient, notwithstanding he thereby diminishes the water in his neighbor's well, unless in so doing he is actuated by mere malice; and, as recognizing the same principle, the respondent also cites *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; and *Chesley v. King*, 74 Me. 164; 43 Am. Rep. 509. This court has recently and distinctly held that the exercise of a property right cannot be affected or curtailed by a malicious motive. *Metzger v. Hochrein*, 107 Wis. 267, 50 L. R. A. 305, 83 N. W. 308. Lastly, in this connection, the respondent cites two cases from Iowa, viz., *Burroughs v. Saterlee*, 67 Iowa, 396, 56 Am. Rep. 350, 25 N. W. 808, and *Willis v. Perry*, 92 Iowa, 297, 26 L. R. A. 124, 60 N. W. 727, as justifying in some degree the contention made here; but, on examination of those cases, it will be seen that in both of them it was found as a fact that the conflicting wells tapped an underground defined stream of water, and hence they were properly governed by the law applicable to surface streams. From this brief review of the law and the cases relied upon as modifying the ancient common-law rule as to percolating waters, it seems clear that it must be held that the appellant had a clear right at common law, resulting from his ownership of land, to sink a well thereon, and use the water therefrom as he chose, or allow it to flow away, regardless of the effect of such use upon his neighbor's wells, and that such right is not affected by malicious intent. Whether this right results from an absolute ownership of the water itself, as stated in some of the authorities, or from a mere right to use and divert the water while percolating through the soil, is a question of no materiality in the present discussion. In either event, it is a property

right, arising out of his ownership of the land, and is protected by the common law as such.

The respondent, however, relies upon the provisions of chapter 354, p. 502, of the Laws of 1901; and it must be admitted that, under the findings of the court, the judgment in this case is justified by the terms of that law. The 1st section of the law in question provides that, "where there are two or more artesian wells in any vicinity or neighborhood, one or more of which are operated or used by any person or owner, the person or owner of such well shall use due care and diligence to prevent any loss or waste or unreasonable use of any water therein contained or flowing from the same, as would deprive or unnecessarily diminish the flow of water in any artesian well, to the injury of the owner of any other well in the same vicinity or neighborhood." The 2d section provides that "any person who shall needlessly allow or permit any artesian well owned or operated by him, to discharge greater quantities of water than is reasonably necessary for the use of such person so as to materially diminish the flow of water in any other artesian well in the same vicinity, shall be liable for all damages which the owner of any such other well shall sustain." The validity of this act is denied by the appellant on the following grounds: (1) That it deprives the owner of property without due process of law; (2) that it is the taking of property for private use and without compensation; and (3) that it is special legislation. On the part of the respondent it is claimed that the legislature has a right to regulate the manner of using water, and that such regulation does not interfere with vested property rights; also that the act is valid as an exercise of police power.

We have seen from the previous discussion in this opinion that the right of a landowner to divert, appropriate, and use percolating waters as he sees fit has always been recognized by the common law as a right of property attached to the ownership of the soil, and enforced as such. In this state, both by the Constitution and judicial decision, it is settled that those parts of the common law which were in force at the time of the adoption of the Constitution, and were not inconsistent therewith, remained in force until changed by the legislature. Const. art. 14, § 13. *Coburn v. Harvey*, 18 Wis. 147. The parts of the common law which were in force at the time of the adoption of the Constitution, and which have thus been recognized as remaining in force, were such parts as were reasonably applicable to our situation and government. *Coburn v. Harvey*, *supra*. Where private property rights were founded

upon, and preserved by any part of, the common law so in force, they could not be taken away or impaired by mere legislative enactment, but only for public purposes, by the exercise of eminent domain, or by the exercise of the police power for the protection of the public. It is true that in many of the extreme western states and territories, where mining interests are of the first importance, or where the land is arid or semi-arid, on account of deficient rainfall, it has been settled that the common-law rules as to the use of surface streams and subterranean waters do not prevail, and that it is competent for the legislature to provide for the appropriation of surface or subterranean waters for the purposes of mining or irrigation; and hence in those states there have grown up by statute or decision, or both, systems of law contravening the rules of common law as stated in this opinion. *Atchison v. Peterson*, 20 Wall. 507, 22 L. ed. 414; *Yunker v. Nichols*, 1 Colo. 551; *Reno Smelting Mill & Reduction Works v. Stevenson*, 20 Nev. 269, 4 L. R. A. 60, 21 Pac. 317; *Jones v. Adams*, 19 Nev. 78, 6 Pac. 442; Kan. Laws, 1891, chap. 133, pp. 223 *et seq.* These systems, however, are all based fundamentally on the proposition that the common-law rules are not applicable to the conditions prevailing in those territories which are widely different from the conditions which prevail in England, or in those parts of this country where the rainfall is normal, and irrigation is not recognized as a prime necessity. In this state it has never been recognized that any such exceptional conditions prevail as has been held to be the case in the regions mentioned. Moreover, it has been recognized in a long line of cases, too numerous and familiar to need mentioning, that the common-law rules as to the use and disposition of water have always prevailed. Most of these cases relate to surface streams or surface waters, but in *Case v. Hoffman*, 100 Wis. 314, 44 L. R. A. 728, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945, the rule as to percolating waters was stated as the undoubted law. So it seems inevitable that in this state, at least, the right of a landowner to sink wells and gather and use percolating waters as he will, even though the flow in his neighbor's well be diminished is a property right, which cannot be taken away from him or impaired by legislation, unless by way of the exercise of the right of eminent domain or by the police power.

As the law in question is in no sense a condemnation law, the only question remaining, is whether it may be sustained as a proper exercise of the police power. The police power is a broad and comprehensive power, by which the rights of an individual,

both as to his liberty and his enjoyment of property, may be curtailed in the interest of the public welfare, but it is not easy of accurate definition. Where laws which are supposed to be enacted in the exercise of the police power interfere with the citizens' liberty or rights of property, they can only be justified upon the ground that they in some manner secure the comfort, safety, or welfare of society. It is on this principle that drainage laws are sustained. *Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389. And conversely, if it appear from the law itself that its purpose is primarily to benefit private owners, they are condemned. *Re Theresa Drainage Dist.* 90 Wis. 301, 63 N. W. 288. It must appear that the interests of the public generally require the restriction, and not the interests, of private individuals. *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 58 L. R. A. 748, 90 N. W. 1098. We find ourselves unable to comprehend how, under these principles, the law in question can be sustained as an exercise of police power. It does not even pretend to conserve any public interest. Upon its face, its purpose is to promote the welfare of one citizen, by preventing his neighbor from using his own property. We are aware that questions of a somewhat similar nature have arisen with regard to laws preventing the waste of natural gas in Indiana, and have received different treatment. *Townsend v. State*, 147 Ind. 624, 37 L. R. A. 294, 47 N. E. 19; *State v. Ohio Oil Co.* 150 Ind. 21, 47 L. R. A. 627, 49 N. E. 809. The statutes under consideration in these cases were both criminal statutes; the first declaring the use of natural gas in flambeau lights to be wasteful and extravagant and dangerous to the public good, and making such use a misdemeanor; the second declaring it to be unlawful for any person having possession of any natural gas or oil well to allow the gas or oil to escape into the open air for a longer period than two days after the gas or oil shall have been struck in the well. The first of the cases above cited was a criminal prosecution under the first of the above-named laws. A conviction was affirmed, and it is said in the opinion that it was agreed on both sides that the act was an exercise of the police power of the state. It was further said that the question whether a statute encroaches upon the natural rights of the citizen is a legislative, and not a judicial, question, and that the courts cannot overthrow it on that ground; also that when the legislature had inquired into the fact, and determined that the burning of natural gas in flambeau lights is waste, that determination is binding on the courts. Upon these premises the result seems easy to reach, but the 62 L. R. A.

difficulty is that the courts of this state do not proceed upon the principle that a legislative determination that an act does not encroach upon the rights of a citizen ends the question, and prevents the courts from passing upon it. In the second of the cases last cited the action was brought by the attorney general, in behalf of the state, to enjoin the defendant from allowing gas to escape into the open air in violation of the second act named. The complaint was voluminous, and showed that a large portion of the people of the state, and many large manufacturing institutions were dependent upon natural gas for a fuel supply, and that the state itself and many cities and counties had equipped their public institutions and buildings for the use of such gas; that the supply was such that, if husbanded and protected, it would last for many years, and increase the comfort and happiness of the people at large; that the defendant had drilled several wells, and permitted large quantities of gas to escape, in violation of the law and threatened to continue such course, and to drill other wells and to allow the gas to escape therefrom; that, if allowed to continue in such course, the supply of gas upon which the citizens of the state depended would be diminished and finally destroyed; that the statutory penalties were inadequate; and that the damage would be irreparable. Upon demurrer this complaint was held to state a good cause of action; the ground being taken that the law was not an unwarranted interference with private property, because the gas did not become private property until reduced to possession, and that the public interest in the supply of natural gas was so great and direct that its waste was a public calamity, and amounted to a public nuisance, which the state had a right to have abated by injunction. It seems clear that, even if the reasoning of these cases could be fully approved, they do not bear very directly upon the question before us. It does not follow that the court would apply the same rules to subterranean percolating waters, which are constantly being renewed, that it does to natural gas, the supply of which is not being renewed. It is to be noticed, also, that both the laws are framed to protect public rights and interests, and not private rights, and that both judgments are based on the ground of great injury to public comfort, prosperity, and welfare. The last case cited was taken to the Supreme Court of the United States (*Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576), and the judgment below was affirmed; the reasoning being that the supply of gas in the ground is the common property of all of the owners of the surface, and that one of the common

owners may rightfully be prevented from wasting the common property to the annihilation of the rights of the remaining owners. However sound this principle may be as applied to natural gas or oil, we have failed to find an authority in the books that holds that percolating waters in the ground are the common property of surface owners. On the other hand, the holdings are unanimous to the effect, either that such water is the absolute property of the landowner in whose land it happens to be, or that the right of the landowner to use or divert it while in his land is an absolute right. Another Indiana case (*Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co.* 155 Ind. 461, 50 L. R. A. 768, 57 N. E. 912), is instructive on this subject, because it draws a distinction between natural gas and subterranean waters, which, if well founded, deprives all the foregoing cases on the subject of the control of the use of natural gas of any significance as applied to the use of subterranean waters. This is an action in equity by one property owner against another, in which the complaint alleged that the defendant, by pumping and using other artificial devices in its wells, was increasing the natural flow of gas in its wells, and thus greatly diminishing the pressure in the underlying gas reservoir, and that as a result a great body of salt water would enter the gas reservoir, and ultimately destroy the plaintiff's wells. This complaint was held to state a good cause of action. In

the opinion the court said that, if gas could be dealt with as subterranean waters, there would be little difficulty in determining the rules by which the rights of landowners should be governed. "But the difference between natural gas and underground waters, whether flowing in channels or percolating the earth, is so marked that the principles which the courts apply to questions relating to the latter are not adapted to the adjustment of the difficulties arising from conflicting interests in this new and peculiar field." The court then holds, in substance, that the natural right of landowners in natural gas is simply to use such portion as will by natural laws of flowage rise in their wells, and not to increase that flow by artificial means, to the detriment of the flow of others.

Perhaps more time has been spent in reviewing these decisions than is profitable, but the subject is interesting, and we have felt that, owing to the importance of the case before us, they should be given serious consideration. That consideration shows conclusively, as we think, that they have no application to the case of the use of percolating waters. The necessary result of the whole discussion is that the law in question cannot be held to be within the police power, and that it, in effect, takes private property for private use, and without compensation.

Judgment reversed and action remanded, with directions to dismiss the complaint.

KANSAS SUPREME COURT.

John M. KINKEL, *Plff. in Err.*,
v.

Scott WINNE *et al.*

(.....Kan.....)

*In the sale of a fire-insurance expiration register, which, without the knowledge or consent of the vendor, had been secretly inspected and partially copied by third persons, made without any representation as to the character or quality of the register with reference to the privacy of the information imparted by it, and without any express warranty that it constituted an exclusive record of the matter it contained, the rule of caveat emptor applies.

(May 9, 1903.)

*Headnote by BURCH, J.

NOTE.—As to implied warranty of fitness of property bought for special purpose, see, in this series, *McQuaid v. Ross*, 22 L. R. A. 187, and note; also *Blerman v. City Mills Co.* 37 L. R. A. 799.
62 L. R. A.

ERROR to the District Court for Reno County to review a judgment in favor of plaintiffs in an action brought to recover the amount alleged to be due on promissory notes given as a portion of the purchase price of an insurance business. *Affirmed.*

The facts are stated in the opinion.

Messrs. Frigg & Williams, for plaintiff in error:

In every sale of personal property, particularly where the seller has all evidences of title in himself, there is an implied warranty of title.

28 Am. & Eng. Enc. Law, p. 743; *Paulsen v. Hall*, 39 Kan. 368, 18 Pac. 225; *Shaw v. Smith*, 45 Kan. 334, 11 L. R. A. 681, 25 Pac. 886.

If a party sells by mistake what he does not own, the price paid may be recovered.

Doom v. Curran, 52 Kan. 360, 34 Pac. 1118; *Scantlin v. Allison*, 12 Kan. 85; 28 Am. & Eng. Enc. Law, p. 743.

The whole transaction shows that the par-

ties intended, at the time of their transaction, that Kinkel should get the entire insurance business and good will of said business.

Black, Law Dict. p. 543; *Glen & H. Mfg. Co. v. Hall*, 61 N. Y. 226, 19 Am. Rep. 278; *Thompson v. Winnebago County*, 48 Iowa, 155.

Mr. H. Whiteside for defendants in error.

Burch, J., delivered the opinion of the court:

In the sale of an insurance business involving the transfer of agencies from the vendors to a vendee, a renunciation of further activity in such business on the part of the vendors, and the future patronizing of the vendee with such business of that character as they might have at their disposal, a written contract between the parties provided as follows: "Said first party further agrees to turn over to said second party the expiration register owned by the firm of Winne & Winne, and to defend any suits that may be instituted by any person for the recovery of same, should litigation ensue." The negotiations concluded with a bill of sale in the following terms: "Know all men by these presents, that in consideration of three thousand and no/100 dollars, the receipt of which is hereby acknowledged, we do grant, sell, transfer, and deliver unto John M. Kinkel, heirs, executors, administrators, and assigns, the following goods and chattels, viz.: One expiration register and the good will and fire-insurance business of the firm of Winne & Winne. To have and to hold all and singular the said goods and chattels forever; and the said grantors hereby covenant with the said grantee that they are the lawful owners of the said goods and chattels; that they are free from encumbrances; that they have good right to sell the same as aforesaid; and that he will warrant and defend the same against the lawful claims and demands of all persons whomsoever." Part of the consideration was the promissory notes of the purchaser. In a suit upon certain of them in default, a failure of consideration was claimed because the expiration register had been wholly or extensively copied, whereby a rival agency became possessed of the information it imparted. It was not contended the vendors were in any way privy to such copy, or had any knowledge of it at the date of sale. To prove damages, the purchaser offered a witness to show the value of the expiration register of the insurance business of Winne & Winne as an exclusive list and the value of such register with a copy thereof extant. The court sustained an objection to the proposed proof, and withdrew the defense from 62 L. R. A.

the jury. Was this error? It is said by plaintiff in error that the title to the expiration register partially failed because the book had been inspected and its entries transcribed. This, however, presents a flagrant *non sequitur*. The reason is wholly inadequate as a guaranty of the assertion. The ownership of a book does not depend upon whether or not it has been read or duplicated. Dominion over it may be complete and absolute, even though it may have informed the minds of multitudes. So, in this case, plaintiff in error owns the book and holds possession of it unvexed by the assertion of any hostile interest in it or title to it whatever.

It is next urged that the quality of the article is not what plaintiff in error assumed it to be, viz., an exclusive record of the matter exhibited by the book. To recover on this ground it is necessary to read into the written contract an agreement that the register contained the sole list of the Winne & Winne insurance expirations. Plainly, this cannot be done. Express covenants are written out in full in the instruments of sale, and these define the limits of the vendor's liability. Without some representation as to the quality or character of the register, or as to the privacy of the information to be imparted by it, upon which the purchaser relied, and by which he was deceived, and without an express warranty, the rule of *caveat emptor* applies. There is no relation of trust and confidence between buyer and seller. The purchaser takes at his own risk as to quality and fitness. When title passes, he has all the vendor engaged to give him, and the courts cannot make another contract for him. Plaintiff in error, however, seeks to interpose an implied warranty of fitness for a specific purpose—that of prosecuting the business of insurance—which was in the contemplation of the parties at the time of the sale, and *Shaw v. Smith*, 45 Kan. 334, 11 L. R. A. 681, 25 Pac. 886, is cited in support of his right so to do. In that case the purchaser applied to a dealer to furnish him flax seed for the purpose of raising a crop. The vendor had no flax seed on hand, and undertook to supply the purchaser's requirements. When the seed was delivered, it appeared to be good, and was believed to be good by both parties, but in fact had lost its germinative power. It was therefore held that, under the circumstances, a warranty might be implied that the seed should be sufficient for the purpose of sowing and raising a crop from it. That case, however, was merely one of a familiar class in which the vendor undertakes to exercise his skill and judgment in the selection of an article appropriate to the vendee's needs after the latter has

trusted him to do so. The underlying principle of the decision is expressed in the following language from the opinion: "The purchaser had to rely upon the seller's furnishing to him the kind of seed agreed upon, and the seller, in effect, agreed that the seed furnished should be the kind of seed agreed upon." In *Leake*, Contr. 2d ed. 404, this rule is stated in a very luminous way: "If an order be given for the manufacture or supply of an article to satisfy a required purpose, that purpose, and not any specific article, being the essential matter of the contract, the seller is then bound, as a condition of the contract, to supply an article reasonably fit for the purpose, and is considered as warranting that it is so. But if an order be given for a specific article of a recognized kind or description, . . . and the article is supplied, there is no warranty that it will answer the purpose described or supposed, although intended and expected to do so." See *Goulds v. Brophy*, 42 Minn. 109. 111, 6 L. R. A. 392, 43 N. W. 834. To the same effect is the classification of Mellor, J., in *Jones v. Just*, L. R. 3 Q. B. 196, 202: "First, where goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable on examination,—at least where the seller is neither the grower nor the manufacturer. *Parkinson v. Lee*, 2 East, 314. The buyer in such a case has the opportunity of exercising his judgment upon the matter; and, if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may, if he chooses, require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality, or are merchantable. . . . Secondly, where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty. *Barr v. Gibson*, 3 Mees. & W. 390. Thirdly, where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described, and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. *Chanter v. Hopkins*, 4 Mees. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288. Fourthly, where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term

or warranty that it shall be reasonably fit for the purpose to which it is to be applied. *Brown v. Edington*, 2 Mann. & G. 279; *Jones v. Bright*, 5 Bing. 533. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment, and not upon his own. Fifthly, where a manufacturer undertakes to supply goods, manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article. *Laing v. Fidgeon*, 4 Campb. 169, 6 Taunt. 108." So, in *Mason v. Chappell*, 15 Gratt. 572, 583, a purchaser ordered 150 barrels of a manure called "Chappell's fertilizer," which proved defective. In an action for breach of warranty against the vendor the court said: "If the plaintiff, relying on the defendant's skill and judgment, had applied to him to furnish a manure which would produce such effects as are attributed to 'Chappell's fertilizer,' without specifying what particular kind of manure he wanted, and the defendant had accordingly furnished an article which, instead of producing such effects, proved to be entirely worthless, there would be good ground for the proposition that there was an implied warranty from which liability would arise. . . . But where a specific article is ordered and furnished, the law is well settled that, although the purchaser states the purpose to which he intends to apply it, there is no implied warranty on the part of the vendor that it is suitable for the purpose; and he will not, in the absence of fraud, or an express warranty, be held liable, however unfit and defective it may turn out to be." See also *Deming v. Foster*, 42 N. H. 165; *Bartlett v. Hoppock*, 34 N. Y. 118, 88 Am. Dec. 428; *McDonough v. Jolly Bros.* 165 Pa. 542, 30 Atl. 1048; *Wisconsin Red Pressed-Brick Co. v. Hood*, 54 Minn. 543, 56 N. W. 165; *McQuaid v. Ross*, 85 Wis. 492, 22 L. R. A. 187, 55 N. W. 705. In the present case the purchaser did not apply to the vendors for the talisman of a successful insurance business, or for a magic weapon or device with which to confound and rout his rivals and competitors; nor did he depend upon them to furnish him with such a precious piece of property. He simply bought a fire-insurance business as it then stood, including the records pertaining thereto as they then presented themselves. The proposition was not, "Sell me a list of expirations known to no other living person," it simply was, "Sell me this list now open before us." The case, therefore, falls within the principle of *Lukens v. Freund*, 27 Kan. 664, 41 Am. Rep. 429, in which a vendor had on hand an article which he desired to sell. The purchaser,

finding it there, bought it. There being no representation or express warranty relating to character or quality, the vendor was not liable. Neither was the expiration register a part of the good will of the Winne & Winne business, as plaintiff in error suggests. It was a specific item of personal property distinguished from good will by the terms of the contract. But, if it were comprehended under the term "good will," the purchaser has it. There was no representation or warranty as to the extent of the good will bargained for. The expiration register was designed to point out the source

of possible business in the future. This office it continues to perform.

A question of damages argued in the brief of plaintiff in error was determined adversely to him by the jury upon sufficient evidence. It therefore needs no further consideration; and, because of the view here taken of the right of plaintiff in error to recover at all, it is not necessary to examine the method adopted by him in the proof of damages.

The judgment of the District Court is affirmed.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

SECOND NATIONAL BANK OF RICHMOND

v.

C. N. FITZPATRICK *et al.*

(.....Ky.....)

1. A finding of a trial court sustaining an attachment upon conflicting evidence will not be disturbed on appeal.
2. In a suit by a national bank upon a note tainted with usurious interest which is credited on, or eliminated from, the note, the judgment should be for the principal with interest at the legal rate from the commencement of the action.
3. In a suit for a penalty for charging usurious interest, interest should be allowed from the date of filing the petition.
4. The principal sum due upon the note need not be paid or tendered before the commencement of a suit for statutory penalties for the collection of usurious interest.
5. The penalty of double the illegal interest paid, imposed for the taking of usurious interest, is twice the entire amount of interest paid, and not merely twice the excess above the legal rate.
6. The maker of a note carrying interest at a usurious rate will not be held to have intended a general payment to be applied on interest merely because the payment was so applied on the books of the bank without his knowledge.

(Burnam, Guffy, and Hobson, JJ., dissent.)

(June 7, 1901.)

CROSS-APPEALS from a judgment of the Circuit Court for Madison County in actions brought to recover the statutory penalty for taking usurious interest, and to recover the amounts alleged to be due on certain promissory notes; the bank appealing

NOTE.—As to forfeiture or other effect of taking or reserving illegal interest by national bank, see also *Citizens' Nat. Bank v. Gentry*, 56 L. R. A. 673, and *note*.
62 L. R. A.

from the portion of the judgments which fixed the interest which should be allowed and the penalty which it should pay, and the makers of the notes appealing from so much as sustained an attachment and made application of payments on the note. *Reversed.*

The facts are stated in the opinion.

Messrs. J. A. Sullivan and A. R. Burnam for appellant.

Messrs. John G. Fitzpatrick, R. H. Crooke, and J. Tevis Cobb for appellees.

Du Relle, J., delivered the opinion of the court:

This appeal is on the record of three cases which were consolidated and heard together in the Madison circuit court. We shall first make a statement of the manner in which the cases originated, adopting in the main the statement of facts on behalf of the bank in regard to the dates and amounts of the money transactions, that being supported by the weight of the testimony, and the basis upon which the circuit court rendered its judgment.

The penalty suit. On January 9, 1896, C. N. Fitzpatrick filed his action to recover of the appellant, which is a national bank, a penalty of twice the amount of the interest paid by him on a note which he paid January 11, 1895, amounting as of that date to \$2,283.51; the penalty claimed being \$2,967.02. This note was a renewal of several small loans by the bank to Fitzpatrick, and included also the sum of \$385, interest at an illegal rate for one year upon the larger note hereinafter referred to. The court adjudged that there was included in the amount of this note, as paid by Fitzpatrick, \$1,063.15 of interest at illegal rates, and rendered judgment for twice that amount, \$2,126.30, with interest from the date of the judgment, which judgment was allowed as

an offset and credit against the judgment rendered in favor of the bank upon the larger note.

The suit upon the larger note. On January 10, 1896, the day after the filing of the penalty suit, the bank filed its action on a note of C. N. Fitzpatrick for the sum of \$6,296.95. This note was in renewal of a number of smaller loans by the bank to Fitzpatrick, to the amount of which interest had from time to time been added and carried in the renewals. The court gave judgment in favor of the bank, for \$5,170, as the amount of money actually loaned by the bank to Fitzpatrick, and remaining unpaid in the note, after eliminating and forfeiting all interest contained therein. On this note, it appears, there were a number of payments, which the court appears to have held were payments of interest as such. Two instalments of the interest upon this debt were, at the dates of the execution of two renewals, added to and included in the amounts of smaller notes which were subsequently paid to the bank; one of them being the note the payment of which is the basis of the penalty suit.

The suit on the smaller note. On the same day on which the suit was filed upon the larger note the bank brought its action on a note for \$1,648.75. This note, also, was in renewal of several smaller obligations. Two payments were made upon this consolidated indebtedness, and these appear by the judgment to have been considered as applied, first, to the payment of the usurious interest charged, and then to the reduction of the principal; the only interest which was eliminated being that which accrued after the last payment. The court gave judgment for \$1,540.24, with interest from the date of the judgment.

The judgment sustaining the attachments sued out by the bank in the suits brought by it, and the propriety of this action, are questioned by the cross-appeal. It may be said, at this point, that, in view of the conflicting testimony upon the attachments, we should not be inclined to disturb the finding of the circuit court.

The questions presented by the original appeal are: (1) From what date should interest be allowed upon the judgments in favor of the bank? (2) In the penalty suit should judgment go for twice the amount of the entire interest paid at the illegal rate, or only for twice the amount of the interest paid in excess of the legal rate? Upon the cross-appeal the questions presented are: (1) Whether the court erred in the application of payments upon the two notes sued upon by the bank; it being contended that a part, at least, of such payments should be applied to the reduction of the principal.

(2) Whether the trial court should have dismissed the attachments sued out by the bank. This question has been already disposed of.

It may be observed here that the contention of appellant that the cross-appeal was not sued out in time is not sustained by the record, which shows that appeal to have been taken within two years from the rendition of the judgment. And see also *Elizabethtown, L. & B. S. R. Co. v. Catlettsburg Water Co.* 22 Ky. L. Rep. 1632, 61 S. W. 47. It will be observed that the only questions presented on the construction of the Federal statute, which have not been disposed of by the opinion in *Citizens' Nat. Bank v. Forman*, 23 Ky. L. Rep. 613, 56 L. R. A. 673, 63 S. W. 454, 757, are those of the time at which interest should commence, and of the basis of recovery in the penalty suit; the remaining question raised on the cross-appeal being one of fact—as to whether there was a specific application of payments by the debtor to the discharge of interest at an illegal rate.

The question of the date from which the judgment should bear interest seems to us to have been settled by the case of *Brown v. Marion Nat. Bank*, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390. Said the court, through Mr. Justice Harlan, in that case: "If a bank which violates that section sues upon the note, bill, or other evidence of debt held by it, the debtor may insist that the entire interest, legal and usurious, included in his written obligation and agreed to be paid, but which has not been actually paid, shall be either credited on the note or eliminated from it, and judgment given only for the original principal debt, with interest at the legal rate from the commencement of the suit." The question of the recovery of interest was before the Supreme Court in that case, and was decided by it. The reason for the fixing of this interest period is not stated in the opinion, but it seems to have been fixed upon the theory that, when suit is brought upon such a note, the demand, while in fact for more than the legal indebtedness, is, as of that date, to be treated as a demand for the amount of the legal obligation, and consequently bears interest from the date of putting the legal obligation in suit. The judgment of the trial court in this regard was therefore error. The interest should also have been allowed in the penalty suit from the date of filing the petition, that being the date of the first demand for the penalty.

It is contended that in a suit for the double penalty no recovery can be had unless it is alleged and proved that the principal sum due has been paid or tendered; and

Haseltine v. Central Nat. Bank, 155 Mo. 66, 56 S. W. 895, from the supreme court of Missouri, is cited in support of this proposition. As we have said in the case of *Citizens' Nat. Bank v. Forman*, 23 Ky. L. Rep. 613, 56 L. R. A. 673, 63 S. W. 454, 757, *supra*, the clear implication of the opinions of the supreme court is that, while there can be no presumption of the application of an undirected payment to the discharge of illegal interest, when not specifically so applied by the debtor, there may be payments of usurious interest, as such, which would entitle the debtor to recover the penalty, although the principal sum remained unpaid. Clearly, if such payments can be made, a case is presented where the interest upon one note is included in the amount of another note, and the other note subsequently paid in full.

It is also contended that, as penal statutes must be strictly construed, the Federal statute should be so construed as to allow a penalty for twice the excess only, and not for twice the amount of interest paid at the illegal rate. Upon this proposition appellant relies on certain cases from Pennsylvania and one Supreme Court case. Of the Pennsylvania cases it may be said that they are in direct conflict with the great weight of authority and with the uniform rulings of this court in that behalf. Moreover, the Supreme Court case relied upon does not support its contention. That case (*National Bank v. Johnson*, 104 U. S. 271, 26 L. ed. 742) was a case in which, judgment having been rendered by the New York court for twice the amount of interest in excess of the interest paid above the legal rate, the bank took the case to the Supreme Court, assigning for error that the New York court held that it was not entitled to the same rights as natural persons in New York to acquire business paper at any rate of interest agreed upon between the parties to the negotiation. Johnson, who was injured by the amount of the judgment, did not prosecute a writ of error, and the question here presented could not possibly have been before the Supreme Court. Nor does the statute, upon any fair rule of construction, support appellant's contention in this behalf. It provides that, "in case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid." etc. If the legal rate is 6 per cent, and interest at 8 per cent has been paid, what is the greater rate of interest which has been paid? Surely not 2 per cent, but 8 per cent. 11 62 L. R. A.

is not the difference which is to be recovered, but the greater rate of interest,—8 per cent; and it is "twice the amount of the interest thus paid" which may be recovered under the statute, and not twice the amount of the excess above the legal rate. The statute does not prohibit the borrower. It prohibits the bank. The borrower may pay, if he wishes, and incurs no penalty thereby. The lender is forbidden to contract for interest at the illegal rate, and by such a contract, though unexecuted, forfeits the entire interest carried in the note. If it receives the interest at the greater rate, it incurs the penalty of twice the amount of the interest thus paid. Surely it is not a fair construction of the statute which would make the penalty less for the accomplished violation of the statute than that denounced for a mere contract to violate it. We are of opinion that there was no error in the judgment of the circuit court in this respect.

There remains the question of the application of the payments upon the two notes upon which suit was brought by the bank. Certain of these payments appear to have been specific payments of interest, as such, by the debtor, accompanied by a renewal of the obligation for its face. Others of the payments, however, appear from the evidence to have been general payments to the bank, with no application by the debtor, except in so far as such application may be presumed by law, or from his supposed acquiescence in the bank's mode of keeping its books, to which he did not have access. As we have held, there is no such presumption of law; and we do not think the debtor can be presumed to have made an application of his payment to interest, as such, from the fact that the bank so applied the payments on its books without his knowledge.

The circuit court will have no difficulty in appropriating the payments in accordance with the views expressed here and in the *Citizens' Nat. Bank Case*, 23 Ky. L. Rep. 613, 56 L. R. A. 673, 63 S. W. 454, 757.

For the reasons given, the judgment is reversed upon the original and cross appeals, and cause remanded with directions to the Circuit Court to enter a judgment in accordance herewith.

Burnam, Guffy, and Hobson, JJ., dissent.

Writ of error dismissed by Supreme Court of United States April 27, 1903.

NEW HAMPSHIRE SUPREME COURT.

Jeremiah J. HORAN

v.

James J. BYRNES.

(.....N. H.....)

1. Forbidding the erection of a boundary fence exceeding 5 feet in height for the sole purpose of annoying adjoining property owners does not deprive the landowner of any property right.
2. That one person at a trial did not deny having made a statement imputed to him by a witness cannot be shown for the purpose of falsifying testimony given by him at a subsequent trial.

(April 7, 1903.)

CASE transferred by the Superior Court for the opinion of the Supreme Court after verdict in favor of plaintiff in an action brought to recover the statutory penalty for maintaining an illegal fence. *Reversed.*

At the trial defendant's wife was asked, as a witness, if she had not said to the plaintiff: "The fence is going higher. We won't leave you a bit of room." Upon her answer in the negative, she was asked if at another trial, when she was present, this statement had not been testified to, and if she did not fail to deny it. This she admitted. Plaintiff's wife testified that she lost her wedding ring on defendant's premises, and that the ring came into the possession of Mrs. Byrnes, who refused to deliver it up, but compelled claimant to go to the police station to recover it.

Further facts appear in the opinion.

Messrs. Brown, Jones, & Warren, for defendant:

When plaintiff sought to contradict Ann's denial he departed from the realm of bias and entered that of contradiction, and an essential element of contradiction was lacking.

3 Greenl. Ev. 16th ed. § 461f.

The testimony concerning the lost wedding ring was inadmissible.

Seavy v. Dearborn, 19 N. H. 351.

The police power of the state extends to the protection of the lives, health, comfort, and quiet of all persons, and the protection of all property, within the state; and persons and property are subjected to

such restraints and burdens as are reasonably necessary to secure the general comfort, health, and prosperity.

State v. White, 64 N. H. 48, 5 Atl. 828.

Mr. P. H. Sullivan, for plaintiff:

Being competent and material for some purpose, the evidence could not be excluded although incompetent upon other issues in the case.

Smith v. Morrill, 71 N. H. 409, 52 Atl. 928; *Rogers v. Kenrick*, 63 N. H. 335.

The defendant's wife, Ann, denies having any ill will toward the plaintiff or his family. The ring incident was admissible for what it was worth to controvert the denial.

Watson v. Trumbly, 60 N. H. 491.

The temper and feelings of a witness towards a party are proper subjects of inquiry, and, if he denies any hostility, he may be contradicted by other witnesses.

Folsom v. Braun, 25 N. H. 122; *Cooper v. Hopkins*, 70 N. H. 273, 48 Atl. 100.

The statute was constitutional.

Karasek v. Peier, 22 Wash. 419, 50 L. R. A. 345, 61 Pac. 33.

Parsons, Ch. J., delivered the opinion of the court:

"Any fence or other structure in the nature of a fence, unnecessarily exceeding 5 feet in height, erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance.

"Any owner or occupant, injured either in his comfort or the enjoyment of his estate by such nuisance, may have an action of tort for the damage sustained thereby.

"If the plaintiff recovers judgment in the action, the defendant shall cause the removal of the nuisance within thirty days from the date of the judgment, and for each day he shall permit the nuisance to remain after the expiration of said thirty days he shall incur a penalty of \$10 for the use of the party injured."

Pub. Stat. 1901, chap. 143, §§ 28-30.

The act forbids the use by one landowner of his land for the unnecessary erection of a fence exceeding 5 feet in height when the purpose of such unnecessary height is the annoyance of the adjoining owner or occupant, if such unnecessary height injures the adjoining owner in his comfort or the enjoyment of his estate. The claim of the defendant in support of his motion for a nonsuit that the statute is unconstitutional raises the question whether the statutory prohibition is an unwarranted interference with the defendant's "natural, essential, and inherent" right of "acquiring, possessing, and

NOTE.—For other cases in this series as to constitutionality of statute limiting height of fences and forbidding malicious erection thereof, see *Rideout v. Knox*, 2 L. R. A. 81, and *Karasek v. Peier*, 50 L. R. A. 345.

As to liability for malicious erection of fence, see *Letts v. Kessler*, 40 L. R. A. 177, and *note*, and *Metzger v. Hochrein*, 50 L. R. A. 305, 62 L. R. A.

protecting property," or deprives him of that protection in its enjoyment which is the right of "every member of the community." Bill of Rights, arts. 2, 12.

"The structure here referred to is one designed to take the place of a fence in the ordinary meaning of the term,—a structure erected upon or near the dividing line between adjoining owners for the purpose of separating the occupancy of their lands." *Lovell v. Noyes*, 69 N. H. 263, 46 Atl. 25; *Spaulding v. Smith*, 162 Mass. 543, 39 N. E. 189. The correlative right and duty of adjoining owners and occupants of lands at the common boundary between them is matter of general and public concern. The existence or not of an obligation to fence, what should constitute performance, and what liabilities should follow from nonperformance, are matters as to which the establishment of a definite rule plainly promotes the public peace and comfort and the security of property rights in real estate. All these questions were early settled by the legislature. It prescribed the obligation to fence as between adjoining owners, provided a method for the enforcement of the duty, declared the legal liability for failure to fence, and defined a sufficient fence. There was legislation upon the subject in 1687, 1692, 1743, and 1792 (1 N. H. Prov. Laws, 200; 3 Prov. Papers, 176; Laws 1696-1725, p. 117; Laws, ed. 1761, p. 225; Act Feb. 8, 1791; Laws, ed. 1797, p. 331); while in 1842 (Rev. Stat. p. 254, chap. 136, § 4) the requirements of a sufficient fence were prescribed. Such a fence need not be more than 4 feet high. Pub. Stat. 1901, chap. 143, § 5. Although these provisions in one sense imposed a burden upon real-estate ownership, the purpose of the legislature, as shown by the titles of the earlier acts "for the regulation of cattle, cornfields, and fences," was to make provision in reference to the control of domestic animals,—“to regulate the use and keeping of such property.” *Morey v. Broun*, 42 N. H. 373, 375. No one has ever been required to fence his land who does not improve it, or who “lays it in common.” Pub. Stat. chap. 143, § 14. The theory of these statutes is simply that, where adjoining owners each desire the exclusive use of their land, the expense of effecting the mutual purpose should be equally divided between them. Pub. Stat. 1901, chap. 143, § 1. The constitutional objection made to the present statute raises the question, if it appears that the statute is an interference with the defendant's property right, whether the interference is or is not one which the legislature might properly make as a regulation of the use of property. The constitutionality of sim-

ilar statutes has been upheld upon the latter ground, as being merely a small limitation of existing rights incident to property, which, under the police power, may be imposed for the sake of preventing a manifest evil. “It is hard,” it has been said, “to imagine a more insignificant curtailment of the rights of property.” *Rideout v. Knox*, 148 Mass. 368, 372, 373, 2 L. R. A. 81, 19 N. E. 390; *Karasek v. Peier*, 22 Wash. 419, 50 L. R. A. 345, 61 Pac. 33; *Western Granite & M. Co. v. Knickerbocker*, 103 Cal. 111, 37 Pac. 192. Similar statutes in Maine, Vermont, and Connecticut have been before the courts, but it has not been suggested that the power of the legislature to adopt them has been attacked in those states. *Lord v. Langdon*, 91 Me. 221, 39 Atl. 552; *Harbison v. White*, 46 Conn. 106; *Gallagher v. Dodge*, 48 Conn. 387, 40 Am. Rep. 182, 183, note.

The present statute was passed in 1887. Laws 1883-87, chap. 91, p. 469. In *Hunt v. Coggin*, 66 N. H. 140, 20 Atl. 250, the verdict was for the defendant; and in *Horan v. Byrnes*, 70 N. H. 531, 49 Atl. 569, the defendant waived any objection to the statute upon this ground. In *Lovell v. Noyes*, 69 N. H. 263, 46 Atl. 25, the question was whether a building was within the terms of the statute. The constitutional question is now presented for the first time.

It is objected in answer to the argument that statutes like the present are within the constitutional exercise of the police power, involving for the general good some slight limitation of existing property rights; that, if one incident of the property right in real estate is the right to use it maliciously for the sole purpose of injuring another, it is as much an invasion of the right to take it from a small portion as from the whole of one's property; and that the matter in question concerns private individuals, and not the public in general, and hence does not come within the police power. *State v. White*, 64 N. H. 48, 50, 5 Atl. 828. It may be thought these objections are successfully answered in the cases cited, or that, if not there answered, a satisfactory answer can be found. But a discussion of these objections does not reach the fundamental question in the case.

“The statute was designed to prevent an act the sole effect of which would be to annoy or injure another.” *Lovell v. Noyes*, 69 N. H. 263, 46 Atl. 25. The primary question, therefore, is whether one's right to use property solely to injure another is a part of his property right in real estate, which is so protected by the Constitution that the prohibition of such use is not within the general power of legislation “for the benefit and welfare of this state and for the governing

and ordering thereof." Const. art. 5. Upon the question whether a fence on or near the division line between adjoining landowners, maliciously built to an unreasonable height for the sole purpose of annoying and injuring the adjoining owner or occupant, is a nuisance which can, in the absence of statutory authority, be abated by an injunction, the courts are in conflict. *Letts v. Kessler*, 54 Ohio St. 73, 40 L. R. A. 177, 42 N. E. 765, answers the question in the negative, while an opposite conclusion is reached in Michigan. *Burke v. Smith*, 89 Mich. 380, 37 N. W. 838; *Flaherty v. Moran*, 81 Mich. 52, 8 L. R. A. 183, 45 N. W. 381; *Kirkwood v. Finegan*, 95 Mich. 543, 55 N. W. 457. In *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81, 19 N. E. 390, and *Karasek v. Peier*, 22 Wash. 419, 50 L. R. A. 345, 61 Pac. 33, cases in which the power of the legislature to enact a statute similar to that under consideration is attacked and upheld, it is conceded "that to a large extent the power to use one's property malevolently in any way which would be lawful for other ends is an incident of property which cannot be taken away even by legislation." *Rideout v. Knox*, 148 Mass. 372, 2 L. R. A. 81, 19 N. E. 392.

The conclusion that a landowner's property right in real estate includes the right to use it solely for the injury and annoyance of his neighbor, without intending to subserve any useful purpose of his own, is "based upon a narrow view of the effect of the land titles," and is reached "by the strict enforcement of a technical rule of ownership briefly expressed in an ancient maxim," *Cujus est solum, ejus est usque ad calum*. The courts of this state have had, in some respects, at least, a different understanding of the elements of landownership. As to the use of land in the control of surface water, the enjoyment of water percolating beneath the surface, and the use generally that may be rightfully made of real estate by the owner or occupant, the test had been considered to be, not merely whether the act was an exercise of dominion on the land, regardless of the injury to other land, but the reasonableness of the use under all the circumstances, including the necessity and advantage to one and the unavoidable injury to the other. *Franklin v. Durgee*, 71 N. H. 186, 58 L. R. A. 112, 51 Atl. 911; *Ludd v. Granite State Brick Co.* 68 N. H. 185, 37 Atl. 1041; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Bassett v. Salisbury Mfg. Co.* 43 N. H. 569, 577, 82 Am. Dec. 179. It has been said that the rule of absolute dominion is easier of application. *Chase v. Silverstone*, 62 Me. 175, 183, 16 Am. Rep. 419. This view, however, does 62 L. R. A.

not seem to be upheld by the difficulties met in its application in reference to surface waters. See *Franklin v. Durgee*, 71 N. H. 186, 189, 58 L. R. A. 112, 51 Atl. 911. But, however that may be, difficulty in administration is not a sufficient reason for the denial of justice. Cases like *Chatfield v. Wilson*, 28 Vt. 49, and *Phelps v. Noulen*, 72 N. Y. 39, 28 Am. Rep. 93, in which the principle of the maxim relied upon is applied to waters of the soil, are not authority here, where a contrary view is entertained. *Franklin v. Durgee*, 71 N. H. 186, 189, 58 L. R. A. 112, 51 Atl. 911; and *Bassett v. Salisbury Mfg. Co.* 43 N. H. 569, 577, 82 Am. Dec. 179.

Aside from the authorities in cases in which the control of waters was in question, the leading case appears to be *Mahan v. Brown*, 13 Wend. 261, 28 Am. Dec. 461. Here, although the plaintiff alleged that the fence complained of was erected solely to injure her, the decision is upon the ground that, by the erection of the fence, the plaintiff is deprived of no right, but is merely prevented from acquiring a right. If, by enjoyment of light and air across his neighbor's land for the prescriptive period, a landowner could acquire a right to such enjoyment, the building of a fence as an assertion of a contrary right, and to prevent the acquiring of such easement, would be a building for a necessary and useful purpose, and not for the sole purpose of annoying another. The case standing upon a view of the effect of nonuser of a right to build, now generally abandoned in this country (*Washb. Easements*, 490, 497, 498), is not of value in the present discussion. The argument generally is that the motive with which one does an act otherwise lawful is immaterial; and hence, as it must be conceded that a landowner has the right to build on his land as he conceives may best subserve his interests, the act lawful for a useful purpose is not made unlawful and a nuisance merely by the intent accompanying it.

Whether the first proposition is entirely true may, perhaps, be doubted. Cases cited to support the proposition (*Walker v. Cronin*, 107 Mass. 555; *Phelps v. Noulen*, 72 N. Y. 39, 28 Am. Rep. 93) do not support it in its entirety. See *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569. In *Houston v. Laffee*, 46 N. H. 505, which was trespass for cutting an aqueduct pipe maintained by the plaintiff upon the defendant's land by a parol license, it was held that, if the cutting of the pipe was done simply for the purpose of putting an end to the license, and without any malice or intentional wrong, the defendant would not be liable; but if the pipe

was cut "wantonly, unnecessarily, maliciously, and with a view . . . to injure the plaintiff," the defendant would be liable. It is true that an act which one has the right to do under all circumstances, like the bringing of a suit upon a valid claim (*Friel v. Plumer*, 69 N. H. 498, 43 Atl. 618, cannot be made actionable by the motive which accompanies it. But, as applied to the use of real estate, the argument begs the question, which is whether the enjoyment of real estate includes the right to use it solely to injure another. Because when employed for a useful purpose such use may rightfully injure another, it does not follow that the same use for a wrongful purpose may also rightfully injure another, except upon the theory of absolute dominion, because the character of the use is an element of the right.

"As a general proposition, it is safe to say that the owner of land has a right to make a reasonable use of his property; and that right extends as well to an unlimited distance above the earth's surface as to an unlimited distance below. He may not only dig for a foundation and a cellar as deep as he pleases, but he may erect his building as high as he pleases into the air, subject all the time, of course, to a proper application of the doctrine contained in the maxim, *Sic utere tuo ut alienum non lœdas*. The erection and maintenance of buildings for habitation or business is a customary and reasonable use of land. Of course, the landowner, in making such erections, must be held to the exercise of all due care against infringing the legal rights of others, to be determined by the nature of the rights and interests to be affected, and all the circumstances of each particular case." *Ladd, J., in Garland v. Tourne*, 55 N. H. 55, 58, 20 Am. Rep. 164. "Property in land must be considered for many purposes not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges, the limits of which are prescribed by the equality of rights and the correlation of rights and obligations necessary for the highest enjoyment of land by the entire community of proprietors. . . . The soil is often called property, and this use of language is sufficiently accurate for some purposes. But the proposition that the soil is property conveys a very imperfect idea of the numerous and variously limited rights comprised in landed estate; and it is sometimes necessary to remember that the name of property belongs to some of the essential proprietary rights vested in the person called the owner of the soil. . . . So those proprietary rights, which are the only valuable. . . ingredients of a land- 62 L. R. A.

owner's property, may be taken from him without an asportation or adverse personal occupation of that portion of the earth which is his in the limited sense of being the subject of certain legally recognized proprietary rights which he may exercise for a short time. . . . One of Eaton's proprietary rights was the correlative of R.'s duty of abstaining from such a use of air and water, and from such an interference with their quality and circulation, as would be unreasonable, and injurious to the enjoyment of Eaton's farm." *Thompson v. Androscoggin River Improv. Co.* 54 N. H. 545, 551, 552, 554. "Excavations maliciously made in one's own land, with a view to destroy a spring or well in his neighbor's land, could not be regarded as reasonable." *Swett v. Cutts*, 50 N. H. 439, 447, 9 Am. Rep. 276.

"If a man has no right to dig a hole upon his premises, not for any benefit to himself or his premises, but for the express purpose of destroying his neighbor's spring, why can he be permitted to shut out air and light from his neighbor's windows maliciously, and without profit or benefit to himself? By analogy, it seems to me that the same principle applies in both cases, and that the law will interpose and prevent the wanton injury in both cases. . . . It must be remembered that no man has a legal right to make a malicious use of his property. . . . for the avowed purpose of damaging his neighbor. To hold otherwise would make the law a convenient engine, in cases like the present, to injure and destroy the peace and comfort, and to damage the property of one's neighbor for no other than a wicked purpose, which in itself is or ought to be unlawful. The right to do this cannot, in an enlightened country, exist either in the use of property or in any way or manner. . . . The right to breathe the air, and to enjoy the sunshine, is a natural one; and no man can pollute the atmosphere, or shut out the light of heaven, for no better reason than that the situation of his property is such that he is given the opportunity of so doing, and wishes to gratify his spite and malice towards his neighbor." *Morse, J., in Burke v. Smith*, 69 Mich. 380, 37 N. W. 838, approved and unanimously adopted in *Flaherty v. Moran*, 81 Mich. 52, 8 L. R. A. 183, 45 N. W. 381, above cited.

"While one may, in general, put his property to any use he pleases not in itself unlawful, his neighbor has the same right to the undisturbed enjoyment of his adjoining property. . . . What standard does the law provide? . . . Whatever may be the law in other jurisdictions, it must be regarded as settled in this state that the

test is the reasonableness or unreasonableness of the business in question under all the circumstances." *Ladd v. Granite State Brick Co.* 68 N. H. 185, 186, 37 Atl. 1041. "The common-law right of the ownership of land, in its relationship to the control of surface water, as understood by the courts of this state for many years, does not sanction or authorize practical injustice to one landowner by the arbitrary and unreasonable exercise of the right of dominion by another" (*Franklin v. Durgee*, 71 N. H. 186, 189, 58 L. R. A. 112, 51 Atl. 911), but makes the test of the right the reasonableness of the use under all the circumstances. In such case the purpose of the use, whether understood by the landowner to be necessary or useful to himself, or merely intended to harm another, may be decisive upon the question of right. It cannot be justly contended that a purely malicious use is a reasonable use. The question of reasonableness depends upon all the circumstances,—the advantage and profit to one of the use attacked, and the unavoidable injury to the other. Where the only advantage to one is the pleasure of injuring another, there remains no foundation upon which it can be determined that the disturbance of the other in the lawful enjoyment of his estate is reasonable or necessary. There is no sound ground upon which a distinction can be made against the plaintiff's right to use his land for the enjoyment of the air and light which naturally come upon it in favor of his right to use it to enjoy the waters which naturally flow upon or under it, except the fact that the use of land for buildings necessarily cuts off air and light from the adjoining estate. The fact that the improvement of real estate in this way for a useful purpose, universally conceded to be reasonable, may affect the adjoining owner's enjoyment of his estate to the same extent as a like act done solely to injure the other, is not a sufficient reason for distinguishing the right to build upon the surface from the right to dig below it, or to control the surface itself. Jurisdictions which reject the doctrine of reasonable necessity, reasonable care, and reasonable use, which "prevail in this state in a liberal form, on a broad basis of general principle" (*Haley v. Colcord*, 59 N. H. 7, 47 Am. Rep. 176), as applied to the ownership of real estate, in favor of the principle of absolute dominion, may properly consider a malicious motive immaterial upon the rightfulness of a particular use; but in this state to do so would be to reject the principle announced in *Bassett v. Salisbury Mfg. Co.* 43 N. H. 569, 82 Am. Dec. 179, and repeatedly reaffirmed during the last forty years.
62 L. R. A.

It is to be conceded that the maxim, *Sic utere tuo ut alienum non laedas*, is to be applied as forbidding injury, not merely to the property, but to the right of another. *Ladd v. Granite State Brick Co.* 68 N. H. 185, 37 Atl. 1041; *Bonomi v. Backhouse*, El. Bl. & El. 622, 643; *Jeffries v. Williams*, 5 Exch. 792; *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 369, 23 Am. Rep. 751; *Letts v. Kessler*, 54 Ohio St. 73, 40 L. R. A. 177, 42 N. E. 765. But the landowner's right in the enjoyment of his estate being that of reasonable use merely, there attaches at once to each the correlative right not to be disturbed by the malicious, and hence unreasonable, use made by another. To hold that a right is infringed because, by the noxious use made by another, the air coming upon a landowner's premises is made more or less injurious, and to deny the invasion of a right by an unreasonable use which shuts off air and light entirely, is an attempt to bound a right inherent and essential to the common enjoyment of property by the limitations of an ancient form of action. An unreasonable use of one estate may constitute a nuisance by its diminution of the right of enjoyment of another, without furnishing all the elements necessary to maintain an action *quare clausum fregit*; though in particular cases it may be said that no right is invaded unless something comes from the one lot to the other. *Lane v. Concord*, 70 N. H. 485, 488, 489, 49 Atl. 687; *Thompson v. Androscoggin River Improv. Co.* 54 N. H. 545, 552; *Wood, Nuisances*, § 611. As, therefore, the statute does not deprive the plaintiff of any right to a reasonable use of his land, but only prohibits an unnecessary, unreasonable use, it does not deprive him of any property right. Hence, it is not necessary to inquire whether, as an invasion of property rights, the limitation of the statute is one which might properly be made for the general good.

Other grounds suggested at the trial in support of the motion for a nonsuit have not been argued, and are understood to be waived. The objection based upon the unconstitutionality of the statute is not sustained, and the exception to the denial of the motions for a nonsuit and to direct a verdict upon that ground is overruled.

The defendant's wife, Ann, being a witness in his behalf, whether she had any bias, prejudice, or hostility toward the plaintiff which might affect her testimony was a material question. *Martin v. Farnham*, 25 N. H. 195. As she denied having any ill will toward the plaintiff or his family, it was, therefore, proper that she should be inquired of upon cross-examination as to statements made by her tending to show such feeling.

of hostility as might tend to color her testimony. She denied making such statement, but admitted that at another trial, when she was present, the statement in question had been testified to, and that she did not then deny it. The inquiry as to the testimony at the former trial was not made for the purpose of calling the matter to the witness's recollection, and thereby enabling her to withdraw the denial if erroneous, but for the purpose of establishing the falsity of her denial that she had made the statement, and as tending to show that the declaration was in fact made by her. The question, therefore, is whether, from the fact that a person present at a judicial proceeding hears in silence a statement testified to by a witness, it can be inferred that by such silence he admits the truth of the statement. "No principle is better settled than that a man's silence upon an occasion where he is at liberty to speak, and the circumstances naturally call upon him to do so, may be properly considered by the jury as tacit admissions of the statements made in his presence. . . . The circumstances must not only be such as afforded an opportunity to . . . speak, but properly and naturally called for some action or reply from men similarly situated." *Corser v. Paul*, 41 N. H. 24, 29, 77 Am. Dec. 753; 1 Greenl. Ev. § 198. The neglect to reply to statements made in one's presence is not an admission of their truth, unless they are addressed to the party, or made under such circumstances as to require a reply. *Gale v. Lincoln*, 11 Vt. 152; *Hersey v. Barton*, 23 Vt. 685, 687, 688.

The only fact appearing in the case—that the witness Ann was present at the trial when the statement in question was testified to—does not bring the case within the rule. She would have had no right to interrupt the proceedings to interpose her denial. Her attempt to do so would have been a violation of the rules of order in judicial proceedings, and, if persisted in, might have subjected her to punishment. Even if she were a party to the suit on trial, she would have had no more right to interrupt a witness upon the stand than any by-

stander, and her attempt to do so would be an equally grave impropriety. Even if she was or could have been called as a witness, her position as a party would give her no right to volunteer testimony upon the stand. Her duty would be to answer such interrogatories as might be put to her by counsel, whose duty it would be to elicit such testimony as was material and important in the case on trial; not to call upon her to testify for the purpose of guarding against future controversies. The statement may have been immaterial in the former trial. It may have been made by a witness so wanting in credibility as not to merit denial, or the case itself may have utterly failed on the merits against the witness, so that no reply to any part of it was advisable. The fact, therefore, that the witness did not deny the statement when made in her presence at a former trial was incompetent as tending to establish the falsity of her testimony, and should not have been admitted. *Greenl. Ev. § 198*, note; *Melen v. Andrews*, *Moody & M.* 336; *Com. v. Kenney*, 12 Met. 235, 237, 46 Am. Dec. 672; *Blackwell Durham Tobacco Co. v. McElwee*, 96 N. C. 71, 60 Am. Rep. 404, 1 S. E. 676; *Broyles v. State*, 47 Ind. 251. The suggestion in *Blanchard v. Hodgkins*, 62 Me. 121, that the rule is changed by the admission of the parties to testify, is not sustained by the reasons for the exclusion or the modern authorities. *Blackwell Durham Tobacco Co. v. McElwee*, 96 N. C. 71, 60 Am. Rep. 404, 1 S. E. 676, and *Broyles v. State*, 47 Ind. 251. Whether the evidence of the plaintiff's wife as to the loss of her wedding ring had any tendency to show such ill will on the part of the defendant's wife toward the plaintiff or his family as would affect her credibility was a question of remoteness determinable at the trial. The evidence improperly admitted was upon a material issue, and had a plain tendency to prejudice the defendant. For this error the verdict must be set aside.

Exception sustained.

All concur.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

EDWARD THOMPSON COMPANY.

v.

AMERICAN LAW BOOK COMPANY, *Appt.*

(122 Fed. 922.)

1. A copyrighted law book is not in-

fringed by a subsequent work on the same subject, where the second author merely collected all available citations, including those found in the copyrighted work, and, after examining the text-books and opinions, used those which he considered available to support his own original text.

NOTE.—On the question of the right of an author to take the citations from a copyrighted book in connection with those which he gets 62 L. R. A.

from other sources, where he uses them only as guides to the books that are cited and makes his own original investigation of those

2. A preliminary injunction will not be awarded against the infringement of a copyright where the evidence raises a doubt whether complainant has not been guilty of similar piracy to that charged against defendant.

(July 1, 1903.)

A PPEAL by defendant from an order of the Circuit Court of the United States for the Southern District of New York granting a preliminary injunction to restrain infringement of copyrights. *Reversed.*

The facts are stated in the opinion.

Argued before Wallace, Townsend, and Coxe, Circuit Judges.

Messrs. Edmund Wetmore and Augustus T. Gurliitz, for appellant:

Complainant has no copyright in its books, and no standing in a court of equity.

Eliminate from complainant's encyclopedias the matter obtained directly from the United States Digest, first series, United States Digest, new services, and the American Digest Annuals and Century editions, and copied into complainant's books, and the matter taken from Jacob's Fisher's Digest, and nothing of complainant's encyclopedias that can be sold as books remains.

When it appears that complainant has not the legal right to sell the book, in respect of the alleged copyright for the infringement of which he sues, the case necessarily fails.

Broder v. Zeno Mauvias Music Co. 88 Fed. 78; *Cary v. Faden*, 5 Ves. Jr. 24; *Poplett v. Stockdale*, Ryan & M. 337; *Stockdale v. Onryhn*, 5 Barn. & C. 173; *Wright v. Tallis*, 1 C. B. 893.

A court of equity is a court of conscience, and those who come into a court of equity, seeking equity, must come with pure hands and a pure conscience.

Manhattan Medicine Co. v. Wood, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; *Worden v. California Fig Syrup Co.* 187 U. S. 516, 47 L. ed. 282, 23 Sup. Ct. Rep. 161.

The use of the citation of cases in the complainant's books as a guide to cases to be examined in the preparation of the defendant's book was proper and legitimate and in no respect an infringement of complainant's copyright.

Macgillivray, Copyright, 103; *Pike v. Nicholas*, L. R. 5 Ch. 263.

Messrs. Walter Large and Frank P. Pritchard, for appellee:

The defendant had the right, in common with all the public, to read and consult the

plaintiff's books; it had no right, in making up a rival work, directly to appropriate the results of the plaintiff's labor as shown in its book, for the purpose of saving a similar amount of labor on its part.

Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177; *Banks v. McDivitt*, 13 Blatchf. 163, Fed. Cas. No. 961; *List Pub. Co. v. Keller*, 30 Fed. 772; *Farmer v. Culvert Lithographing, E. & M. Pub. Co.* 1 Flipp. 228, Fed. Cas. No. 4,651; *American Trotting Register Assn. v. Gocher*, 70 Fed. 237; *West Pub. Co. v. Lawyers' Co-op. Pub. Co.* 35 L. R. A. 400, 25 C. C. A. 648, 51 U. S. App. 216, 79 Fed. 756; *Moffatt v. Gill*, 86 L. T. N. S. 465.

Although two successive compilers of such a work as a map must necessarily, if accurate, reach the same result, it is clear that a later publisher cannot, on that account, be justified in sparing himself the labor and expense of actual survey.

Longman v. Winchester, 16 Ves. Jr. 269; *Jarrold v. Houlston*, 3 Kay & J. 708; *Kelly v. Morris*, L. R. 1 Eq. 697; *Morris v. Ashbee*, L. R. 7 Eq. 34.

Coxe, Circuit Judge, delivered the opinion of the court:

The complainant is the publisher of two encyclopedias; one of American and English Law, the other of Pleading and Practice. The defendant is compiling a work called the "Cyclopedia of Law and Procedure," two volumes of which were published when this action was commenced in December, 1901. The complainant alleges that these volumes infringe its copyrights.

The method adopted by the complainant in preparing the articles for its books was, briefly stated, as follows: When a topic was assigned to a writer, paragraphs cut from the United States Digest, the American Digest, and Jacob's Fisher's Digest, bearing upon the subject in question, were placed in his hands. In this way the writer, without any labor on his part, mental or physical, had before him, not only the authorities collected by others, but also the paragraphs written by others, which were used by him in preparing his article. It is alleged by the defendant that all of the digests thus used were copyrighted, and that the copyrights were infringed by the complainant's verbatim appropriation of a large number of these paragraphs, and that, in any event, having adopted the same method which it now denounces as piratical, the complain-

books, and independently prepares the material that he uses therefrom, the above case is one that seems to have no exact precedent.

The decision denying an injunction against infringement of a copyright in favor of one whose copyrighted work does not appear to be 62 L. R. A.

itself free from the taint of infringement is also one of first impression, although it is in principle similar to the decisions found in the note to *Joseph v. Macowsky*, 19 L. R. A. 53, denying a remedy against infringement of a fraudulent or deceptive trademark.

ant is not entitled to equitable relief. The defendant's method was similar to that of the complainant, except that it obtained from the owners of the copyrighted digests the right to use these works.

The only act of the defendant which is complained of is this: Lists of all the cases bearing upon a given subject, including the cases found in complainant's books, were put in the hands of the editor chosen to develop that subject. The list of complainant's cases contained authorities not found in the digests. The original reports of these cases were examined by the editor, and, if the cases were found applicable, they were cited by him in support of his article; if not, they were rejected. There is no pretense that a word of the complainant's text has been copied; in fact the defendant's editors were not permitted to open the complainant's books. The list of cases furnished the editor was not copied in the defendant's work, and the only use made of the list was as a guide to the volumes where the cases were reported.

Briefly stated, then, the question is this: Is a copyrighted law book infringed by a subsequent work on the same subject where the only accusation against the second author is that he collected all available citations, including those found in the copyrighted work, and, after examining them in text-books and reports, used those which he considered applicable to support his own original text? We are of the opinion that this question must be answered in the negative. The doctrine contended for by the complainant extends the law of copyright beyond its present bounds, and, if pushed to its logical conclusion, will inflict a far greater injury upon literature than it can ever expect to prevent. If it be held that an author cannot consult the authorities collected by his predecessors, the law of copyright, enacted to promote the progress of science and useful arts, will retard that progress. It will be found, upon examining the reported cases, that there has been a finding of noninfringement, unless it appears that the whole or a part of the copyrighted work has been copied, either *in hæc verba* or by colorable variation.

In *Pike v. Nicholas*, L. R. 5 Ch. 263, it was held that the defendant was not permitted to copy a passage from another author directly from the plaintiff's work, "but having been put on the track, and having looked at that particular part of the book which the plaintiff led him to, he was entitled to make use of every passage from that author which the plaintiff had made use of."

In *Morris v. Wright*, L. R. 5 Ch. 287, it 62 L. R. A.

was decided that, if the defendant "used the plaintiff's book in order to guide himself to the persons on whom it would be worth his while to call, and for no other purpose, he made a perfectly legitimate use of the plaintiff's book."

In the case of *Moffatt v. Gill*, 86 L. T. N. S. 465, which the complainant quotes with approval, infringement was found because it was abundantly shown that "not only have the quotations in substance been taken, but the letter press connecting them has also in substance been taken in a great many instances and particularly in the character sketches." The court, however, expressly recognizes the right of a subsequent author to do what the defendant in the case at bar has done. In speaking of the cases relating to directories the court says: "You cannot, where another man has compiled a directory, simply take his sheets and reprint them in your own. You are entitled, taking the sheets with you, to go and see whether the existing facts concur with the description in the sheets, and if you do that you may publish the result as your own."

To the same effect are *List Pub. Co. v. Keller*, 30 Fed. 772; *Jarrold v. Houlston*, 3 Kay & J. 708; *Simms v. Stanton*, 75 Fed. 6; *Macgillivray*, Copyright, 103; *Mead v. West Pub. Co.* 80 Fed. 380.

Counsel for complainant, in order to illustrate their position, put the following question: "Suppose the author of a dictionary of quotations inserts after each quotation, as is customary, the book and page of the original author, will it be contended that the compiler of a subsequent book of quotations could have his clerk copy a list of all the references contained in the first author's book without copying the quotations, and could then go to the original authors and copy the quotations found at the pages indicated by the references? Yet he would have an undoubted right to do this if the contention in the appellant's brief is sound."

Assuming that the question is answered in the negative, we do not think the conclusion follows. It may very well be that the second compiler would not be permitted to copy the quotations, and for the reasons suggested by Lord Collins in *Moffatt v. Gill*, 86 L. T. N. S. 465. He says: "That [the defendant's contention] leaves out the whole merit; the felicity of the quotation; its adaptability to a particular end; its illustration of a particular characteristic. All those things enter into the choice of one quotation as apart from another. That is a process which may involve gifts both of knowledge and intelligence."

The difficulty with the counsel's hypothe-

sis is that the case stated is not the case made by the proofs. The defendant has not copied a sentence or a word from the complainant's book and, of course, has not appropriated the skill and taste of the complainant in selecting or arranging quotations or any other matter. If, in the case put, the subsequent compiler had simply made, in connection with other lists, a naked list of the authors quoted, it cannot be doubted that he would have the right to select from their works such quotations as he desired.

It is well known that Motley produced his great work after years of patient research among the original archives preserved at The Hague and other European capitals and that he brought to light and translated documents which had lain dormant for centuries. The *data* thus collected enabled him to tread an almost undiscovered path of history. But can it be contended that a subsequent historian of the Netherlands would be debarred from consulting the same sources of information because he was guided to them by a list made up from Motley's footnotes? It is thought not. The literature of the law as it exists to-day is the result of evolution. Each author has had the benefit of all that preceded him, and has thus been able to add something to the common fund intended to lighten the labors of the profession. It would be a serious blow to jurisprudence were the rule enunciated that the author of a law book is precluded from taking a list of authorities cited by a previous writer on the same subject and making an independent examination of them. Individuals might profit but the development of legal science would be hampered by such a rule,—a rule not of advancement, but of retrogression.

The defendant asserts that in no circumstance can the preliminary injunction be upheld, for the reason that the complainant has been guilty of a much more flagrant piracy than that charged against the defendant, and that, therefore, the complainant has no place in a court where clean hands and "a conscience void of offense" are required.

In order to establish this infringement the defendant has presented to the court a volume entitled "Pointers to Complainant's Infringements," which contains a large number of instances of alleged piracy. This exhibit we are not at liberty to consider for the reason that it was not served in time and is no part of the record. But, irrespective of this exhibit, the affidavits describing the method pursued by complainant's editors distinctly charge that they not only used, but actually copied, paragraphs and syllabi from the copyrighted works of

the West Publishing Company and other publishers. This charge has not been denied, but an attempt has been made in the brief to excuse and palliate it. That there have been instances of piracy is, in substance, admitted in the complainant's brief where it is said: "While it is undoubtedly true that among the large number of writers employed by it, some may have been found who, through incompetence or carelessness, or a desire to save labor, have used the language found in digests or reports instead of their own, it is very clear from the affidavits that the plaintiff's work has been made up from a study of the original opinions, the digests being used, as it was proper that they should be used, as books of reference to find opinions."

We do not intend to pass upon the question of complainant's infringement as presented by the exhibit referred to, for the reason that the complainant has had no opportunity to meet the charge. We see, however, no escape from the conclusion that, if the defendant is an infringer, so is the complainant, for their methods in examining the authorities cited in prior copyrighted works are substantially identical. For the reasons before given, we do not think that the complainant's acts, when limited to the use of the cases cited in the copyrighted digests, sustain the charge of infringement. Indeed, it would seem quite impossible to compile an encyclopedia, which includes a general survey of antecedent knowledge, without doing exactly what both parties did in this regard. But if it were piracy in one it was piracy in the other, and a literary pirate is not entitled to consideration in a court of equity. Consistency requires that the defendant should not be punished for doing that which the complainant does with perfect impunity. An author who has pirated a large part of his work from others is not entitled to have his copyright protected. This proposition is well stated in complainant's work as follows: "When it is said that a mere new disposition of existing materials may be original, this must be taken with the limitation that the materials are such as may be lawfully used; there can be no protection for that which is itself a piracy." 7 Am. & Eng. Enc. Law, 2d ed. p. 536.

In *Cary v. Faden*, 5 Ves. Jr. 24, Lord Eldon said: "What right had the plaintiff to the original work? If I was to do strict justice, I should order the defendants to take out of their book all they have taken from the plaintiff, and, reciprocally, the plaintiff to take out of his all he has taken from Patterson. I think the plaintiff may be contented that a bill is not filed against him." Digitized by Google

It is stated in the defendant's brief that the precise question has not been decided in this country, and the court has been unable to find such an authority, although the point was presented in *Banks v. McDivitt*, 13 Blatchf. 163, Fed. Cas. No. 961, and Judge Shipman intimated, at page 169, that the defendant's position, if supported by the facts, would be sound in law. Upon the general proposition that equity will refuse its aid to a suitor who has himself been guilty of the same inequitable conduct

which he denounces in others, see *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; *Hilson Co. v. Foster*, 80 Fed. 896, 901, and cases cited.

Without intending to decide the question of complainant's infringement, we think sufficient doubt is presented by the evidence properly before the court to warrant the refusal of a preliminary injunction.

It follows that the order should be reversed, with costs.

NEW YORK COURT OF APPEALS.

Herbert J. RICE, *Appt.*,
v.

EUREKA PAPER COMPANY, *Respt.*

(174 N. Y. 385.)

That repairs promised by an employer to be made upon a defective machine when the mill was shut down for repairs "the fore part of the following week" had not been made by Wednesday does not deprive an employee, who complained of the defective condition of the machine, of the benefit of the rule that an employee who continues work in reliance on the master's promise to repair does not assume the risk of defects during the reasonable time allowed for making the repairs.

(April 9, 1903.)

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, reversing a judgment of a Trial Term for Oswego County in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. Frank C. Sargent, for appellant:

The defendant was guilty of negligence.

If the machine furnished by the master is not a reasonably safe one the servant has a right, under the law, to demand one that is reasonably safe, regardless of what might be necessary for the master to do, in order to meet the requirement of the law.

Radman v. Haberstro, 17 N. Y. S. R. 497, 1 N. Y. Supp. 561. Affirmed in 119 N. Y. 659, 23 N. E. 1150; *Thomas*, Neg. p. 746; *Benzing v. Steinway & Sons*, 101 N. Y. 547, 5 N. E. 449; *Laning v. New York C. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417; *Corcoran v.*

NOTE.—As to rights of servant who continues work on faith of master's promise to remove a specific cause of danger, see also *Illinois Steel Co. v. Mann* (Ill.) 40 L. R. A. 781, and *note*, and *Albrecht v. Chicago & N. W. R. Co.* (Wis.) 53 L. R. A. 653. 62 L. R. A.

Holbrook, 59 N. Y. 517, 17 Am. Rep. 369; *Cone v. Delaware, L. & W. R. Co.* 81 N. Y. 206, 37 Am. Rep. 491.

The plaintiff did not assume the risk, nor was he guilty of contributory negligence by continuing at work, under the promise to repair.

The existence of a promise to repair, by the master, successfully rebuts the usual presumption of law, that the servant has undertaken to assume the risk; and, therefore, between the time of making such promise and the time for its fulfillment, and for a reasonable length of time thereafter, the risk is assumed by the master, and not by the servant.

Cooley, Torts, 2d ed. pp. 559, 560; *Shearm. & Redf. Neg.* 5th ed. p. 372; *Bailey*, Master's Liability for Injuries to Servant, p. 207; *Dresser*, Employers' Liability to Servants, § 115, p. 583; 2 *Thomp. Neg.* p. 1009; *Whittaker's Smith*, Neg. p. 172; *Barrows*, Neg. p. 120; *Wood, Mast. & S.* § 380, p. 753; *Hough v. Texas & P. R. Co.* 100 U. S. 225, 25 L. ed. 617; *Swift & Co. v. O'Neill*, 187 Ill. 337, 58 N. E. 416; *Ferriess v. Berlin Mach. Works*, 90 Wis. 541, 63 N. W. 234; *Stoutenburgh v. Dow, G. H. Co.* 82 Iowa, 179, 47 N. W. 1039; *Roux v. Blodgett & D. Lumber Co.* 85 Mich. 519, 13 L. R. A. 728, 48 N. W. 1092; *Snowberg v. Nelson-Spencer Paper Co.* 43 Minn. 532, 45 N. W. 1131; *Union Mfg. Co. v. Morrissey*, 40 Ohio St. 148, 48 Am. Rep. 669; *Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Patterson v. Pittsburg & C. R. Co.* 76 Pa. 389, 18 Am. Rep. 412; *Gulf, C. & S. F. R. Co. v. Donnelly*, 70 Tex. 371, 8 S. W. 52; *Harris v. Hewitt*, 64 Minn. 54, 65 N. W. 1085; *Burlington & C. R. Co. v. Liche*, 17 Colo. 280, 29 Pac. 175; *Counsell v. Hall*, 145 Mass. 468, 14 N. E. 530; *Holmes v. Worthington*, 2 Post. & F. 538; *Holmes v. Clarke*, 6 Hurlst. & N. 357; *Healy v. Ryan*, 25 N. Y. Week. Dig. 23, Affirmed in 116 N. Y. 657, 22 N. E. 1130; *Dowd v. New York, O. & W. R. Co.* 170 N.

Y. 468, 63 N. E. 541; *Hawley v. Northern C. R. Co.* 82 N. Y. 370.

Messrs. Hancock, Hogan, & Devine, for respondents:

The risk incident to the service and operating the machine being obvious and understood by the plaintiff, he must be held to have assumed it, and defendant is, as a matter of law, exempt from liability.

Hickey v. Taaffe, 105 N. Y. 26, 12 N. E. 286; *Buckley v. Gutta Percha & Rubber Mfg. Co.* 113 N. Y. 540, 21 N. E. 717; *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648; *Knisley v. Pratt*, 148 N. Y. 373, 32 L. R. A. 367, 42 N. E. 936; *Monzi v. Friedline*, 33 App. Div. 217, 53 N. Y. Supp. 482; *Farrell v. Tatham*, 36 App. Div. 319, 55 N. Y. Supp. 199; *Cmielewski v. Mollenhauer Sugar Ref. Co.* 11 App. Div. 111, 42 N. Y. Supp. 936.

The plaintiff in accepting service upon the machine, took the risk of the apparent perils incident to its use in its then condition, and defendant was not called upon to make any alterations to secure greater safety.

Hickey v. Taaffe, 105 N. Y. 26, 12 N. E. 286; *Sweeney v. Berlin & J. Envelope Co.* 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358; *Gibson v. Erie R. Co.* 63 N. Y. 452, 20 Am. Rep. 552; *DeForest v. Jewett*, 88 N. Y. 264; *Shaw v. Sheldon*, 103 N. Y. 667, 9 N. E. 183; *Bajus v. Syracuse, B. & N. Y. R. Co.* 103 N. Y. 318, 57 Am. Rep. 723, 8 N. E. 529.

Even assuming that a promise was made by the defendant to place a shifter upon the machine, the risk assumed by the plaintiff was not suspended, and plaintiff was guilty of contributory negligence.

Sweeney v. Berlin & J. Envelope Co. 101 N. Y. 523, 54 Am. Rep. 722, 5 N. E. 358; *Hannigan v. Smith*, 28 App. Div. 176, 50 N. Y. Supp. 845; *McCarthy v. Washburn*, 42 App. Div. 252, 58 N. Y. Supp. 1125; *Spencer v. Worthington*, 44 App. Div. 496, 60 N. Y. Supp. 873; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56.

Even though a promise be made which does suspend the risk, it is suspended only while the promise is running, and the promise must be the inducement that led the servant to continue work.

Burlington & C. R. Co. v. Liehe, 17 Colo. 286, 29 Pac. 175; *Standard Oil Co. v. Helmick*, 148 Ind. 460, 47 N. E. 14; *McFarlan Carriage Co. v. Potter* (Ind.) 52 N. E. 209; *Wilson v. Winona & St. P. R. Co.* 37 Minn. 326, 33 N. W. 908; 20 Am. & Eng. Enc. Law, p. 128; *Lewis v. New York & N. E. R. Co.* 153 Mass. 73, 10 L. R. A. 513, 26 N. E. 431.

The absence of a shifter upon this rag cutter was not the proximate cause of plaintiff's injury, and whether its presence would have prevented the injury is pure speculation and guess-work.

There can be no conflict as to the scientific fact that such a machine could not be

stopped instantly or immediately by any device, when we consider the speed with which it was run, the weight of the balance wheels, and the size of the belt that was running it. In such case this court will still exercise jurisdiction, and review and reverse if justice requires.

Hudson v. Rome, W. & O. R. Co. 145 N. Y. 408, 40 N. E. 8; *Bond v. Smith*, 113 N. Y. 378, 21 N. E. 128; *Pauley v. Steam Gauge & Lantern Co.* 131 N. Y. 90, 15 L. R. A. 194, 29 N. E. 999; *Linkauf v. Lombard*, 137 N. Y. 417, 20 L. R. A. 48, 33 N. E. 472; *Hemmens v. Nelson*, 138 N. Y. 517, 20 L. R. A. 440, 34 N. E. 342; *Laidlaw v. Sage*, 158 N. Y. 73, 44 L. R. A. 216, 52 N. E. 679; *Ridger v. Syracuse Rapid Transit R. Co.* 171 N. Y. 139, 58 L. R. A. 125, 63 N. E. 836.

The injury was the result of an unforeseen accident, not one that could have been reasonably anticipated by the defendant, and plaintiff cannot recover.

Buckley v. Gutta Percha & Rubber Mfg. Co. 113 N. Y. 540, 21 N. E. 717; *Ayers v. Rochester R. Co.* 156 N. Y. 104, 50 N. E. 960; *Cleveland v. New Jersey S. B. Co.* 125 N. Y. 306, 26 N. E. 327.

Werner, J., delivered the opinion of the court:

This action is brought to recover damages for injuries sustained by plaintiff through defendant's alleged negligence. The facts which for the purposes of this appeal must be taken as true are briefly as follows: In April, 1900, and for a number of years prior thereto, the defendant was engaged in the manufacture of paper in its mill located at Oswego Falls, New York. As part of its equipment, it had a machine known as a "rag cutter," which was on the second floor of the mill, almost directly over the main power shaft, which extended through the first story of the building, near the ceiling. This rag cutter, roughly described, consisted of a feed table about 3 feet long, one end of which connected with a large, slowly revolving cylinder, with teeth or spikes upon its circumference. Underneath this cylinder was a stationary plate, and behind this an arrangement of rapidly revolving knives. The rags, rope, and other materials to be cut up were fed into the machine by the operator, who stood at the end of the feed table. As this material reached the spiked cylinder, it was drawn in and subjected to pressure, which brought it into contact with the knives, where it was cut into small fragments. Near the end of the axle or shaft of this machine, but beyond the reach of the operator when standing at his position in front of the feed table, were two pulleys,—one tight, the other loose, and both

covered by a box. On the power shaft in the lower story there were also two pulleys similarly arranged. These two sets of pulleys were connected by a belt, which, when on the tight pulleys, transmitted the power from the main shaft to the rag cutter, and set it in motion. The only way in which this machine could be stopped, in the room where it was located, was to lift the cover or box from the pulleys on the machine's axle, and, with a stick to guide the belt from the tight pulley to the loose one; and in starting the machine this process was, of course, reversed. If the power was to be shut off at the main shaft, that was done on the floor below, by means of a longer stick, with which the belt was shifted to the loose pulley on the power shaft. Beyond these contrivances there were no means by which the machine could be stopped when the power shaft was in operation. Belt shifters and belt tighteners were then in common use in other mills upon machines of this character, and by their use an operator could, without leaving his position, stop his machine almost instantly. Defendant then had in its mill a belt tightener which had been made for this machine, but which, for some unexplained reason, had not been used. On the 4th day of April, 1900, while the plaintiff was engaged in feeding this machine, his right hand became entangled in a mesh of string, and was being drawn slowly toward the spiked cylinder. In attempting to disengage it, the other hand was also caught in the mesh, and both were drawn to the cylinder and upon the knives, where they were so mangled that the right hand was utterly destroyed, and the left one was annihilated, with the exception of a small portion of the palm and a single finger. At this time the plaintiff had been employed by the defendant for nearly eighteen months, and had been operating this machine for over a year. He was forty years of age, ordinarily bright, and fully understood the construction and operation of this machine. He knew that a belt tightener had been made for it, but not used, and he was aware of the danger incident to the operation of the machine without either a belt shifter or a belt tightener. This is clearly established by his testimony to the effect that, on the Saturday night preceding the Wednesday on which he was injured, he told defendant's treasurer that the machine ought to be provided with a shifter, and that he would quit if one was not put on. He says that the treasurer then told him the mill would be shut down for other repairs the fore part of the following week, and while shut down they would put on a shifter or a tightener, and that, relying upon this promise, he continued work until he was injured.

62 L. R. A.

Upon these facts two propositions are so clearly established that they are practically conceded. The first is that the defendant, as employer, furnished to the plaintiff, as its employee, a machine that was not reasonably safe, because it lacked the necessary appliance to stop it quickly in case of accident. The second is that the plaintiff, by accepting employment upon this machine with full knowledge of its defects and dangers, voluntarily assumed the risks incident thereto; and this is equally true whether we regard the machine as lacking in improved appliances which the defendant was under no legal obligation to adopt, or as defective in respect of repairs which it was the defendant's duty to make. If there were nothing further in the case, the bare statement of these two propositions would conclusively bar plaintiff's claim for damages. But we must assume, for the purposes of this appeal, that there was a promise on the part of the employer to remedy the defects in the machine, in reliance upon which promise the employee remained at work, instead of quitting as he had threatened to do. This is the point upon which the case turns. The plaintiff testified that on the Saturday night before the accident he told the treasurer of the defendant that this machine ought to have a shifter or tightener on it, and that he would quit work unless one was put on. He says that the treasurer told him the mill would be shut down for other repairs the fore part of the next week, and while it was shut down they would put on a shifter or a tightener. The plaintiff further says he believed this and relied upon it or he would not have remained at work. He did stay, and on the Wednesday of the "next" week, before the mill was shut down or a shifter or tightener put on the machine, he was injured as described. Upon this evidence the plaintiff contends that the assumption of risk which would ordinarily bar his right of action was suspended during the running of the promise to repair, and for a reasonable time after the period when it was to be fulfilled. The defendant meets this argument with the assertion that such a promise, if made, cannot suspend or shift the risk assumed by the employee, because it was a promise not to be performed at once, but at a future time; that during the interim between the promise and the time for its fulfillment, and for a reasonable period thereafter, the plaintiff remained at work as much at his own risk as before the promise was made, because he knew it was not to be fulfilled at once, but at a later and specified time. The narrow and concrete question presented by these conflicting claims is whether such a promise at once absolves the employee from the risk which he had there-

tofore voluntarily assumed, or whether the risk is continued until the time when the master's promise to repair is to be fulfilled. Before proceeding to analyze the promise upon which plaintiff's cause of action and defendant's liability depend, let us consult the text-writers and the reported decisions upon the subject.

Judge Cooley, in his work on Torts (pp. 550, 560), says: "If the servant, having a right to abandon the service, because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume its risk. So far as the particular peril is concerned, the implication of law is rebutted by the giving and accepting of the assurance, for nothing is plainer or more reasonable than that parties may and should, where practical, come to an understanding between themselves regarding matters of this nature." Judge Thompson, in his work on Negligence (vol. 2, p. 1009), thus states the rule: "But a servant does not, by merely continuing in the service after knowledge of defects in the machine which he is obliged to use, assume the risks attendant upon the use of such machinery. Such a result only follows where he continues in the service without objection or protest, or without being induced by his master to believe that a change will be made. If the master has promised to remedy the defect, or has held out other like inducements to the servant to remain in the service, the mere fact of his having remained in the service will not of itself, . . . exonerate the master from liability. . . . If the servant, after acquiring knowledge of the defect, complains of it to the master, and the master assures him that it will be repaired in a reasonable time, he will not be presumed to have waived the defect by remaining for such reasonable length of time in the service." Other well-known text-writers state the rule in substantially similar terms. 1 Shearm. & Redf. Neg. 5th ed. § 215, p. 372; Bailey, Master's Liability for Injuries to Servant, p. 207; Dresser, Employers' Liability for Injuries to Servants, § 115, p. 583; Whittaker's Smith, Neg. p. 172; Barrows, Neg. p. 120; Wood, Mast. & S. p. 753, § 380. The following English authorities support the doctrine laid down by the text-writers above cited: *Holmes v. Worthington*, 2 Fost. & F. 533, is to the effect that if a servant complains of the defect, and the master promises to repair it, the servant

will not be defeated merely because, relying on the promise, he continues to work. In *Holmes v. Clarke*, 6 Hurlst. & N. 357, it was held that there may be many cases where a servant can reasonably incur the risk of working on defective appliances instead of abandoning the service; and if the servant complains of the defect to his master, and the master promises to repair it, it must be considered that the master takes upon himself the responsibility of any accident that may occur.

The United States Supreme Court and many of the state courts have also applied the same doctrine to a great variety of cases. In *Hough v. Texas & P. R. Co.* 100 U. S. 225, 25 L. ed. 617, the defendant made use of an engine having a defective pilot. Plaintiff's intestate, the employee, had been aware of the defect for some time. He had complained of its condition to the defendant's foreman. A new pilot had been made, but, by reason of the negligence of the defendant, it was not put on the engine. Upon these facts the Supreme Court, in an opinion by Mr. Justice Harlan, approved the rule as stated by Judge Cooley. In Illinois there are many cases illustrating the rule. In *Swift & Co. v. O'Neill*, 187 Ill. 337, 58 N. E. 416, it was held that a servant did not assume a risk, under a promise to repair, where the master failed to place proper and suitable lights in the premises, although the servant knew of such condition. The court distinctly stated that, where a master makes a promise to repair, he, and not the servant, assumes the risk between the time of the promise and the time for its fulfillment, and for a reasonable length of time afterwards. To the same effect are *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425; *Weber Wagon Co. v. Kehl*, 40 Ill. App. 584, Affirmed in 130 Ill. 644, 29 N. E. 714; *Swift & Co. v. Madden*, 165 Ill. 41, 45 N. E. 979; *Chicago Anderson Pressed Brick Co. v. Subkoniak*, 148 Ill. 578, 36 N. E. 572; *Illinois Steel Co. v. Mann*, 170 Ill. 200, 40 L. R. A. 781, 48 N. E. 417, and *Donley v. Dougherty*, 174 Ill. 582, 51 N. E. 714. So in Wisconsin the rule was approved in *Ferries v. Berlin Mach. Works*, 90 Wis. 541, 63 N. W. 234, and in Iowa in the cases of *Stoutenburgh v. Dow*, G. H. Co. 82 Iowa, 179, 47 N. W. 1039, and *Greenleaf v. Dubuque & S. C. R. Co.* 33 Iowa, 52. The same is true of Michigan (*Lytle v. Chicago & W. M. R. Co.* 84 Mich. 289, 47 N. W. 571; *Roux v. Blodgett & D. Lumber Co.* 85 Mich. 519, 13 L. R. A. 728, 48 N. W. 1092); of Minnesota (*Snowberry v. Nelson-Spencer Paper Co.* 43 Minn. 532, 45 N. W. 1121; *Harris v. Hewitt*, 64 Minn. 54, 85 N. W. 1085); of Ohio (*Union Mfg. Co. v. Morrissey*, 40 Ohio St. 148, 48 Am. Rep. 669); of Missouri

(*Conroy v. Vulcan Iron Works*, 62 Mo. 35); of Pennsylvania (*Patterson v. Pittsburg & C. R. Co.* 76 Pa. 389, 18 Am. Rep. 412); and Texas (*Gulf, C. & S. F. R. Co. v. Donnelly*, 70 Tex. 371, 8 S. W. 52). In Massachusetts (*Counsell v. Hall*, 145 Mass. 408, 14 N. E. 530), it has been held that such a promise is a circumstance to be considered by the jury in determining whether the servant or the master has assumed the risk.

It is to be noted that, in all of the authorities above referred to, the promise to repair has been spoken of in general terms, and without emphasizing the point whether it was to be fulfilled at once, within a reasonable time, or at some definite future period. Some of the courts have drawn a distinction between a promise to repair at once, or within a reasonable time, and a promise to repair at a stated time in the future; and that is the theory upon which the very able discussion of Mr. Justice McLennan proceeded in the court below. Examples of this latter class of cases in other states may be found in *Standard Oil Co. v. Helmick*, 148 Ind. 460, 47 N. E. 14; *Indianapolis & St. L. R. Co. v. Watson*, 114 Ind. 30, 14 N. E. 721, 15 N. E. 824; and *Wilson v. Winona & St. P. R. Co.* 37 Minn. 326, 33 N. W. 908. In the *Helmick Case*, 148 Ind. 460, 47 N. E. 14, the defect complained of was an improperly fitted crank on a candle machine upon which the servant was employed. The master had ample notice of the existence of the defect, and promised to repair it. The court, in discussing this promise, said: "But here the promise was not made to repair generally, which would imply that it was to be done within a reasonable time. The promise was to repair as soon as the present order was run out. How long that would take—whether a week, thirty days, six months, or a year after the promise was made—is not found in the special verdict. For aught that appears, it may have required thirty days or six months to run out that order. At the end of that time the promise was to repair. That being so, there could have been no inducement influencing the appellee to remain in the service and work with the alleged dangerous machine during that thirty days or six months, expecting the danger to be obviated, as is the case where the promise is to repair generally: implying that it is to be done within a reasonable time." In the *Watson Case*, 114 Ind. 30, 14 N. E. 721, 15 N. E. 824, the discussion was over an alleged promise by the master to furnish his watchman with a lantern. Although the court there finally concluded that no such promise had been made, it said, "Now, if there had been a promise to furnish a lantern at the end of thirty days, that would not relieve plaintiff from the risk

incurred by working without a lantern for that thirty days, when he says he had no expectation that a lantern would be furnished." In the *Wilson Case*, 37 Minn. 326, 33 N. W. 908, it was held "that a conditional promise by defendant's foreman to repair if he gets time on some Saturday evening" is insufficient to take the case out of the general rule, and that the servant assumed the risk.

Coming now to the decisions in this state, we find that, while the question involved in the case at bar has been incidentally discussed in a number of cases in this court, it has never been actually decided; and, although it appears to have been up in several cases in the appellate division, it has not been given a prominent or controlling place in the written discussions. In *Healy v. Ryan*, 25 N. Y. Week. Dig. 23, Affirmed without opinion in 116 N. Y. 657, 22 N. E. 1130, the plaintiff, while employed by the defendant, was injured in a collision caused by a defective brake. He notified the foreman, who had authority to make repairs, and who promised to make them. On appeal to the general term of the fourth department it was held that the question of notice to the defendant and the promise to repair were properly submitted to the jury, as bearing upon the question of plaintiff's freedom from contributory negligence. In the case of *Sweeney v. Berlin & J. Envelope Co.* 101 N. Y. 525, 54 Am. Rep. 722, 5 N. E. 358, there was no promise to repair and the injury to the plaintiff was occasioned by a machine that was not out of repair, but was not equipped with certain well-known safety appliances then in use on other kinds of machinery, but not on that particular kind of machines. This court, after stating the reasons why the defendant could not be held liable, remarked: "If the defect had been in the pedal, and a promise made to repair that, and yet directions given for its use, it might be otherwise, but here the promise, if there was any, concerned a new appliance, not attached to that particular machine, nor to any machine of that make." In *Marsh v. Chickering*, 101 N. Y. 400, 5 N. E. 56, the plaintiff, an ordinary laborer in the employ of the defendants, was injured while using a stepladder which was not "hooked or spiked" on the bottom. He complained to defendant's superintendent, who promised several times to have the ladder hooked or spiked. The judgment recovered by the plaintiff in the courts below was reversed in this court upon the ground that the ladder furnished was a reasonably safe appliance, about which the servant knew as much as the master, and the fact that the servant "notified the master of the defect, and asked for another instrument, and the master

promised to furnish the same, in such a case, does not render the master responsible if an accident occurs." In *Dowd v. New York, O. & W. R. Co.* 170 N. Y. 468, 63 N. E. 543, plaintiff's intestate was killed in a collision between a car that had been "kicked" from one track to another, and the car under which he was at work. In discussing an exception that arose under the head of assumed risk, the court said: "If he [decedent] knew of the practice [kicking cars], and continued to work without any promise by the defendant to correct its methods, he assumed the danger, and waived any claim for damages on account thereof." *Hannigan v. Smith*, 28 App. Div. 178, 50 N. Y. Supp. 845, was a case where the plaintiff, a hod carrier, was injured by a falling brick which had come down between the upper floor beams that were uncovered and unprotected. The defendant's attention had previously been called to the danger from this source, and he had promised to have the floor planked over, and told the plaintiff to go ahead with his work. The appellate division held that, as the plaintiff knew as much about the danger as the defendant, the former was not free from contributory negligence, notwithstanding the promise of the latter to plank the flooring. In *McCarthy v. Washburn*, 42 App. Div. 252, 58 N. Y. Supp. 1125, the plaintiff was employed in removing sand from the defendant's sand bank. The bank caved in, and the plaintiff was injured. Several days before the accident the defendant's attention had been called to the dangerous condition of the bank, and he said to the plaintiff: "I will secure the bank in a day or two, and I will warrant you that nothing will happen you." The *Hannigan Case*, 28 App. Div. 178, 50 N. Y. Supp. 845, was cited with approval, and a dismissal of the complaint affirmed upon the ground that the danger was as obvious to the plaintiff as the defendant. In *Spencer v. Worthington*, 44 App. Div. 496, 60 N. Y. Supp. 873, the plaintiff, a mechanic in the machine shop of the defendant, was oiling a tool held by a ram, which moved up and down with great force and rapidity. He was using an oil can with a short spout. This was caught by the ram and bent over upon plaintiff's finger, which was so injured that it had to be amputated. Until about three weeks before the accident the plaintiff had used an oil can with a long spout, so as to avoid danger. This oil can had been carried away by someone. Plaintiff applied to the foreman for another can with a long spout, and protested several times against being compelled to use the can with the short spout. The foreman promised to get another can with a long spout. It was held that, despite the promise of the foreman, the plaintiff had

assumed the risk, because the character of the appliance and the danger from its use were as obvious to the plaintiff as to the defendant.

Thus, it will be observed that the text-writers upon the law of negligence, almost without exception, and a great majority of the reported decisions in other jurisdictions, support the doctrine that if a servant, who has knowledge of defects in appliances or machinery from which danger is to be apprehended, is induced to continue in the employment by the promise of the master to repair the defect, the risk during the running of the promise and for a reasonable time thereafter is that of the master, and not of the servant. In a few of the cases outside of this state, above alluded to, there has been a sharp accentuation of the distinction between a general promise to repair, and a promise to repair at a definite future time; and upon this distinction is based the theory applied in the court below, that under a promise to take effect in the future the risk remains that of the servant, until the time for the fulfilment of the promise and for a reasonable time thereafter. Then, in this state, as we have seen, there are cases in which it has been held that in the case of simple appliances or conditions, such as unspiked stepladders, falling bricks, short-spouted oil cans, and insecure sand banks, the servant continues the employment at his own risk, notwithstanding the promise of the master to repair or improve. But the decisions in these last-mentioned cases are supported by other principles, not involved here, so that it would unduly lengthen this opinion, without profit, to attempt to explain or distinguish them.

From the foregoing review of the authorities, it is clear that, although the courts of the state have not hitherto had occasion to definitely adopt the rule under which a servant may be relieved from an assumed risk of his employment by the master's promise to remove the danger which creates the risk, the rule is so generally recognized as a part of the jurisprudence of this country, and is so strongly supported by reason and justice, as to justify its adoption by this court. At this point the question arises, however, whether the rule shall be adopted without qualification, or as limited by some of the courts, and particularly by the appellate division, from whose order this appeal is taken. Since, under our construction of the master's promise herein, it may fairly be said to fall within the general rule, without qualification, and in view of the fact that under the so-called employers' liability act (Laws 1902, chap. 600, p. 1748) now in force, the rule above adverted to may in the future present a question of purely academic

interest, we do not now decide the general question whether it would be wiser to adopt the rule in its entirety, or as modified by the limitations referred to. That question we leave open for future decision, if it ever arises.

This conclusion leaves nothing further for discussion, except our construction of the promise upon which the plaintiff relies, and that can be done very briefly. The defendant's promise to repair the machine upon which the plaintiff was employed was made on Saturday night, at the close of the working week. It was to the effect that the repairs would be made in the fore part of the following week, when the mill was to be shut down for other repairs. As the plaintiff was only an ordinary laborer, it is not to be presumed that he was in the confidence of his employer to the extent of being informed of the precise time when the mill was to be shut down. For aught that appears in the case, the employer himself may not have known just when that would occur. Under these conditions, the plaintiff may have gone to work on Monday morning in the ex-

pectation or belief that the mill might be shut down at any moment without further notice to him; and we cannot say as a matter of law, that this would have been an unreasonable view of the defendant's promise. The expression "fore part of the week" was as applicable to Monday or Tuesday as to Wednesday, the day of the accident. The promise made, if not strictly the equivalent of a promise to repair at once, certainly seems to be capable of the construction that it was to be fulfilled within a reasonable time; and, if that is true, then the plaintiff was justified in remaining at his work, because during that reasonable time, covered by defendant's promise, the risk theretofore voluntarily accepted by the plaintiff was assumed by the defendant.

We therefore think that the order of the Appellate Division should be reversed, and the judgment for the plaintiff entered upon the verdict should be affirmed, with costs.

Parker, Ch. J., and Gray, O'Brien, Bartlett, Martin, and Cullen, JJ., concur.

IOWA SUPREME COURT.

GETCHELL & MARTIN LUMBER & MANUFACTURING COMPANY

v.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, Limited, Appt.

(117 Iowa, 180.)

An insurer against employer's liability, whose contract gives it the right to defend against suits by employees against the assured, and which, after a judgment in excess of the insurance has been obtained against

the assured, agrees to perfect an appeal, is not liable for negligently failing to do so, whereby the judgment is affirmed, in the absence of anything to show that the judgment was erroneous, and that plaintiff could not have succeeded on a second trial.

(May 22, 1902.)

A PPEAL by defendant from a judgment of the District Court for Polk County in favor of plaintiff in an action brought to recover for breach of defendant's contract

NOTE.—*Liability involved in the exercise of the right to control or carry on litigation in the name of another party.*

- I. In general, 617.
- II. *Liability of beneficial plaintiff for costs.*
 - a. Under Code and statutory provisions.
 1. In New York, 618.
 2. In other states, 621.
 - b. In the absence of statutory provisions.
 1. In ejectment cases, 623.
 2. In other cases, 625.
- III. *Costs against third parties defending.*
 - a. In ejectment cases, 626.
 - b. In other cases, 628.
- IV. *Costs against third parties agreeing to pay the same,* 630.
- V. *Summary,* 631.

I. In general.

In GETCHELL & MARTIN LUMBER & MFG. CO. v. EMPLOYERS' LIABILITY ASSUR. CORP. an employers' liability company was sued for negligence in permitting a judgment to go against its 62 L. R. A.

policy holder in an action for damages, where the policy provided that the insurer should have "the absolute conduct and control of defending the same throughout." The insurer had defended the action, and the judgment was largely in excess of the amount insured against. After judgment the insurer expressly agreed to take an appeal, but had failed so to do. It was held that it could not be held liable for failing to appeal, unless it was shown that the judgment would have been changed by prosecuting the appeal. The court said: "Here there was a judgment of the district court against plaintiff. Generally speaking, it was presumptively valid, and would stand on appeal. . . . What warrant is there for saying that in a case of this kind there is a counter presumption that it would have been reversed? And, without such presumption, plaintiff has made no showing of damage. Even overcoming the presumption first mentioned would not be enough to make plaintiff's case. We must further presume that Newbury could not have succeeded on another trial. In our opinion the burden is upon a

to perfect an appeal from a judgment. *Reversed.*

Statement by Waterman, J.:

Both parties hereto are corporations. Plaintiff is engaged in manufacturing, and employs labor, and defendant's business is that of insuring employers against loss on account of personal injuries suffered by their employees in the line of duty. Plaintiff had a policy with defendant in which it was insured to the amount of \$1,500 in case of injury to any one employee. During the existence of this policy, one Harry A. Newbury met with an accident while in plaintiff's employ, which resulted in the loss of his right hand. He instituted an action for damages against plaintiff on account there-

of. The petition in the case at bar is in three counts. The first claims the sum of \$1,500, the amount of the insurance under the policy. The second and third counts, which are substantially the same, set up the fact that defendant undertook to defend the action brought by Newbury, and, through its negligence, judgment was permitted to go against plaintiff for the sum of \$4,300, which, with interest and costs, amounting in all to \$4,737.25, plaintiff has been obliged to pay. The amount claimed under these counts is \$3,237.25. Defendant made a written tender of the sum of \$1,500, and afterwards deposited that amount in court, acknowledging liability to that extent. The contest, therefore, is over the claim made in the other two counts. There was a denial

plaintiff in an action of this nature to show the amount of his damages."

This seems to be the only case reported where a party assuming control of legal proceedings has been sued for negligently defending an action brought against another party.

In *Brown v. Demont*, 9 Cow. 263, where a defendant in ejectment had been taken on a *ca. sa.*, and the judgment had been set aside for irregularity, and the defendant brought suit against the lessor of plaintiff for trespass and false imprisonment. It was held that the lessor would not be liable without some collateral evidence to connect the execution with the judgment and the lessor with the execution, and it should be shown that the lessor, or his attorney, issued the execution, or that one of them was privy to it.

II. Liability of beneficial plaintiff for costs.

a. Under Code and statutory provisions.

1. In New York.

In some of the states there is a statutory or Code provision imposing liability for costs upon any person who prosecutes an action for his own benefit in the name of another. N. Y. Code Civ. Proc. § 3247, provides that, where an action is brought in the name of another by a person who is beneficially interested therein, the latter shall be liable for costs the same as if he was the plaintiff. Under this provision of the Code a party beneficially interested, who prosecuted an action in the name of another, was held liable for the costs in the following cases:

Where an action for specific performance of an agreement by which defendant assumed to pay a mortgage was brought in the name of one person for the benefit of another, asking that relief be granted to the latter, it was held that the beneficial party should be charged with costs. *Slauson v. Watkins*, 95 N. Y. 300.

And the promoter of a suit in the name of a corporation, where the plaintiff was not a corporation, was held liable for the costs. *Metropolitan Addressing & Mailing Co. v. Goodenough*, 21 N. Y. Civ. Proc. Rep. 268, 18 N. Y. Supp. 212.

And the real parties in interest, who brought an action through the plaintiffs as their agents, in whose names all their business was done, were held liable for the costs. *Henricus v. Englert*, 43 N. Y. S. R. 598, 17 N. Y. Supp. 235.

62 L. R. A.

Where an assignor residing in New Jersey assigned his demand to a resident of New York to avoid the necessity of giving security for costs, retaining an equitable and beneficial interest in the same, it was held that the assignor was properly chargeable with the costs recovered by the defendant in the action after the return of an execution unsatisfied. *Pendleton v. Johnson*, 21 N. Y. Civ. Proc. Rep. 272, 18 N. Y. Supp. 211.

So, where a party owning a claim assigned it to an irresponsible third party for the purpose of suing thereon, and the action failed, it was held that the assignor was liable for the costs of the case. *Winants v. Blanchard*, 12 N. Y. S. R. 384. In this case the court said: "The plaintiff evidently had no interest in the demand, did not expect anything from it, and, in fact, scarcely knew what the use of her name imported. Under such circumstances McClosky must be held the real party in interest, and liable for the costs of defendant." The court did not cite the statute, but this case evidently was under Code Civ. Proc. § 3247.

An assignee of a receiver brought an action to recover unpaid subscription to stock, and obtained a judgment. The plaintiff made a written assignment of the judgment including all sums of money that might be obtained in any proceedings to be had thereupon. On appeal the judgment was reversed on the ground that the plaintiff had no right to maintain that action, as it should have been in equity. It was held that the assignee of the judgment was liable for defendant's costs. *Tucker v. Gilman*, 58 Hun, 167, 11 N. Y. Supp. 555. Affirmed in 125 N. Y. 714, 26 N. E. 756. The point was made that, as there was no right of action, there was nothing to assign, and, as the assignee took nothing, he should not be held liable. The court said: "The liability follows the assignment of the asserted, not a real, cause of action. Neither can this liability be avoided by his omission to take the active charge of the prosecution of the action. For it has been made to result from the assignment itself, by which the assignee becomes entitled to the advantages of the litigation in case of its success. All that is requisite is that the cause of action, whatever it may be when it is capable of being transferred, shall become the property of the assignee. And that property will be derived from the assignment alone. By taking the assignment the assignee made himself a party

of all liability under these counts. The case, by agreement, was tried to the court, and resulted in a judgment for plaintiff in the sum of \$3,209, from which defendant appeals.

Mr. N. T. Guernsey, for appellant:

When the liability company reserved to itself the right to conduct and control this litigation, it reserved to itself the right to select counsel and to determine the general policy of the litigation.

What obligation to the Getchell & Martin company is implied from the right of the liability company to select counsel for it? It is merely the obligation to exercise good faith, or, at the utmost, reasonable care in the selection of competent counsel.

to the litigation. From that time it was carried on wholly for his benefit. If it had resulted favorably, the proceeds would have belonged to him. It was his suit, and it was by his permission that it afterwards went forward in the name of the plaintiff. He voluntarily assumed that relation to the action. And the merits were as fully heard for him as they could have been if he had been in name, as he was in fact, the party prosecuting. He acquired the litigation with all its consequences, one of which was this liability."

After the judgment in the court of appeals, it was held that the assignee could be fined the amount of the costs, and adjudged to be in contempt on refusal to pay the same. 20 N. Y. Civ. Proc. Rep. 397, 14 N. Y. Supp. 392.

The Code of Procedure, § 321, provided that, in an action in which the cause of action shall, by assignment after the commencement of the action, become the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party. Under this section a party taking an assignment of a cause of action after an action had begun, and prosecuting the same in the name of another, was held liable for costs in the following cases:

An action was brought to determine the conflicting claims of children to the proceeds of insurance. M. L. Keyes was awarded the money and judgment for costs against the other defendants. A purchaser of the interests of the children by the first wife of the deceased took an assignment of their claim and prosecuted an appeal in their names to the court of appeals, and the judgment below was affirmed with costs. The purchaser was held liable for the defendant's costs. *Olmstead v. Keyes*, 2 How. Pr. N. S. 1.

This section of the Code was repealed September 1, 1880, and the right to these costs became fixed by judgment before the repeal. It was also held in this case that the proviso in § 3352 of the Code of Procedure, that nothing shall impair any proceedings, or rights, defense, or limitation, lawfully accrued, and that the statutes in force on the day before the provision takes effect are deemed to remain in force to protect such a right, protected all the rights lawfully accrued or established. It was further held that, if § 321 of the Code of Procedure did not apply, the same rule would apply under Code Civ. Proc. § 3247, *supra*. 62 L. R. A.

Eighmy v. Union P. R. Co. 93 Iowa, 538, 27 L. R. A. 296, 61 N. W. 1056; *Maine v. Chicago, B. & Q. R. Co.* 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; *Laubheim v. De Koninglyke Nederlandse S. B. Maatschappij*, 107 N. Y. 228, 13 N. E. 781; *Secord v. St. Paul, M. & M. R. Co.* 5 McCrary, 515, 18 Fed. 221; *O'Brien v. Cunard S. S. Co.* 154 Mass. 272, 13 L. R. A. 329, 28 N. E. 266; *Allan v. State S. S. Co.* 132 N. Y. 91, 15 L. R. A. 106, 30 N. E. 482; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Guelich v. National State Bank*, 56 Iowa, 434, 41 Am. Rep. 110, 9 N. W. 328; *First Nat. Bank v. German Bank*, 107 Iowa, 543, 44 L. R. A. 133, 78 N. W. 195.

There was no breach of this obligation.

After an action was commenced the cause of action was assigned and the assignee continued the prosecution of it. The complaint was dismissed, and it was held that the assignee was liable for the costs of defendant. It was further held that a *capias ad satisfaciendum* could not be issued, but the process should be an attachment bailable and returnable before the court. *Morrison v. Lester*, 15 Hun, 538. The court said: "There is no reason why he should be subject to a greater liability than the plaintiff himself. His liability must be enforced differently, because there is no lien by judgment or execution. But his liability can only be this, that he must apply his property, if he has any, to pay these costs."

Where a receiver continued the prosecution of an action begun by the company before his appointment he was held chargeable with the costs in like manner as if he were made a party plaintiff. *Columbian Ins. Co. v. Stevens*, 37 N. Y. 536. In this case the court said: "In my opinion the right of the defendants to this protection and indemnity against groundless prosecution is clear, and it is not necessary to invoke the 317th section of the Code for its maintenance, further than to say that its provisions warrant the charge of these costs upon the fund; and such charge should be absolute and prior to the claims of those for whose benefit the action is prosecuted, if the rules of equity require it. Whether that section imperatively entitles the prevailing party to such priority of payment in all cases mentioned in that section it is unnecessary in this case to decide."

These sections *supra* were derived from 2 N. Y. Rev. Stat. 610, § 44, providing that, when any action shall be brought in the name of another by an assignee or person beneficially interested, such assignee or person shall be liable for costs to the same extent in which a plaintiff would be liable.

In the following cases under this statute, the beneficial plaintiff was held liable for costs where he unsuccessfully prosecuted an action in the name of a third party:

A person brought a suit in the name of another to recover a penalty, by reason of the defendant's omitting to duly advertise real estate of the plaintiff sold by him as sheriff on an execution, and agreed to carry on the suit at his own expense and to have a portion of the expected recovery. It was held that he was liable for the costs recovered against the nominal

The damages claimed are remote and speculative.

8 Am. & Eng. Enc. Law, 2d ed. p. 551; *Howe Mach. Co. v. Bryson*, 44 Iowa, 159, 24 Am. Rep. 735; *Carl v. Granger Coal Co.* 69 Iowa, 519, 20 N. W. 437; *Williams v. Brown*, 76 Iowa, 643, 41 N. W. 377; *Schwartz v. Davis*, 90 Iowa, 324, 57 N. W. 849; *Norman v. Winch*, 65 Iowa, 263, 21 N. W. 598; *Noble v. Hand*, 163 Mass. 289, 39 N. E. 1020; *Todd v. Keene*, 167 Mass. 157, 45 N. E. 81; *Spangler v. Sellers*, 5 Fed. 882; *Joy v. Morgan*, 35 Minn. 184, 28 N. W. 237; *Reumping v. Wharton*, 56 Neb. 536, 76 N. W. 1076.

If *Godefroy v. Jay*, 7 Bing. 413, is claimed to be applicable to every case where negligence is alleged, then it is in conflict with the current of American authority.

Spangler v. Sellers, 5 Fed. 882.

party. *Giles v. Halbert*, 12 N. Y. 32. In this case the party beneficially interested was held liable under 2 N. Y. Rev. Stat. 619, § 44, and this was held whether such contract was void or not, on the ground that, having prosecuted the action, he could not be excused from the legal consequences of his own acts.

In *Miller v. Franklin*, 20 Wend. 630, it was said: "When one man, as assignee, or as beneficially interested in the demand, brings an action in the name of another, he is liable for the costs which may be adjudged to the defendant; and is also bound to indemnify the plaintiff on record. 2 Rev. Stat. 619, § 44; *Norton v. Rich*, 20 Johns. 475; *Waring v. Barret*, 2 Cow. 460; *Miller v. Adsit*, 18 Wend. 672; *Colvard v. Oliver*, 7 Wend. 497. An assignee is liable to the defendant for costs, although the assignment is made pending the suit, if he afterwards proceeds in the action (*Schoolcraft v. Lathrop*, 5 Cow. 17); and in such a case he takes the demand *cum onere*, and is liable for the costs which had accrued before, as well as those which may arise after, the assignment. *Jordan v. Sherwood*, 10 Wend. 622. But the mere fact of taking an assignment pending the action will not, I think, make the assignee liable, unless he afterwards carries on the suit."

And where a deputy sheriff and the plaintiffs in execution brought an action in replevin in the name of the sheriff in order to subject property to the execution, and one of the plaintiffs in execution settled the suit, it was held that the parties who prosecuted the replevin suit in the name of the sheriff were liable for the costs to the administratrix of the sheriff. *Colvard v. Oliver*, 7 Wend. 497. This was on the ground that, if the application for costs had been made by the defendants, it would be but ordinary practice to grant the motion; and the same practice applied where the application came from the nominal plaintiff.

And a party bringing a suit on an assigned cause of action to recover a demand in which he was beneficially interested, in the name of another person, was held liable for the defendant's costs though he was not an assignee of the entire demand. *Bliss v. Otis*, 1 Denio, 656. In this case the court said: "Mr. Dewitt had an interest in the demand in suit, and was, therefore, liable for costs if the action was brought by him as a 'person beneficially inter-

If a claim or demand on a third party were received for collection by an attorney, it would be his duty, if it were not otherwise collected, to sue upon it in a reasonable time. His failure to act would be a negligent breach of contract. To recover actual damages, the burden would, upon general principles, be upon the plaintiff, and the quantum of damages would necessarily be regulated by the value of the claim lost by the failure to sue.

Collier v. Pulliam, 13 Lea, 114.

The trial and judgment against appellee made the strongest possible *prima facie* case that this judgment was right.

Westaway v. Frost, 12 Jur. 698; *Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; *Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386; *Bruce v. Baxter*, 7 Lea, 477; *Wilcox v. Plummer*, 4 Pet. 172, 7 L. ed. 821; 3 Am.

ested in the recovery.' The statute is direct to this point. It declares, not only that the assignee shall be liable, but also 'any person beneficially interested in the recovery.' 2 Rev. Stat. 619, § 44; *Whitney v. Cooper*, 1 Hill, 629; *Miller v. Franklin*, 20 Wend. 630."

And where the receiver appointed under a creditor's bill brought a suit at law in the name of the debtor, by the direction and for the benefit of the creditor, and judgment was rendered against the debtor for costs, it was held that the creditor might be compelled to pay them by attachment. *M'Hench v. M'Hench*, 7 Hill, 204.

So a judgment creditor who sued through a receiver in supplementary proceedings, and was solely interested in the recovery of a judgment, was held liable for costs where the defense was successful. *Ward v. Roy*, 69 N. Y. 96; *Galation v. Smith*, 48 How. Pr. 477.

The latter case was under N. Y. Code of Procedure, but it was not cited. The fact that this case was brought without leave of court was given as an additional reason why costs should be imposed on the creditor.

See *Boardon v. Martin*, 84 Hun, 179, 32 N. Y. Supp. 441, Affirmed in 142 N. Y. 669, 37 N. E. 571, III. b, *infra*.

But in some cases, under these Codes and statutory provisions, the court refused to impose costs on a third party where it was not established that such third party was the beneficiary, and where it was held that the remedy by attachment given by Code Proc. § 321, did not apply to assignees in their representative capacity.

An order of arrest was made, and one of the defendants was held to bail. The complaint was dismissed for want of prosecution, and the sureties of the plaintiff appealed to the court to set aside the default, and were allowed to prosecute the action. They obtained a judgment for the plaintiff, which was reversed on appeal. It was held that the sureties were not liable for defendant's costs, under N. Y. Code Civ. Proc. § 3247, on the ground that the cause of action had not been transferred to them, and they did not become beneficially interested therein, and that the remedy of defendants, if they were entitled to recover costs from the sureties in the undertaking, must be by an action upon that instrument. *Metropolitan Concert Co. v. Sperry*, 58 Hun, 470, 12 N. Y. Supp. 494, Affirmed in 125 N. Y. 760, 47 N. E. 408.

& Eng. Enc. Law, 2d ed. p. 398; *Jamison v. Weaver*, 81 Iowa, 212, 46 N. W. 996.

Messrs. Clark & McLaughlin, for appellee:

Defendant is responsible for the negligence of its attorney.

Walker v. Stevens, 79 Ill. 193; *Bradstreet v. Emerson*, 72 Pa. 135, 13 Am. Rep. 665; *Wilkinson v. Griswold*, 12 Smedes & M. 669; *Lewis v. Peck*, 10 Ala. 142; *Pollard v. Rouland*, 2 Blackf. 22; *Krause v. Dorrance*, 10 Pa. 462, 51 Am. Dec. 496; *Simpson v. Waldby*, 63 Mich. 439, 30 N. W. 199; *Weyerhaeuser v. Dun*, 100 N. Y. 150, 2 N. E. 274; *Shattuck v. Bill*, 142 Mass. 56, 7 N. E. 39.

A concern whose business is defending lawsuits for hire, taking from the party to the action all discretion and control, closing his mouth and tying his hands, assuming entire responsibility to the exclusion of the

party to the action, ought in law and morals to be held to a very high degree of responsibility for failure to do as agreed, and for allowing judgment to be entered against the party to the action without the hearing and trial guaranteed by law.

The contract sued on is a policy of insurance, and the same should be construed most strongly and rigidly against the company.

Fenton v. Fidelity & C. Co. 36 Or. 283, 48 L. R. A. 770, 56 Pac. 1096; *Anoka Lumber Co. v. Fidelity & C. Co.* 63 Minn. 286, 30 L. R. A. 689, 65 N. W. 353; *Hoven v. Employers' Liability Assur. Corp.* 93 Wis. 201, *sub nom. Hoven v. West Superior Iron & Steel Co.* 32 L. R. A. 388, 67 N. W. 46.

Both parties knew that, if the appeal was not perfected as agreed, the judgment would be affirmed, and that appellee would be com-

An assignee in bankruptcy, who was appointed after the action had begun, continued the action in the name of the original plaintiff. On a judgment for defendants it was held that the remedy by attachment, given by N. Y. Code Proc. § 321, against an assignee *pendente lite* to enforce the judgment for costs for which he was made liable by that section, was intended only to apply as against assignees taking and holding in their own right. It was further held that, if such assignee held in a representative capacity, under N. Y. Code Proc. § 317, providing that costs shall be chargeable only upon the fund unless personally charged on the trustee for mismanagement or bad faith, he was protected from personal liability by that section, and § 321 did not impose a greater liability than if the action had been originally brought by him in his representative capacity. *Reade v. Waterhouse*, 52 N. Y. 587, *Reversing 3 Jones & S. 78*, *Affirming 12 Abb. Pr. N. S. 255*.

And under 2 N. Y. Rev. Stat. 515, 2d ed. § 47, providing that every person beneficially interested in the recovery in an action on an assigned cause of action is liable for costs, it was held that a person having a lien by assignment was not liable for costs where it was not clear that he was acting in the prosecution of the claim. *Whitney v. Cooper*, 1 Hill, 629. In this case the court said: "that a person having a lien for his debt on a chose in action occasionally inquires as to its progress of the attorney who holds it for prosecution, admits himself to be interested, and advises and urges the suit are not of themselves enough to charge him with the defendant's costs."

2. In other states.

Similar statutory provisions exist in other states imposing liability for costs on the party beneficially interested who unsuccessfully prosecutes a suit in the name of another party. The cases in which this liability was imposed were generally those in which an action was brought in the name of one party for the use of another. The same rule was applied in actions of ejectment where the landlord sued in the name of his tenant.

Under *Starr & C. Anno. Stat. (Ill.) chap. 33, § 19*, providing that, where judgment for costs 62 L. R. A.

is given against a plaintiff suing for the use of another, such judgment shall also be against the person for whose use the suit is brought as if he had been a joint plaintiff, where a judgment was rendered against the plaintiff for costs, in an action wherein the Keystone Manufacturing Company for the use of M. L. Paddock was plaintiff, and the nominal plaintiff failed to procure indemnity from Paddock to manage the case,—It was held that he could not obtain an injunction against the collection of the costs. *Keystone Mfg. Co. v. Watts*, 100 Ill. App. 11. The court said: "Where a person prosecutes a suit in the name of another he is bound to indemnify and protect him against the payment of costs; but, in order to obtain such protection, it is the duty of the nominal plaintiff to make an application to the court where the case is pending for an order on the beneficial plaintiff to indemnify him."

But where an equitable assignee of a chose in action brought suit thereon for his use in the name of his assignor, and judgment was rendered for defendants, it was held that the nominal plaintiff, having paid the costs, was entitled to recover the same from the party who prosecuted the action. *Henderson v. Welch*, 8 Ill. 340. The court said: "The equitable assignee of a chose in action may sue upon it in the name of the party having the legal title, but he is bound to indemnify such party against the payment of costs."

And in *Dazey v. Mills*, 10 Ill. 67, the court said: "The assignee is allowed to sue in the name of the person having the legal interest, and to control the proceedings. The latter cannot interfere further with the prosecution than to require indemnity against the payment of costs."

And in *Sumner v. Sleeth*, 87 Ill. 500, the court said: "It has long been the practice of courts of law to look through the nominal parties to the rights of the real parties in interest; and, where a necessary nominal party, either as plaintiff or defendant, fails or refuses to use his name, either in prosecuting or defending an action at law, courts will (upon proper indemnity as to costs and damages) permit the real party in interest to use the name of the nominal party, and that against the protest of the nominal party."

In *State use of Charlotte Hall School v.*

pelled to pay it. The damage that appellee would suffer by a breach of the contract, as contemplated by both parties, was the affirming of the judgment and payment by appellee, and the amount of damage would be the amount appellee would be required to pay in excess of that which would be repaid by appellant. The affirming of the judgment and payment by appellee followed as a necessary consequence of the breach of the contract and because thereof.

Jamison v. Weaver, 81 Iowa, 212, 46 N. W. 996.

On the breach of the contract being shown, and that judgment in the supreme court necessarily followed and was the result of appellant's breach, and that appellee paid the judgment, a necessary result of its

rendition, what reason obtains for saying that the same does not make a prima facie case of damage in the amount of the judgment paid, throwing upon the party in fault the burden of overcoming the prima facie case by evidence showing that, notwithstanding appellant's fault, the appellee was not damaged in said amount because the judgment would have been affirmed, even if the appeal had been perfected.

The court, in a case of plain negligence on the part of an attorney, would not be very exacting in its requirements of a prima facie showing in order to shift the burden to the other side.

Collier v. Pulliam, 13 Lea, 114.

Negligence having been shown causing damage, the burden is on the attorney to

Greenwell, 4 Gill & J. 407, which was an action in the name of the state for the use of a school to obtain possession of an estate, where the intestate died without known relatives legally entitled to the same, the court said: "Some objections have gone to the form of the judgment itself, others to the pleading in the cause. It is no valid objection against the judgment, if costs could in such a case have been rightfully granted, that costs have been adjudged against the state. It is certainly true that the state is not liable for costs, unless there exists some legislation to make her so; and the act of assembly of 1704, chap. 54, § 10, so far from creating any responsibility, throws it on the *cestui que use*, and renders such person liable by attachment. On a failure, however, of the plaintiff in his action, the act of assembly contemplates the entry of a judgment, and it could not be entered in any other manner than against the state, because in all the records and proceedings the state's name, and not the name of the *cestui que use*, is used as the plaintiff, and it could not be, therefore, entered against the *cestui que use*. But, notwithstanding this, the only effect of the judgment is to create a liability in the *cestui que use* for the amount. In the rendition of the judgment, however, no execution should have been awarded against the state. It is also erroneous in adjudging costs against the plaintiff. In a successful motion in arrest each party pays his own costs. The defendant is not entitled to costs. He should have taken advantage of the error in the pleadings, by demurrer, and, not having done so, he has, by laying by, contributed to the costs of the proceeding."

In *Anderson v. Miller*, 7 Smedes & M. 586, the court said: "When an instrument not assignable is sued on, in the name of one for the use of another, the nominal plaintiff cannot discharge or release the action. The courts of law will protect the equitable right to this extent, and will compel the nominal plaintiff to permit his name to be used for the recovery of the claim. All he can require is indemnity against costs."

A judgment that the defendant recover his costs from the lessor of the plaintiff in an action of ejectment was held to be proper where the plaintiff failed in the suit. *Doe ex dem. Blount v. Wright*, 60 N. C. (1 Winst. L.) 89. This was under N. C. Rev. Code, chap. 31, § 45, providing that, upon the return of any declara-

tion in ejectment, the real plaintiff shall give security to prosecute the action, or otherwise pay all such costs and damages as shall be awarded on failure thereof. It was further held that in ejectment he was to be regarded as a party to the action.

In *Eaton v. Benefield*, 2 Blackf. 54, note, it was said that Ind. Stat. 1833, p. 113, provides that, in actions of ejectment, actions in the name of the state for the use of any person, actions in favor of a nominal plaintiff for the use of another person, the defendant, if he obtain judgment, may, in lieu of the order and attachment for costs heretofore allowed, take a judgment for costs against the lessor, relator, or person for whose use the suit is brought.

In *Utt v. Long*, 6 Watts & S. 174, where a witness brought a suit for his fees against a party who subpoenaed him, it was held that the fact of taking an active part in carrying on the suit would not render such party liable to the witnesses for their fees, without an express promise to pay; but, if the party was an active agent in having the suit in ejectment brought, and if it was projected and instituted by him in the name of a committee for a lunatic, he would be liable to the witnesses for the plaintiff for their mileage and daily pay, without an express promise to pay, under Pa. act April 23, 1829, § 2, providing that the equitable plaintiff or person for whose use or benefit and at whose instance any action has been prosecuted, whether named on the record or not, shall be liable to execution on judgment for costs against the legal plaintiff.

And in *Coffey v. White*, 14 W. N. C. 108, it was said: "In Pennsylvania the equitable owner of a chose in action is entitled, by virtue of his ownership, to bring an action in the name of the legal plaintiff for his use in order to recover the chose; that the party whose name is thus necessarily used as a legal plaintiff cannot prevent such use of his name and will not be permitted to arrest or discontinue the action; that, when the name of the use plaintiff is not mentioned, he may, nevertheless, be sought out and made responsible for costs,—that the defendant may set up any just defense which he has against the use plaintiff, as, for example, a set-off; that, when the action has been commenced in the name of the legal plaintiff without his knowledge or against his consent, he is not liable for costs, that he is only liable for costs where he has authorized the action;

show that his negligence did not cause the damage.

Wharton, Neg. p. 638, § 752; *Godefroy v. Jay*, 7 Bing. 413; *Swannell v. Ellis*, 1 Bing. 347; *Bourne v. Diggle*, 2 Chitty, 311; *Aitchison v. Madock*, Peake, N. P. Cas. pt. 1, p. 218; *Thompson v. Lobdell*, 7 Rob. (La.) 369; *King v. Fourchy*, 47 La. Ann. 354, 16 So. 814; *Grayson v. Wilkinson*, 5 Smedes & M. 268; *Fitch v. Scott*, 3 How. (Miss.) 314, 34 Am. Dec. 86; *Coopwood v. Baldwin*, 25 Miss. 129; *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739; *Brock v. Barnes*, 40 Barb. 521; *Howell v. Ransom*, 11 Paige, 538; *Jennings v. McConnel*, 17 Ill. 148; *Shearm. & Redf. Neg.* § 566; *Wood's Mayne, Damages*, § 648; *Weeks, Attorneys at Law*, 2d ed. § 298; *Patterson v. Westervelt*, 17 Wend.

and that the use plaintiff, if the action is defeated, is always liable for costs where the action has been brought with his privity or consent."

In *Armstrong v. Lancaster*, 5 Watts, 68, 30 Am. Dec. 293, it was said: "The court will undoubtedly search out the actual plaintiff, where it is necessary, and fix on him the responsibility of a party, by subjecting him to costs, a plea of set-off, or any other liability that may be necessary to protect the defendant."

And where, after the commencement of an action, the claim was assigned, and the plaintiff took the benefit of the insolvent law, and the action was afterwards carried on for the use of the assignee, who instructed counsel and assisted at the trial, when a verdict passed for the defendant, it was held that the assignee should be required by rule to pay the costs. *Canby v. Ridgway*, 1 Blinn. 496.

In an action of ejectment, where a verdict was found in favor of the defendant, it was held that judgment was properly rendered against the lessor of the plaintiff for costs, under Tenn. act 1801, chap. 11, providing that a person instituting an action of ejectment shall give bond, and the clerk shall issue a *copias* for the defendant, who shall give a bail bond, which the sheriff shall assign to the lessor of the plaintiff. *Hopkins v. Godbehire*, 2 Yerg. 241. In this case the court said: "By these statutes, the lessor of the plaintiff, before he can sue in ejectment, is bound to give bond and security, payable to the defendant, conditioned that he will prosecute his suit with effect, or, in case of failure, that he will pay and satisfy all costs that may be awarded against him for wrongfully prosecuting the suit."

So, in *Anderson v. Bradie*, 7 Yerg. 297, and *Morrison v. Deaderick*, 10 Humph. 344, it was said that one of the objects of Tenn. act 1825, chap. 20, providing that in all suits prosecuted in the name of one person for the use of another the person for whose use the suit is brought shall be the real party on record, against whom judgment shall be rendered and execution issued for costs, was to subject the party having a beneficial interest to liability for costs.

So, where a party brought a suit for his own benefit in the name of another, and afterwards dismissed the action, it was held that a judgment was properly rendered against him for the defendant's costs. *Pates v. St. Clair*, 11 62 L. R. A.

543; *Hall v. Brooks*, 8 Vt. 485, 30 Am. Dec. 485; *Moore v. Floyd*, 4 Or. 101; *West v. Rice*, 9 Met. 564; *Crauford v. Andrews*, 6 Ga. 244; *Studebaker Bros. Mfg. Co. v. Zollars*, 12 S. D. 296, 81 N. W. 292; *Ranken v. Jones* (Tex. Civ. App.) 53 S. W. 583.

Waterman, J., delivered the opinion of the court:

One provision in the policy reserved rights to defendant in these words: "On receiving from the employer notice of any claim, the corporation may take upon themselves the settlement of same, and in that case the employer shall give them all necessary information and assistance for the purpose. The employer shall not, except at his own cost, settle any claim or incur any ex-

Gratt. 22. It was further held that this would be a proper judgment without regard to Va. Code 1849, p. 706, § 9, providing that, "when a suit is in the name of one person for the benefit of any other, if there be judgment for the defendant's costs, it shall be against such other."

Persons who bring an action without authority in the name of another, as a general rule, are held liable for costs, and it is also a contempt of court to prosecute such an action; but such cases are not intended to be included in the note.

b. In the absence of statutory provisions.

1. In ejectment cases.

Under the old practice, in ejectment a declaration was delivered to the tenant in possession on a feigned demise, in which the supposed lessee was the nominal plaintiff and a casual ejector was the defendant, to which declaration a notice was annexed from the casual ejector to the tenant in possession advising him to appear at a certain time and cause himself to be made defendant. On the receipt of this, if the tenant did not appear, he was supposed to have no title; and, on proof of service of the declaration and notice, the court ordered judgment against the casual ejector by default, and possession of the premises was given to the lessor of the plaintiff, who was considered as the real claimant. But, if the tenant appeared pursuant to the notice, a rule of court was drawn up by consent of the parties, called the consent rule, by which it was ordered that the tenant be made defendant instead of the casual ejector, and forthwith appear at the suit of plaintiff and plead not guilty, and upon the trial confess lease, entry, and ouster, and insist upon the title only; otherwise that judgment would be entered for the plaintiff against the casual ejector. By the consent rule it was ordered that if, on the trial, the tenant should not confess the same, whereby the plaintiff should not be able to prosecute his suit, the tenant should pay costs to the plaintiff; but it was further ordered that if, upon the trial of the issue, a verdict should be given for defendant, or the plaintiff did not prosecute his suit, for any other cause than for not confessing lease, entry, and ouster, then the lessor of the plaintiff should pay the costs of the defendant, 2 Tidd. Pr. 1203.

pense without the consent of the corporation: Provided, however, that if, upon the happening of an accident covered by this policy, the employer shall, in his discretion, take any step for the immediate medical or surgical relief of an injured employee, the corporation shall reimburse any moderate expense so incurred. If any legal proceedings be taken to enforce a claim, the corporation shall, at their own cost and expense, have the absolute conduct and control of defending the same throughout, in the name and on behalf of the employer; but, if the corporation shall offer to pay the employer the full amount insured, they shall not be bound to defend the case, nor be liable for any costs or expenses which the employer may incur in defending such case.

In some cases, under the old practice, that did not reach final judgment, and the lessor did not enter into the consent rule, he was held not liable for the defendant's costs. *Doe ex dem. Prior v. Salter*, 3 Taunt. 485; *Doe ex dem. Pratten v. Board*, 10 Mees. & W. 675; *Den ex dem. Struggle v. Hayne*, 21 N. J. L. 245; *Anonymous*, 8 N. J. L. 288.

In *Doe ex dem. Prior v. Salter*, 3 Taunt. 485, which was an action in ejectment, it was held that the only mode of recovering costs of a nonsuit upon the merits in ejectment was to serve the lessor of the plaintiff with a copy of the consent rule and *allocatur* of costs, and to attach him if he did not obey.

And where, after a rule for judgment in ejectment against the casual ejector the defendant delivered a plea and consent rule, in the latter of which the lessor of the plaintiff never joined, and judgment of *non pros.* was afterwards signed, it was held that the court had no power to compel the lessor of the plaintiff to pay those costs or join in the consent rule. *Doe ex dem. Pratten v. Board*, 10 Mees. & W. 675.

So, in ejectment the lessor of the plaintiff was held not liable for costs when *non prossed* for refusing to join in the consent rule. This was on the ground that, not being a party to the record, he was liable for costs only under the consent rule. *Den ex dem. Struggle v. Hayne*, 21 N. J. L. 245; *Anonymous*, 8 N. J. L. 288.

Some early English cases held that the real party in interest in bringing a suit in ejectment should be held liable for costs. *Morgan v. Stepely*, 1 Keble, 827. In this case it was not shown whether or not he had entered into the consent rule. The lease was made by baron and *feme*, and it was held that on his death she was liable as well as other joint tenants surviving.

And where an ejectment was brought upon a demise of the Duke of Richmond, and costs were taxed for the defendant, and, the plaintiff not being found and the duke a person privileged by Parliament and an ambassador beyond sea, it was ruled that the duke's agents who gave the name of the plaintiff to the duke's attorney should pay the costs or produce a plaintiff able to pay them, and the court committed the agents until they did so. *Henloe v. Peters*, 2 Lev. 66.

In ejectment, where the father that prosecuted the suit was dead and the lessor was an infant, and a rule for costs against the infant in whose right the father sued was prayed, it was held that, the father having left no assets, 62 L. R. A.

The employer shall, at the cost of the corporation, render them every assistance in his power in carrying on any suit which they shall undertake to defend on his behalf."

The facts are that Newbury obtained judgment against plaintiff in the district court for \$4,300, and defendant, in attempting to take an appeal, failed to perfect it in proper time, and the judgment was affirmed on motion. It is upon this failure to have the appeal heard upon its merits that the claim of liability is founded. We very much doubt whether defendant, under the clause of the contract we have set out, would be liable for failing to take an appeal if it thought it inadvisable, or in any event be under obligation to do more than

and the attorney not being in fault, and there being no timely motion for an able plaintiff, and the costs being above \$50, the court accepted an offer of the executor to pay \$10. *Austin v. King*, 3 Keble, 437, *Freem. C. L. Rep.* 373.

In *Noke v. Windham*, 1 Strange, 693, "the lessor of the plaintiff being an infant, the court obliged him to name a good plaintiff, who might be answerable for costs."

And in *Throgmorton ex dem. Miller v. Smith*, 2 Strange, 932, on a motion that an infant lessor in ejectment should be compelled to name a good plaintiff who would be answerable for costs, where the father had entered into a rule to pay costs, and there was a rule to stay proceedings until security was given, the last day of the term the infant's mother entered into the rule.

In a similar case, where it was shown that the guardian of the infant had undertaken to pay the costs, the rule was discharged. *Anonymous*, 1 Cowp. 128.

After the consent rule was abolished by the common-law procedure act 1852 (15 & 16 Vict. chap. 76, §§ 186, 221), it was held that the real party in interest would be held liable for the defendant's costs, and that the equitable jurisdiction exercised by the courts in ejectment cases still existed. *Mobbs v. Vanderbrande*, 4 Best & S. 904, 33 L. J. Q. B. N. S. 177, 10 Jur. N. S. 745, 9 L. T. N. S. 760, 12 Week. Rep. 405; *Thornton v. Wilkinson*, 9 Jur. N. S. 606, 8 L. T. N. S. 507, 11 Week. Rep. 916.

In some cases in this country the lessor appears to have been held liable for costs whether he had entered into the consent rule or not.

In *Jackson ex dem. Vrooman v. Haines*, 2 Cow. 462, it was held that a female lessor of the plaintiff in an action of ejectment was not exempt from an attachment for the nonpayment of defendant's costs, where they did not exceed \$50, under 1 N. Y. Rev. Laws, 527, providing that no female person shall be imprisoned upon execution in any civil action for debt or damages in which the debt or damages shall not, exclusive of costs, exceed \$50, as the terms made use of in the statute did not reach the case of an attachment for costs.

And in *Jackson ex dem. Runno v. Stiles*, 1 Cow. 166, it was held that in ejectment, where the lessor neglected to join in the consent rule, the court ordered that the lessor pay the costs of the motion and join in the consent rule within twenty days, or that the tenant may enter

employ a competent attorney; but it appears that, after the judgment below, it expressly agreed to take an appeal, and attempted to do so, and its liability in this action we think must rest upon this second agreement. The question of whether it was obliged to do more than select a competent attorney is extensively discussed by counsel, but we do not feel required to determine it. We may assume, for the purpose of this case, that defendant is liable for any default or negligence of the attorney it employed, and we then have this question: What damages have been shown? The case is a singular one in many of its features. Our attention has been called to none just like it in the books. Plaintiff lays much stress upon the fact that defendant was an

insurance company, and some of the arguments made seem to embody the thought that it guaranteed a hearing in this court, but this is not so. In so far as the appeal was concerned, it had the responsibility only that would have attached to any other agent undertaking a like duty.

Counsel for plaintiff ground their case upon this rule: "When negligence has been shown, in consequence of which judgment has gone against the client, it is not incumbent on the client to show that but for the negligence he could have succeeded in the action. It is for the solicitor to defend himself . . . by showing that the client was not hurt by his negligence." Wharton, Neg. § 752; Shearm. & Redf. Neg. 5th ed. § 566; Weeks, Attorneys at Law, § 298.

a *non pros.*, and that the lessor pay the costs of the defense.

In *People v. Honsenfratts*, 3 Cow. 26, it was held that the lessor of the plaintiff in ejectment could not be taken on a ca. sa. for costs of the defendant, where the lessor had not been served with a taxed bill of costs before moving for the attachment. In this case the lessor of the plaintiff had entered into the consent rule, and the verdict and judgment were against the nominal plaintiff.

And in *People v. Merritt*, 7 Cow. 415, where defendants in ejectment had recovered a verdict and judgment for costs against the nominal plaintiff, it was held that an attachment could not be awarded against the lessor, as no ca. sa. for costs against the nominal plaintiff had been shown to the lessor.

The remedy failed in these last two cases on account of the mode of procedure.

And where the lessor of the plaintiff in ejectment entered on the premises during the pendency of the suit it was held that he became liable to pay the costs of the suit, as his entry defeated the writ. *Gubbs v. Ellis*, 4 N. C. (2 Car. Law. Repos.) 612.

But in *Doe ex dem. Brown v. Owen*, 2 Blackf. 452, in the absence of a statute, it was held that in ejectment, if there be a verdict and judgment for the defendant, the judgment for costs must be entered against the nominal plaintiff, and not against the lessor who had entered into the common consent rule. This did not decide that he would not be held liable on attachment. Subsequently the Indiana statute imposed a liability for costs on the lessor in ejectment where the judgment was for defendant. See *Eaton v. Benefield*, 2 Blackf. 54, note, *supra*, II. a. 2.

Cases in regard to staying proceedings in ejectment until costs are paid are not intended to be included in this note.

2. In other cases.

It seems to have been generally held, in cases other than ejectment, that the beneficial plaintiff was not liable for costs. The exceptional cases are one in Queen's bench division, which is a *dictum*, to the effect that he would be liable for costs; and two cases in New York, where assigned claims were prosecuted for the benefit of assignees, which cases arose before the statute.

An action was brought against a clerk of the 62 L. R. A.

trustees of the district and another party who was a constable for the trustees, in making a distress, occupied by the plaintiff as tenant, and there was a nonsuit. It was held that the landlord would not be liable for costs although he was the real party in interest. *Hayward v. Giffard*, 4 Mees. & W. 194, 6 Dowl. P. C. 699, 7 L. J. Exch. N. S. 256. The court said: "The cases where the courts have interfered in this way are cases of exception. They are cases where application is made for security for costs, and even there the order is made in the cause, and the immediate thing commanded is a stay of proceedings, by which means the ulterior object of a security for costs is obtained. So, in ejectment, which is a fictitious proceeding, the courts allow the action to be brought in the name of the nominal plaintiff, and allow the landlord to come in and defend, but they take notice of the real party litigant. Those are the excepted cases, but the general rule is that courts of justice have no power to except over parties to the record."

In *Evans v. Rees*, 1 Gale & D. 579, 1 Dowl. P. C. N. S. 338, 2 Q. B. 334, 11 L. J. Q. B. N. S. 11, 5 Jur. 1060, which was a *replevin* case, it was held that the court had no power, after judgment for defendant, to make a third party pay the costs on the ground that he was the real plaintiff. The court said: "No case, except in ejectment, has been cited in which a person, not a party before the court, has been compelled to pay costs. The action of ejectment is an exception to the general rules."

And in *Scott v. Pascall*, 15 Sim. 559, 11 Jur. 550, where a suit was instituted by two of the guardians of the poor on behalf of themselves and other guardians to enforce payment of money for the benefit of a parish, it was said that the persons on whose behalf the plaintiff sued were not liable for the costs of the suit.

But in *Reg. v. Wheatley*, 34 Week. Rep. 257, where the justices had made an order to abate a nuisance, under public health act 1875, § 94, providing that the local authorities may require a nuisance to be abated within a specified time, the court said: "It is not usual to give costs against the justices, but I think we should reserve the right to Mr. Charles to ask that the local board should pay the costs if it is found that they have carried on this litigation under the shadow of the justices." The order made by the justices failed to designate the work required to abate the nuisance, and was defective. This

These writers all rely in support of this rule principally upon the English case of *Godefroy v. Jay*, 7 Bing. 413. As to that case, it is enough to say it has been questioned, expressly or by implication, in several well-considered cases in this country. See *Collier v. Pulliam*, 13 Lea, 114; *Spangler v. Sellers*, 5 Fed. 882; *Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262. There are doubtless instances in which the rule stated may, to some extent, be properly applied. Where an attorney undertakes to make a collection and negligently fails, prima facie the amount of the cause of action is the amount of the loss, but it is incumbent on the client to show that the claim was a valid obligation. But, in those cases which seem to adopt the rule of the *Godefroy Case*, an examination will disclose a state of facts not requiring the application of so extended a doctrine. For instance, in *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739, where the attorney was guilty of gross fraud, and sac-

rificed his client's rights to protect himself, by taking a judgment less favorable to plaintiff than he might have had, the fact that he obtained a judgment showed the merits of the claim, and its amount may well be said to have been prima facie the measure of plaintiff's rights. These instances, and the other cases cited by plaintiff, differ from that at bar in this: Here there was a judgment of the district court against plaintiff. Generally speaking, it was presumptively valid, and would stand on appeal. 1 Greenl. Ev. § 19; *Smith v. Yager*, 85 Iowa, 706, 50 N. W. 224; *Wright v. Farmers' Mut. Live-Stock Ins. Asso.* 96 Iowa, 360, 65 N. W. 308. What warrant is there for saying that in a case of this kind there is a counter presumption that it would have been reversed? And, without such presumption, plaintiff has made no showing of damage. Even overcoming the presumption first mentioned would not be enough to make plaintiff's case. We must

order was reversed on certiorari. The court, Queen's bench division, did not cite any authorities, and this case does not appear to have been subsequently cited.

No statute appears to have been in force at the time the following two cases were decided, and the beneficiary was held liable for costs under the practice which existed. This rule of practice seems to have been the foundation for the statutory provision in 2 N. Y. Rev. Stat. 619, § 44.

In *Schoolcraft v. Lathrop*, 5 Cow. 17, it was said: "It is now the well-settled practice that, where one is beneficially interested in the demand of the plaintiff, as assignee, and the suit is carried on for his benefit, upon judgment against the plaintiff, such assignee is liable for the costs."

An assignee of a chose in action, upon which a suit as prosecuted for his benefit, on judgment being rendered for the defendant, was held liable for the costs. *Waring v. Barret*, 2 Cow. 460. In this case an effort was made to tax part of the costs against the attorneys for plaintiff, and it was admitted on argument that the assignee was liable.

The only authority for taxing costs against the assignee in the *Waring* case was the citation of *Ketcham v. Clark*, 4 Johns. 484, where the plaintiffs, having become insolvent, assigned all their property to other parties, for whose benefit that suit was commenced, and the plaintiffs were unable to pay costs. The court said: "It is just that the assignee should be responsible for the costs, and required security to be given."

III. Costs against third parties defending.

a. In ejectment cases.

In New York it is held that a party unsuccessfully defending an ejectment case in the name of another will be liable for the costs on the return of an execution unsatisfied against the losing party. In *Livingston v. Clements*, 1 Hill, 648, this rule was denied, claiming that the case of *Jackson ex dem. Martin v. Van Antwerp*, 1 62 L. R. A.

Wend. 295, was overruled in *Miller v. Adsit*, 18 Wend. 672 (a replevin case), and in *Ryers v. Hedges*, 1 Hill, 646, the same view was taken; but in that case the proof of privity would not support a judgment against the party said to be defending. These two ejectment cases in 1 Hill are in effect overruled in *Farmers' Loan & T. Co. v. Kursch*, 5 N. Y. 558, and the rule in that state seems to be that in all cases a party unsuccessfully defending an action in the name of another will be held liable for costs where he has the right to be made a party defendant under the statute and Code, but fails to exercise that right.

In *Jackson ex dem. Martin v. Van Antwerp*, 1 Wend. 295, it was held that a landlord defending a suit of ejectment in the name of his tenant should be ordered to pay the costs of the suit.

So, in *Farmers' Loan & T. Co. v. Kursch*, 5 N. Y. 558, it was held that a grantor who defended unsuccessfully an ejectment suit against his tenant was liable to pay the costs of the plaintiff after execution against the defendant was returned unsatisfied. This was on the ground that a person would be liable who defended without being made a party, and who had the right to be made a party under 2 N. Y. Rev. Stat. 341, § 17, providing that no imparlance, voucher, aid, prayer, or receipt shall be allowed; but, whenever any action shall be brought against any tenant to recover land held by him, the landlord and any person having any privity of estate or interest, may be made a defendant, or may, at his election, appear without such tenant. This statute was held to supply the deficiency that existed in the act of 1813 (1 Rev. Laws 443), requiring the defendant in ejectment to give immediate notice to his landlord, and authorizing the latter to appear and become a joint defendant, and providing that, if he failed in the action after becoming a defendant, judgment should be rendered against him for costs.

In *Finnegan v. Carraher*, 47 N. Y. 493, affirming 61 Barb. 252, it was said that, where a

further presume that Newbury could not have succeeded on another trial. In our opinion, the burden is upon a plaintiff in an action of this nature to show the amount of his damages. Sometimes he is aided in this by a presumption, but not so under the facts in the case at bar. As sustaining this conclusion, see, in addition to the cases cited, as criticising the rule in the *Godefroy Case*: *Bruce v. Baxter*, 7 Lea, 477; *Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386; *Suydam v. Vance*, 2 McLean, 99 Fed. Cas. No. 13,657. Plaintiff presses upon our attention, as directly in point in support of his contention, the case of *Jamison v. Weaver*, 81 Iowa, 212, 46 N. W. 996. In that case an attorney sued to recover fees. Defendant filed a counterclaim based upon the attorney's negligence in failing to properly prosecute an appeal to this court, in an action in which defendant was appellant, by reason of which the costs of the appeal, \$37, were taxed to and paid by defendant. There was a demurrer to this counterclaim, which

was sustained by the trial court, and this court reversed the ruling. It will be seen there were certain admitted damages, arising out of the failure to prosecute the appeal, and in that important respect the case differs from the one at bar. By the demurrer it was admitted the costs were taxed to defendant because of the failure of plaintiff to diligently prosecute the appeal.

But, were we to adopt the rule plaintiff contends for, we hardly think its situation would be improved. Let us suppose the burden on defendant to show that plaintiff was not damaged by the failure to perfect the appeal. The presumption in favor of the correctness of the judgment at nisi prius would make a prima facie case to that effect. The burden would then shift to plaintiff to overcome such case, and this burden it has failed to sustain.

For the reasons given, we think the judgment of the trial court erroneous, and it is reversed.

landlord defends unsuccessfully, in the name of his tenant, an action of ejectment, he will be held liable for the costs of the plaintiff.

In *Livingston v. Clements*, 1 Hill, 648, Overruled in *Farmers' Loan & T. Co. v. Kursch*, 5 N. Y. 558, *supra*, where an ejectment suit was defended in the name of the tenant at the instance and for the benefit of his landlord, it was held that the landlord was not liable for the plaintiff's costs. In this case the court said: "This case, as it stands between the plaintiff and Polly, would, on the affidavits of the defendant, be the same with *Jackson ex dem. Martin v. Van Antwerp*, 1 Wend. 295,—that is to say, Polly would be liable to pay the plaintiff's costs on his motion. Then it is insisted that he may be compelled to do the same thing upon the defendant's motion, for which we are referred to *Colvard v. Oliver*, 7 Wend. 497. The principle of the latter case would seem to be a warrant for this motion, on the defendant's facts, if we could go behind the nominal defendant and consider another defending in his name as the real party, for the purpose of compelling the latter to pay costs on the application of the plaintiff. I should doubt whether we could, even were the landlord, who defended in the name of his tenant, called on. *Jackson ex dem. Martin v. Van Antwerp* does not appear to be sustained by any precedent, and is, I think, in principle, overruled by *Miller v. Adsit*, 18 Wend. 672."

So, in *Ryers v. Hedges*, 1 Hill, 646, it was said: "It must be taken as a general rule since our decision in *Miller v. Adsit*, 18 Wend. 672, that, though one person, for the protection of his own interest, defend an action in the name of another, yet he will not be liable for the costs which the plaintiff recovers. The action of ejectment, where the landlord defends in the name of his tenant, has been holden to constitute an exception (*Jackson ex dem. Martin v. Van Antwerp*, 1 Wend. 295); but this is contrary to the principle of *Miller v. Adsit*." In this case the relation of landlord and tenant was denied to exist, and the affirmative proof was held insufficient. But see *Farmers' Loan* 62 L. R. A.

& T. Co. v. Kursch, 5 N. Y. 558, *supra*; and *Miller v. Adsit*, 18 Wend. 672, *infra*, III. b.

A mortgagee who unsuccessfully defended an ejectment suit against the mortgagor without being made a party defendant was held liable for costs. *Sand v. Church*, 32 App. Div. 139, 52 N. Y. Supp. 854. This decision was on the ground that a person would be liable for costs who defended an action, and who had the right to be made a party defendant but failed to exercise that right, under N. Y. Code Civ. Proc. § 452, providing that, where a person not a party to an action has an interest in the subject thereof, or in real property, and makes application to the court to be made a party, he must be brought in by the proper amendment. This section was construed in connection with § 1503, providing that any other person (than grantee, heir, or occupant) claiming title to, or the right of possession of, the real property sought to be recovered as landlord, remainderman, reversioner, or otherwise adversely to the plaintiff, may be joined as defendant in an action therefor.

It may be noticed that N. Y. Code Proc. § 122, provided that a person interested, not a party, "in an action for the recovery of real or personal property," on making an application may be brought in as a defendant. The scope of the present provision seems to give a party interested in the subject-matter of any action the right to be made a party.

In England parties who defended an action in the name of another were held liable for costs; but were not held liable where they were only equitable mortgagees and the proof did not establish that they assumed control of the defense, and where the party defending did not claim title. But as to this latter there is one case, *Hutchinson v. Greenwood*, 4 El. & Bl. 324, 3 C. L. Rep. 115, 24 L. J. Q. B. N. S. 2, 1 Jur. N. S. 329, 3 Week. Rep. 105, *infra*, where such liability was imposed, but this case does not seem to have been followed in other cases.

So, where three actions of ejectment had been brought against a landlord and his two tenants, and the landlord obtained a rule for the consolidation of the three actions, and that the

ejectment against one of the tenants, who was a pauper, should abide the event of the ejectment against the other, and that action was tried and the lessor of the plaintiff obtained judgment, the court compelled the landlord defendant to pay the costs of that ejectment. *Thrustout ex dem. Jones v. Shenton*, 10 Barn. & C. 110.

And where the tenant in ejectment had been put in possession of the premises by the parish officers, who made an order, on ejectment being brought, that the action should be defended at the expense of the township, and the lessor of the plaintiff obtained a verdict, it was held that the parish officers should be required to pay the costs. *Doe ex dem. Masters v. Gray*, 10 Barn. & C. 615. In this case the court said: "In ejectment we can make the real party to the suit pay the costs. *Thrustout ex dem. Jones v. Shenton*, 10 Barn. & C. 110. Here the parish officers put a mere pauper into possession, and the lessor of the plaintiff was bound to bring the ejectment against him. The parish officers, therefore, ought to pay the costs."

And in an action of ejectment it was held that the court had jurisdiction to order, by rule, the parties really conducting the defense to pay the costs of the plaintiff, though those parties were strangers to the record and claimed no interest in the property; and that this rule applied as well since the common-law procedure act of 1832 abolishing the consent rule as before. *Hutchinson v. Greenwood*, 4 El. & Bl. 324, 8 C. L. Rep. 115, 24 L. J. Q. B. N. S. 2, 1 Jur. N. S. 329, 3 Week. Rep. 105. In this case Erie, J., dissenting, said: "As far as I know, the only authority for the position is *Doe ex dem. Masters v. Gray*. In *Thrustout ex dem. Jones v. Shenton* the party who was ordered to pay the costs was a party to the consent rule; that gave the court jurisdiction. These cases came under consideration in *Doe ex dem. Wright v. Smith*, 8 Dowl. P. C. 517. There the party against whom the rule was directed had employed an attorney to defend the ejectment for the defendant on the record, who would have otherwise allowed judgment to go by default. He claimed no interest in the land, and Williams, J., decided that, even if he interfered for bad or vexatious motives, the court had no jurisdiction to order such a stranger to pay the costs. He points out that in *Doe ex dem. Masters v. Gray* the party was one defending to protect an interest claimed by himself, and that the extreme limit to which any court had ever gone was in that case. I am aware of no case, but *Doe ex dem. Masters v. Gray*, in which the principle has been acted on, even so far."

But, in order to entitle a plaintiff in ejectment to call upon parties who are strangers to the record to pay the costs, it was held that it should be clearly shown that the defense was conducted by them for their own benefit in the name of the proper defendant, and that it was not enough to show that they were interested as equitable mortgagees of part of the premises, and they endeavored to make terms with the plaintiff after judgment. *Anstey v. Edwards*, 16 C. B. 212. In this case the evidence showed that the defendant was a client of the solicitor defending, and that the latter never was authorized by the parties sought to be charged with costs to defend the ejectment on their account, and that all they sought was to secure their own interest as equitable mortgagees of part of the property, and that after the plaintiff knew of the nature of the interest which the bank had,

he took the defendant in execution for the costs with which he now sought to charge the bank. This case arose after the procedure act of 1832 that abolished the consent rule.

Where, in an action of ejectment, an insolvent defendant had been induced to defend the action by a third person who employed an attorney and furnished the money to defend, but who claimed no interest in the property, it was held that the latter would not be compelled to pay the costs of the lessor of the plaintiff. *Doe ex dem. Wright v. Smith*, 8 Dowl. P. C. 517. This was on the ground that the party did not claim title, and was not a party to the record. The court said: "Several cases were cited which I have much considered. The last case was that of *Hayward v. Giffard* [4 Mees. & W. 194, 6 Dowl. P. C. 699, 7 L. J. Exch. N. S. 256]. I think that case shows that the instances in which such a rule as the present can be granted at all, against a party not on the record, are in actions of ejectment. This case does not, however, dispose of the present motion, although this is an action of ejectment. It is obvious that an action of ejectment is a peculiar and altogether a fictitious proceeding. It is a proceeding under the regulation of the court, and the court will mould it so as to further justice between the parties. The court has a larger control over that action than any other. It further appears that, where a party claims title to certain property which is the subject of an action, it is to a certain extent a deception on the court, if he interferes, he being entitled to defend it himself. To a certain extent that is misconduct on his part. If he chooses to make a person who is not solvent defend the action for him, he will be compelled to pay the costs of that action. That was the course pursued in *Thrustout ex dem. Jones v. Shenton* and *Doe ex dem. Masters v. Gray*. In both of those cases it is obvious that a party against whom the motion was made was one claiming a right to defend as landlord. But I am not aware of any case, nor was any cited, where the court has interposed in the way now required, except against a party who has claimed title to the matter in dispute. I am aware of no case, in which a party who has really been setting another to defend, or who has furnished money, and employed the attorney, but who does not claim any title to the property in question, has been made to pay the costs of the action." See *Hutchinson v. Greenwood*, 4 El. & Bl. 324, 8 C. L. Rep. 115, 24 L. J. Q. B. N. S. 2, 1 Jur. N. S. 329, 3 Week. Rep. 105, *supra*.

b. In other cases.

As to the liability for costs of third parties defending, in actions other than ejectment cases, it seems that in New York a third person, who is not a party unsuccessfully defending proceedings in error, will not be held liable for the defendant's costs. In some of these cases the broad ground was taken that in this state the costs of the defense will not be allowed in any case. But in *Perrigo v. Dowdall*, 25 Hun. 234, costs of the defendant in trespass were imposed on a third party defending, and the changes of the statute by the Code provisions were reviewed, and the position was taken, that in any case where a party had such an interest in the subject of an action that he could apply and be made a party to the action, a defense by one having such a right imposed the same liability as in ejectment cases. N. Y. Code Civ.

Proc. § 452, provides that where a person, not a party to an action, has an interest in the subject thereof, or in real property, the title to which may in any manner be affected by the judgment, or in real property, for injury to which the complaint demands relief, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment. It is believed that the liability for costs attaches to anyone who defends a case without being made a party, and who has the right, under this section of the Code, to be made a party.

In *Miller v. Adsit*, 18 Wend. 672, an action of replevin to recover horses taken on execution was brought against a constable. It was claimed that the plaintiff in the execution defended for the constable, and judgment for defendant was reversed in the court for the correction of errors. On a motion that the plaintiff in the execution who defended the action, be taxed with costs, it was held that he was not liable as it was not shown conclusively that he defended the action. It was also held that the rule in regard to prosecuting suits did not apply where defense was made, unless it might be in ejectment cases. In this case the court said: "The general principle is that an assignee, or other party in interest, who commences and carries on a suit in the name of another, shall, if the action fail, answer to the defendant for costs; and the payment may be enforced by attachment. *Norton v. Rich*, 20 Johns. 475; *Schoolcraft v. Lathrop*, 5 Cow. 17; *Colvard v. Oliver*, 7 Wend. 497. . . . But here the plaintiff has sued and recovered against *Adsit*, and now calls upon a third person to take the defendant's place, and pay the costs. And this, too, in a case where, according to his own account of the matter, he had an election against whom the suit should be brought. If Ball directed the levy on the horses he was answerable as well as the constable. A suit might have been brought against him alone, or against him and the constable jointly. The plaintiff has made his election to proceed against *Adsit*, and now, after finding him unable to pay, he chooses to consider Ball the real party defendant. There is no precedent for such an application." The court said that a party defending an ejectment case, as in *Jackson ex dem. Martin v. Van Antwerp*, 1 Wend. 295, was an exception, and that 2 N. Y. Rev. Stat. 619, § 44, providing for the payment of costs against persons who are not parties to the record, was confined to a suit brought by an assignee or person beneficially interested in the recovery in the name of another.

In *Farmers' Loan & T. Co. v. Kirsch*, 5 N. Y. 558, the court said: "In *Jackson ex dem. Martin v. Van Antwerp*, 1 Wend. 295, it was decided that a landlord defending an ejectment in the name of his tenant may be compelled to pay the costs of the suit. But it is said that this decision was overruled in subsequent cases. Mr. Justice Bronson did not intend to overrule it, or to question its correctness by what he said in *Miller v. Adsit*, 18 Wend. 674. He notices the case, and regards the action of ejectment as standing on peculiar grounds. *Miller v. Adsit* was an action of replevin; and *Bendernagle v. Cocks*, 19 Wend. 151, which is supposed to be at variance in principle with *Jackson v. Van Antwerp*, was an action on contract. *Ryers v. Hedges*, 1 Hill, 646, was an action of ejectment in which the plaintiff moved that Bogert, who was alleged to be the defendant's landlord, should

be ordered to pay the costs on the ground that he had defended the suit unsuccessfully in his tenant's name. But the relation of landlord and tenant between them was denied both by Bogert and the defendant, and their denial was fortified by other affidavits 'too strongly,' says Mr. Justice Cowen, 'to warrant us in granting this motion upon the present state of the proofs.' He further observes that the decision in *Jackson ex dem. Martin v. Van Antwerp* was contrary to the principle of *Miller v. Adsit*. But in this he evidently differs in opinion with Mr. Justice Bronson. In another case decided at the same term (*Livingston v. Clements*, 1 Hill, 648) Cowen, J., says he should doubt whether the landlord who defends a suit in the name of his tenant can be called on by the plaintiff to pay costs, and repeats that he thinks the case of *Jackson ex dem. Martin v. Van Antwerp* is overruled in principle by the case of *Miller v. Adsit*. We are called on to decide between the opinions of these learned judges. The case of *Jackson ex dem. Martin v. Van Antwerp* was decided in 1828. At that time, and long before, there was a statutory provision requiring the defendant in ejectment, holding the land as tenant of a third person, to give immediate notice thereof to his landlord; and authorizing the landlord to appear and to become a defendant to the suit jointly with the tenant, or alone if the tenant refused to appear. 1 Rev. Laws, 443. If, after becoming a defendant, he failed in his defense, judgment and execution went against him for the costs. The intent of the statute was to give him an opportunity of defending his title, and to charge him with the costs if he failed. The landlord has frequently, and, indeed, most commonly, a greater interest in defending the suit, and preventing a change of possession, than his tenant; and the statute secured him against collusion between the tenant and the plaintiff. The decision in the case of *Jackson ex dem. Martin v. Van Antwerp* (although the reason is not stated) is well founded on the principle that the landlord ought not, by collusion with, or favor of, the tenant, to obtain the benefit which the statute gave him, without subjecting himself to the burden it imposed upon him. There is no statutory provision of the like nature in relation to actions for personal property. *Miller v. Adsit* was a case of that kind; and, if the rule in that case influenced the subsequent cases of *Ryers v. Hedges* and *Livingston v. Clements*, I think it was misapplied; and that the case of *Jackson ex dem. Martin v. Van Antwerp* was rightly decided upon the distinction between the cases to which the statute referred to applied and those to which it did not."

In *Bendernagle v. Cocks*, 19 Wend. 151, it was held that a party in interest was not liable for costs of the reversal where the defendant prosecuted a writ of error and obtained a reversal. The court said: "Assuming that Sears was the owner of the demand prosecuted in the common pleas, he succeeded in recovering a judgment in that court; had he failed, he would have been liable in that court to the defendants for costs. In this court, instead of prosecuting, he defended, and we have repeatedly held that a party defending a suit in the name of another, though himself the party in interest, is not liable to the costs of the action if the defense prove unsuccessful. We cannot regard the writ of error as such a continuation of the suit below as to place the defendant in error in the light of a party prosecuting his demand."

He is not a volunteer in this court, but is called here by his adversary,—the same as a defendant in an ordinary suit."

A plaintiff obtained a judgment for \$49.50, and the defendant obtained a judgment for \$19.12, the excess of his costs over the judgment of plaintiff. The judgment was reversed on appeal on account of the refusal to allow plaintiff interest. A motion was made for an order directing the attorney of the defendant to pay the costs of the action, as he was the party beneficially interested on appeal. It was held that he was not liable, as he was acting on the defense. *Peetsch v. Quinn*, 12 Misc. 61, 33 N. Y. Supp. 87. The court said: "The present statute, which gives a right to a successful litigant to charge a third party with the costs of the litigation by reason of a beneficial interest in, or a transfer of the cause of action to, such third party, is § 3247 of the Code of Civil Procedure, a substantial re-enactment of a corresponding provision of the Revised Statutes (2 Rev. Stat. 619, § 44, 2 Edm. Stat. 515, § 47), which provision was uniformly held to apply only to the beneficial interest of or transfer to, one prosecuting the action, not to one defending a suit (*Miller v. Adsit*, 18 Wend. 672; *Ryers v. Hedges*, 1 Hill, 646), or responding to an appeal (*Bendernagle v. Cocks*, 19 Wend. 151); and failing an expression of legislative intent that a person, other than as specified, shall be required to pay the successful party's costs, though he himself be no party to the record, it is not for the courts to establish any such requirements. *Miller v. Adsit*, 18 Wend. 672, *supra*. Under § 321 of the Code of Procedure, it was held that one defending in the name of another could be so charged; but this was by reason of the wording of that statute, wherein there was a distinct departure from the provisions of the enactment before in force. *Wolcott v. Holcomb*, 31 N. Y. 126. The legislature, by rejecting the phraseology of the former Code, and embodying that of the Revised Statutes in the enactment of § 3247 of the present Code, must clearly have intended that the law, in this aspect, should be as interpreted by the earlier decisions cited above."

Where an assignee in bankruptcy simply defended an appeal from a judgment formerly recovered by the bankrupt, on which appeal the judgment was reversed, and the assignee took no further steps in the matter, it was held that he was not liable for costs on a dismissal of the complaint on a new trial. *Heather v. Neil*, 14 N. Y. Week. Dig. 46. The court said: "The mere transfer of a judgment recovered, or a right of action in the course of its prosecution, to an assignee in bankruptcy is not sufficient to render him chargeable with the costs which may afterwards be recovered in the action by the defendants. *Reade v. Waterhouse*, 52 N. Y. 587. The action must be either prosecuted or defended by him before he can be charged with any costs whatever accruing afterwards (Code, § 317; Code Civ. Proc. § 3246), and even then he is only liable to pay the costs made by him, out of the property in his hands."

But in *Wolcott v. Holcomb*, 31 N. Y. 125, the court said: "The provision of the Code of Procedure in respect to the liability for costs of persons not parties to the record is broader than the former practice of the courts, or the corresponding provision of the Revised Statutes. Code, § 321, 2 Rev. Stat. 515, 2d ed. § 47. It embraces in its language the case of one de-

fending an action in the name of the defendant on the record, and of a respondent on appeal; whereas the former law was limited to one prosecuting in the name of a plaintiff under such circumstances. *Miller v. Adsit*, 18 Wend. 672; *Bendernagle v. Cocks*, 19 Wend. 151; *Ryers v. Hedges*, 1 Hill, 646. The Code, however, requires that the cause of action should have become the property of the person sought to be charged, by means of an assignment or otherwise."

And in *Perrigo v. Dowdall*, 25 Hun, 234, it was held that a party defending unsuccessfully an action of trespass on his own account, the defendant on the record being "his mother and his tenant," was liable for the costs of the action where they could not be collected from the defendant. This was on the ground that the statute giving a landlord the right to defend (2 N. Y. Rev. Stat. 341, § 17), providing that, in any action against a tenant to recover possession of land, any person having any privity of estate or interest with such tenant may appear, was changed, giving a broader application, by Code Civ. Proc. § 452, providing that, where a person not a party to an action has an interest in the subject thereof or in real property, the title to which may be affected by the judgment, and makes application to be made a party, the court must direct him to be brought in by the proper amendment. The court held that, as this party had the right to be made a party and to defend, having defended unsuccessfully in the name of his tenant, he would be liable for the costs.

An action was brought against a company for food and meals furnished at the request of the defendant. In another action against another party this company, on supplementary proceedings, paid the amount to the sheriff, and was discharged. Thereupon the receiver in supplementary proceedings was substituted as the defendant in the first action, which was finally decided in favor of the plaintiff, and the defendant was charged personally with the costs, and thereafter the judgment creditor, as the person beneficially interested, was required to pay the costs. *Bourdon v. Martin*, 84 Hun. 179, 32 N. Y. Supp. 441, Affirmed in 142 N. Y. 669, 37 N. E. 571. The court said: "It appears that the appellant is the only person who would have been benefited by the fruits of the action commenced by the receiver." In this case the receiver did not resist a recovery in the action where he was substituted as a defendant, but claimed the fund and represented the creditor, who was the real party in interest.

See *M'Hench v. M'Hench*, 7 Hill, 204; *Gallation v. Smith*, 43 How. Pr. 477; *Ward v. Roy*, 69 N. Y. 96, *supra*, II. a, 1.

IV. Costs against third parties agreeing to pay the same.

A plaintiff in attachment assigned its claim, and it was agreed that the assignees were to have full charge of said suit, and were to hold the plaintiff harmless from costs, and the plaintiff was required to pay a bill of costs taxed in the cause by the clerk, after having first notified the assignee's attorneys to either pay or contest the correctness of the same by a motion to retax, which they failed to do. It was held that, after having been notified and not having the bill revised, and the plaintiffs having been required to pay it, the assignees

should not be heard to deny their liability under the contract. *Morgan v. North Texas Nat. Bank* (Tex. Civ. App.) 34 S. W. 138.

And where one requested permission to bring an action for his own benefit in the name of another against a third person, to recover a debt supposed to be due, promising to indemnify the nominal plaintiff against all damages, it was held that such promise was binding and not against public policy, nor within the statute of frauds, and a recovery against the indemnitors for costs was granted. *Knight v. Sawin*, 6 Me. 361.

And a promise by an indemnitor to indemnify and pay all costs, provided he was allowed to assume the defense, was held to be valid and not void for want of consideration. And it was also held that it was not within the statute of frauds, and could not be avoided on the ground of maintenance. *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572. In this case a vendor of land had a deed made to his grantee by another party, and when the grantee was sued in ejectment the vendor assumed the defense of the suit and promised to save the grantee harmless from, and to pay all costs arising or which might arise in, the prosecution of the defense. A judgment for possession and for costs was rendered against the grantee.

And where a vendor gave to his vendee a bond to indemnify against any claim affecting the premises, and to "pay all costs, charges, and expenses necessary to defend the said premises against any such claims," it was held that the obligee was entitled to recover on the bond the amount paid to counsel and the expenses of defending an unsuccessful action of ejectment for the premises. *Robinson v. Bakewell*, 25 Pa. 424. In this case the vendor had notice of ejectment against his vendees and an appearance was entered in the case at his instance, and he was requested by the counsel of the vendee not to interfere; but he and his counsel assisted in the preparation and trial of the case.

Where a solicitor who, in order to induce a plaintiff to go on with a suit to restrain the issue of certificates by a company, agreed to indemnify plaintiff against the costs, it was held that the solicitor made the suit his own, and he became liable to pay the costs of the defendant. *Fielden v. Northern R. Co.* 40 L. J. Ch. N. S. 113, 19 Week. Rep. 361, L. R. 6 Ch. 497, 23 L. T. N. S. 655.

See *Whiting v. Aldrich*, 117 Mass. 582, *supra*, I., and *Giles v. Halbert*, 12 N. Y. 32, *supra*, II. a, 1.

A party negligently allowed cattle to escape, and then brought a replevin action in the name of the owner to recover the same, promising him to pay all expenses. The owner gave a bond with sureties. On this bond judgment was recovered against the owner of the cattle. That action was defended by the party who allowed the cattle to escape and who retained counsel. It was held that he was not chargeable with other counsel fees which were voluntarily paid by the owner. *Whiting v. Aldrich*, 117 Mass. 582. In this case the court said: "The promise of the defendant to hold the plaintiff harmless, and to pay the bills, was a contract of indemnity, and, so far as the plaintiff is concerned, must be construed to mean that

he should be protected from all liability which the use of his name would impose upon him, and should be paid all debts actually incurred by him, and for his services. Neither of these items for counsel fees falls within the contract. The services thus rendered the defendant, in the absence of an agreement, cast no liability upon the plaintiff merely because he was party of record. The contract of indemnity cannot be held to cover an authority to the plaintiff to pay all bills incurred by the defendant in these suits, which the plaintiff might choose to pay. The defendant has the right to deal with such bills himself. The payment, therefore, to Mr. Verry was a voluntary payment, and, even if made under a mistake of legal liability, cannot create a debt against the defendant."

V. Summary.

The liability of the parties carrying on litigation to the nominal party for negligence must be clearly established by the evidence, and negligence will not be presumed by the failure to appeal. It seems that in all cases where an action is brought by one for the use of another, the beneficial plaintiff is liable for costs, and this is generally established by Code or statutory provisions. In the absence of statutory provisions the weight of authority seems to be that the beneficial party, not succeeding in ejectment, will be held liable for defendant's costs. Some of the early cases held this on the ground that he had entered into the consent rule, which would render him liable; and the same was held after the English procedure act of 1852, which abolished the consent rule. In actions other than ejectment it seems that the weight of authority holds that the beneficial plaintiff is not liable for costs. The exceptional cases are those where the assignee of a chose in action was held liable before the statute was passed; and an English case held that a local health board would be liable where it obtained an order of justices abating a nuisance that was reversed on certiorari. In ejectment a beneficial party unsuccessfully defending in the name of another is generally held liable for the costs. In some English cases it was held that this liability would not attach where such party did not claim title to the property. In actions other than ejectment the cases where it was sought to render a third party defending liable for costs appear to be the New York cases. The earlier cases held that the rule in ejectment did not apply, and that he was not liable, and the later cases hold that a party defending on appeal or error will not be liable. In some intermediate cases, owing to the changes in the Code, it was held that a person having a right to be made a party, and who defends an action, will be held liable for costs. This was the reason the New York ejectment cases held a party defending liable for costs; that, having the right under the statute to be made a party, the courts impose upon him a liability for costs where he defends without taking advantage of the statute. It is believed that this should be the rule in actions other than ejectment under the present Code, and seems to have been so held where the question was discussed.

I. T.

NEW YORK COURT OF APPEALS.

JOHN D. PARK & SONS COMPANY, *Appt.*,
v.

NATIONAL WHOLESALE DRUGGISTS'
ASSOCIATION *et al.*, *Respts.*

(175 N. Y. 1.)

1. A plan by a voluntary association of merchants engaged in selling proprietary medicines, adopted by manufacturers of them, looking to the maintenance of prices, by which the manufacturers should sell at fixed prices, with a rebate only to concerns who could be relied on to maintain the selling price, is not void as creating a monopoly or in restraint of trade, nor as against public policy.
2. The adoption of a plan for the sale of their product, by manufacturers of proprietary medicines, as proposed by an association of wholesale dealers, which results in a refusal to sell to complainant, is not shown to have been compelled by threats or intimidation by allegations that the manufacturers were prevented from selling to complainant for the reason that they wished to protect themselves "with the wholesale and jobbing druggists," and that the committee of the association recommended "that continuing and untiring opposition be shown to the sale of those articles of those proprietors who do not adopt" the plan.
3. No boycott against a merchant is effected by the refusal by the manufacturers of a proprietary medicine, at the instance of a voluntary association of merchants engaged in the same line of business, to give him a rebate from the selling price of the medicines unless he will maintain the price to consumers.
4. Equity will not interfere with the action of an association of merchants in keeping watch of other merchants for the purpose of ascertaining who refuses to maintain the fixed price for proprietary medicines.
5. A merchant of large means, who is in position, by reason of large orders, to obtain more advantageous prices from manufacturers than others, so that he can undersell them in the market, has no cause of complaint if they combine, and, by representation and persuasion, induce the manufacturers to refuse to sell to him unless he will agree to maintain prices to consumers.

(Vann, Martin, and Cullen, JJ., dissent.)

(April 28, 1903).

NOTE.—As to validity of combinations to create monopoly or control prices, see also, in this series, *People v. North River Sugar Ref. Co.* (N. Y.) 2 L. R. A. 33, and *note*; *Richardson v. Buhl* (Mich.) 6 L. R. A. 457, and *note*; *National Benefit Co. v. Union Hospital Co.* (Minn.) 11 L. R. A. 437; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.* (Mass.) 12 L. R. A. 563; *Lovejoy v. Michels* (Mich.) 13 L. R. A. 770, and *note*; *Ford v. Chicago Milk Shippers' Assn.* (Ill.) 27 L. R. A. 298; *People v. Milk Exchange* (N. Y.) 27 L. R. A. 437; *United States v. E. C. Knight Co.* (C. C. App. 3d C.) 24 L. R. A. 428, 62 L. R. A.

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Special Term for New York County in favor of defendants in an action brought to recover damages for alleged injuries to plaintiff's business through a conspiracy on the part of defendants. *Affirmed.*

The facts are stated in the opinion.

Messrs. Morris & Fay, for appellant:

Plaintiff's action is to enjoin the continuance of a conspiracy on the part of certain wholesale druggists, its competitors, defendants herein and others, to injure, ruin, and destroy its business, and specifically to enjoin the continuance of various acts being done in furtherance of that conspiracy.

The right of a person to do, or not to do, a certain act is no warrant in law for a conspiracy of others, sought to be accomplished by compelling him to do so.

People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. 48; *Casey v. Cincinnati Typographical Union No. 3*, 12 L. R. A. 193, 45 Fed. 135; *Curran v. Galen*, 152 N. Y. 33, 37 L. R. A. 802, 46 N. E. 297.

The fact that the articles in question are not necessities of life does not affect the plaintiff's rights.

Judd v. Harrington, 46 N. Y. S. R. 925, 19 N. Y. Supp. 406, *Affirmed* in 139 N. Y. 103, 34 N. E. 790; *People v. Duke*, 19 Misc. 292, 44 N. Y. Supp. 336.

The fact that plaintiff has no contract with the manufacturers does not deprive it of a right to relief.

Temperton v. Russell [1893] 1 Q. B. 715.

A conspiracy is a combination of two or more persons, either to do an act which is itself unlawful, or to accomplish some lawful purpose by unlawful means.

Lambert v. People, 9 Cow. 578.

Where the purpose of the combination is illegal, acts done in furtherance of it are illegal, no matter what their character might otherwise be.

Clancey v. Onondaga Fine Salt Mfg. Co. 62 Barb. 395; *Lambert v. People*, 9 Cow.

Affirmed in 39 L. ed. U. S. 325; *State v. Phipps* (Kan.) 18 L. R. A. 657; *Queen Ins. Co. v. State* (Tex.) 22 L. R. A. 483; *Nester v. Continental Brewing Co.* (Pa.) 24 L. R. A. 247; *National Harrow Co. v. Hensch* (C. C. App. 3d C.) 39 L. R. A. 299; *San Diego Water Co. v. San Diego Flume Co.* (Cal.) 29 L. R. A. 839; *Trenton Potteries Co. v. Oilphant* (N. J. Eq.) 46 L. R. A. 255; *Tuscaloosa Ice Mfg. Co. v. Williams* (Ala.) 50 L. R. A. 175; *Com. v. Grinstead* (Ky.) 56 L. R. A. 709, and *Gibbs v. McNeeley* (C. C. App. 9th C.) 60 L. R. A. 152.

578; *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122; *People v. Chase*, 16 Barb. 495.

If a conspiracy is entered into, either for the purpose of doing an unlawful act, or of accomplishing some lawful purpose by unlawful means, acts done in furtherance thereof are illegal no matter how long a period of time may have intervened between the formation of the conspiracy and the doing of the overt acts to carry out the same.

Rex v. Hammond, 2 Esp. 719; *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122; *People v. Willis*, 23 Misc. 568, 52 N. Y. Supp. 808.

There are many things which it is unlawful for a combination of individuals to do, which may be done by one individual with perfect legality.

1 Am. & Eng. Enc. Law, p. 585; *People v. North River Sugar Ref. Co.* 22 Abb. N. C. 164, 3 N. Y. Supp. 401; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Mogul S. S. Co. v. McGregor* [1892] A. C. 25.

The things which it is unlawful for a combination of individuals to do are fixed, so far as this case is concerned, by statute.

Section 168 of the Penal Code of the state of New York declares it to be unlawful for two or more persons to conspire:

"5. To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering, or threatening to interfere, with tools, implements, or property belonging to, or used by, another, or with the use or employment thereof; or—

"6. To commit any act injurious to the public health, to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws."

A combination is also unlawful at common law which attempts to enforce its rules and regulations upon persons not members of its association.

Anderson v. United States, 171 U. S. 604, 613, 43 L. ed. 300, 305, 19 Sup. Ct. Rep. 50; *Master Stevedores' Assn. v. Walsh*, 2 Daly, 1.

The defendants are engaged in, and parties to, an unlawful conspiracy to control jobbing prices of, and restrict and restrain the jobbing trade in, patent medicines, and prevent competition therein.

Stanton v. Allen, 5 Denio, 434, 49 Am. Dec. 282; *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Clancey v. Onondaga Fine Sait Mfg. Co.* 62 Barb. 395; *Livermore v. Bushnell*, 5 Hun, 285; *People v. North River Sugar Ref. Co.* 22 Abb. N. C. 164, 3 N. Y. Supp. 401, Affirmed in 54 Hun, 354, 5 L. R. A. 386, 7 N. Y. Supp. 406; *People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221, 34 N. E. 785; *Judd v. Harrington*, 139 N. Y. 32 L. R. A.

105, 34 N. E. 790; *People v. Milk Exchange*, 145 N. Y. 267, 27 L. R. A. 437, 39 N. E. 1062; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Vulcan Powder Co. v. Hercules Powder Co.* 96 Cal. 510, 31 Pac. 581; *National Harrow Co. v. E. Bement & Sons*, 21 App. Div. 290, 47 N. Y. Supp. 462.

It is illegal for an association of persons to take advantage of the existence of contractual relations to prevent a person from exercising his lawful calling.

Curran v. Galen, 2 Misc. 553, 22 N. Y. Supp. 826, 77 Hun, 610, 28 N. Y. Supp. 1134, 152 N. Y. 33, 37 L. R. A. 802, 46 N. E. 297.

The mere action of the wholesalers in calling upon the manufacturers, under the contracts and agreements referred to, not to sell to plaintiff was unlawful; defendants having been making use of other unlawful means.

People v. Kostka, 4 N. Y. Crim. Rep. 429; *People v. Wilzig*, 4 N. Y. Crim. Rep. 403; *United States v. Kane*, 23 Fed. 748; *Mattheus v. Shankland*, 25 Misc. 604, 56 N. Y. Supp. 123; *Davis v. Zimmerman*, 91 Hun, 489, 36 N. Y. Supp. 303.

Among the unlawful means made use of by the defendants, one was the employment of detectives, and spying thereby upon the business of the plaintiff. The things which the defendants are shown by the amended complaint to be doing are clearly illegal.

Davis v. Zimmerman, 91 Hun, 489, 36 N. Y. Supp. 303; *Mackall v. Ratcliff*, 82 Fed. 41; *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Assn.* 59 N. J. Eq. 49, 46 Atl. 208; *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. 811; *Mattheus v. Shankland*, 25 Misc. 604, 56 N. Y. Supp. 123.

Another was issuing blacklisting circulars, letters, etc., containing plaintiff's name as a person not to be sold to.

People v. Kostka, 4 N. Y. Crim. Rep. 429; *Casey v. Cincinnati Typographical Union No. 3*, 12 L. R. A. 193, 45 Fed. 135; *Emaok v. Kane*, 34 Fed. 47.

The manufacturers were compelled to authorize a subcommittee of the committee on proprietary goods to order supplies to be withheld from any person said committee might find violating the contracts of any one party.

Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665; *De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.* 16 Daly, 529, 14 N. Y. Supp. 277.

The means, therefore, by which the defendants have been, and are, attempting to carry out their purpose of injuring the plaintiff in its business are unlawful, and their combination so to do becomes, therefore, an ille-

gal conspiracy, both at common law and under § 168 of the Penal Code.

People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501; *Master Stereodores' Asso. v. Walsh*, 2 Daly, 1; *Emmanuel's Case*, 6 N. Y. City Hall Rec. 33; *Jones v. Baker*, 7 Cow. 445; *Temperton v. Russell* [1893] 1 Q. B. 715; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. 48; *Casey v. Cincinnati Typographical Union No. 3*, 12 L. R. A. 193, 45 Fed. 135; *Blindell v. Hagan*, 54 Fed. 40; *Smith v. Bivens*, 56 Fed. 352; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Longshore Printing & Pub. Co. v. Howell*, 26 Or. 527, 28 L. R. A. 464, 38 Pac. 547; *Thomas v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 788, 62 Fed. 803; *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14; *Van Horn v. Van Horn*, 52 N. J. L. 284, 10 L. R. A. 184, 20 Atl. 485; *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. 811; *Ertz v. Produce Exchange*, 79 Minn. 140, 48 L. R. A. 90, 81 N. W. 737; *Davis v. Zimmerman*, 91 Hun, 489, 36 N. Y. Supp. 303; *Ryan v. Burger & H. Brewing Co.* 37 N. Y. S. R. 287, 13 N. Y. Supp. 660.

Plaintiff is entitled to a judgment restraining the further continuance of each of the illegal acts complained of.

Davis v. Zimmerman, 91 Hun, 489, 36 N. Y. Supp. 303; *Curran v. Galen*, 152 N. Y. 33, 37 L. R. A. 802, 46 N. E. 297; *Mattheus v. Shankland*, 25 Misc. 604, 56 N. Y. Supp. 123; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *Casey v. Cincinnati Typographical Union No. 3*, 12 L. R. A. 193, 45 Fed. 135; *Arthur v. Oakes*, 25 L. R. A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310; *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. 811; *Cœur D'Alene Consol. Min. Co. v. Miners' Union*, 19 L. R. A. 382, 51 Fed. 260; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Emuck v. Kane*, 34 Fed. 47.

Recent decisions, involving substantially the same conspiracy here complained of, have sustained plaintiff's right of action contended for in this case.

Brown v. Jacobs' Pharmacy Co. 115 Ga. 429, 57 L. R. A. 547, 41 S. E. 553; *Rourke v. Elk Drug Co.* 75 App. Div. 145, 77 N. Y. Supp. 373.

Messrs. **Leo Everett and Henry Galbraith Ward**, with Messrs. **Robinson, Biddle, & Ward**, for respondents:

The validity of a contract between the manufacturer and the purchaser of an article, that the latter shall not sell below a stipulated price, is well established.

Garst v. Harris, 177 Mass. 72, 58 N. E. 174; *Fowle v. Park*, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 658; *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91, 62 L. R. A.

A combination of this sort is not illegal provided that it is legitimately directed to the benefit of the members of the combination, and not organized for the purpose of injuring persons outside.

Lough v. Outerbridge, 143 N. Y. 271, 25 L. R. A. 674, 38 N. E. 292; *Continental Ins. Co. v. Board of Fire Underwriters*, 67 Fed. 310; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; *Mogul S. S. Co. v. M'Gregor*, L. R. 15 Q. B. Div. 476; *National Protective Asso. v. Cumming*, 170 N. Y. 315, 58 L. R. A. 135, 63 N. E. 369.

The effect of the statute is merely to make penal those combinations which had always been held illegal at common law.

People v. Sheldon, 139 N. Y. 251, 23 L. R. A. 221, 34 N. E. 785; *Re Davies*, 168 N. Y. 89, 56 L. R. A. 855, 61 N. E. 118.

The articles with which we are concerned are secret preparations, the demand for which depends upon the extent to which they are advertised, and there is no public policy requiring that their sale shall be unrestricted. The owner of each of them has a legal monopoly, and has a right to sell it at his own price.

Good v. Daland, 121 N. Y. 1, 24 N. E. 15; *Cummings v. Union Blue Stone Co.* 164 N. Y. 401, 52 L. R. A. 262, 58 N. E. 525; *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174.

The plaintiff has no standing to obtain an injunction against the defendants.

Atty. Gen. v. Utica Ins. Co. 2 Johns. Ch. 371; *Thomas v. Musical Mut. Protective Union*, 121 N. Y. 45, 8 L. R. A. 175, 24 N. E. 24; *Re Davies*, 168 N. Y. 89, 56 L. R. A. 855, 61 N. E. 118; *Mogul S. S. Co. v. M'Gregor* [1892] A. C. 25; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, *sub nom. Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.* 21 L. R. A. 337, 55 N. W. 1119.

Haight, J., delivered the opinion of the court:

The question presented for review is as to whether the complaint states facts sufficient to constitute a cause of action. The relief sought by the plaintiff is an adjudication that the resolutions, agreements, plans, and modes for the conducting of the business of the sale of proprietary medicines by the National Wholesale Druggists' Association are illegal, and that an injunction issue, restraining the members of the association from continuing to make efforts to induce any manufacturer or proprietor of what are known as patent or proprietary medicines to adopt the rebate or contract plan for the sale of their goods, or to continue such plan if they have previously adopted the same. The complaint is very voluminous, and I have not attempted to give even

a fair synopsis, for that would necessarily cover many pages, and I have not deemed it necessary, for it appears to me that the rights of the parties must depend upon a few controlling facts, which may be briefly stated.

It appears from the allegations of the complaint that the matter in controversy has reference to the sale by manufacturers of those particular medicines or remedies covered by trademarks, copyrights, or patents, which secure to the manufacturer or proprietor the exclusive right to manufacture and sell the same. These medicines are known as "proprietary goods," and their manufacture and sale are confessedly under the control and management of the owner or manufacturer, who may fix his own price, and adopt such plan for the sale thereof as he, in his judgment, may determine. At one time the sale of these goods was largely made through traveling sales agents, who worked upon commissions, and supplied the goods to the consumer or retailer. Later on they were sold largely through the druggists, but many of the manufacturers did not maintain a uniform price. They would supply goods to some of the wholesalers upon more favorable terms than to others; thus permitting large dealers to make a profit, while a great number of the smaller druggists found the handling of proprietary goods unprofitable. This resulted in the organization of the National Wholesale Druggists' Association, an unincorporated body, which in 1882 and 1883 represented 90 per cent of the wholesale jobbing trade of the United States. At a meeting of this association a plan was devised and adopted for the conduct of the business of the sale of proprietary goods which was in the form of a petition addressed to the proprietors, asking them to fix a uniform jobbing price for fixed quantities, and also a selling price by the druggists, which they were to agree to maintain, and that the druggists should be allowed the difference between the jobbing and the selling price as their profit or rebate, which they asked should be not less than 10 per cent; the proprietors defraying the expenses of boxing and freight to the nearest transportation station of the buyer. It is alleged that a large number of the proprietors consented to this arrangement, and adopted the plan suggested by the wholesale druggists. And this mode of conducting the business appears to have been continued until the December meeting of the association, in 1893, at which time a committee, to whom the Detroit plan, so called, had been referred, reported among other things, the following: "That in order to strengthen and render this plan more effective it is respectfully recommended that

62 L. R. A.

proprietors accept orders for full quantities with rebate, discounted only from regular houses recognized as belonging to the number who will faithfully observe the prices and conditions established by the manufacturers." This appears to have been adopted and was acquiesced in by the manufacturers, and became the plan under which the business was conducted at the time this action was commenced. It further appears from the allegations of the complaint that the plaintiff never acquiesced in this plan of conducting the business, but always insisted on its right to sell proprietary goods at such price or prices as it saw fit, in its discretion, and would not be bound by the price established by the manufacturers; that thereupon the manufacturers refused to sell or ship goods to the plaintiff, and it was compelled to procure goods from other druggists; that the National Wholesale Druggists' Association caused the plaintiff's premises to be watched by spies or detectives, and that they made reports to the manufacturers of the druggists who purchased goods of the proprietors and caused them to be delivered at the plaintiff's premises; and that the association also furnished the manufacturers with a list of all the druggists throughout the United States who were willing to be controlled by the contract plan. The complaint then alleges that the defendants "were combining and conspiring to obtain an exclusive control of the wholesale and jobbing trade, as between the manufacturer and the retailer, in all classes of patent medicines or proprietary goods, and to regulate and control the methods upon which the said trade shall be carried on throughout the entire United States, and to control the prices at which, and the discounts, allowances for freight, and the terms of credit upon which, the said proprietary goods shall be sold to the various retail druggists throughout the United States, and to destroy and prevent any and all competition between the said wholesale and jobbing druggists in the wholesale and jobbing trade in said proprietary goods, and limit and restrict the business of each of the wholesale and jobbing druggists, or such of them as are in one locality, to certain exclusive territory, tributary or proximate to each of them, respectively."

The demurrer is an admission of the facts alleged, but not of the conclusions of law. The allegations just above quoted I understand to be conclusions of law drawn from the allegations of fact alleged in the complaint, and are not, therefore, admitted by the demurrer. It therefore becomes necessary to determine whether the plan for the conducting of the business of the sale of proprietary goods adopted by the associa-

tion, and which it requested the proprietors or manufacturers to adopt and carry out, is lawful. The question thus presented is of considerable importance. The plan, as we have seen, in its substantial features, has been in operation nearly twenty years, and in its final, completed form, nearly ten years. This plan, as I understand, is not one confined to the sale of proprietary medicines, but is one that has been adopted by many manufacturers of merchandise and other goods where manufacturers have established a trademark, and have gained a reputation which they wish to maintain throughout the country for character, quality, and durability of the goods which they manufacture. They have, consequently, established prices at which their goods shall be sold to the consumer, and require all wholesale and retail dealers to supply the consumer at the price list established. The decision, therefore, reached herein, may largely affect the plan of conducting business in other articles of commerce.

It is said that the National Wholesale Druggists' Association was organized and continued for the purpose of monopolizing and controlling the business of the wholesale druggists and jobbers in the sale of proprietary or patent medicines in the United States. The association doubtless was organized and continued for the purpose of devising and procuring to be carried into effect a plan for the sale of such goods throughout the United States, which would do away with the necessity of maintaining traveling sales agents, and which would secure to the dealers a uniform commission for the handling of the goods; but I do not understand that this was the establishing of a monopoly on the part of the members of the association, for, under the plan adopted, every dealer has the right to purchase goods from the manufacturers upon the same terms as the members of the association, with the right to the same rebate or commissions upon complying with the requirements of the manufacturers with reference to following their price list in making sales of goods. The members of the association clearly had the right to work for their own interests. They had the right to devise and adopt a plan for the conduct of the business in which they could make a commission or a profit, so long as they did not unlawfully interfere with the rights of others. They had the right to petition the manufacturers to adopt the plan devised by them, and to support their petition with all of the arguments and persuasions that they could bring to bear, so long as they did not resort to threats or intimidation. The proprietors, having the exclusive right to manufacture and sell their goods, had the right to adopt

such plan with reference to the disposal thereof as they saw fit; and if they became convinced that the contract or rebate plan, so called, was more advantageous to them, and more fair and just to the public, by establishing a uniform price in all sections of the country, they had the right to adopt the same, and no one could complain.

Nor does the plan appear to me to be in restraint of trade. It is true that it does away with the competition among dealers as to prices, but it creates no restriction upon them as to the quantities that they may be able to sell, or the territory within which they may confine their transactions; but upon the question of prices we must bear in mind that the goods are covered by patent rights and trademarks, which give the proprietors the exclusive right of specifying prices at which the articles shall be sold, and, following this, the right also to require dealers to maintain the prices specified. The plan does not operate to restrict sales in any localities, but contemplates a ready method of distributing the goods throughout the entire country. It is, in effect, the creating of an agency on the part of the proprietors, by which every druggist throughout the United States may receive the goods and dispose of them as agents of the principal, receiving the commissions agreed upon therefor.

Is this plan against public policy? An active competition and rivalry in business is undoubtedly conducive to the public welfare, but we must not shut our eyes to the fact that competition may be carried to such an extent as to accomplish the financial ruin of those engaged therein, and thus result in a derangement of the business, an inconvenience to consumers, and in public harm. While public policy demands a healthy competition, it abhors favoritism, secret rebates, and unfair dealing, and commends the conduct of business in such a way as to serve all consumers alike. That this is the tendency of modern times is evident from the recent discussions and legislation upon the subject of interstate commerce. One of the cardinal and chief principles of the plan adopted is the establishing of a uniform price by proprietors, which necessitates the service of all persons alike throughout the United States; the proprietors subjecting themselves to the extra expense for freight, etc., in remote sections of the country. I can discover nothing in this which is detrimental to the public policy of the country. The right would certainly not be denied to the manufacturer of a given remedy to adopt the rule that he would only sell it to the jobbers of the country at a certain long price, and would not allow a discount of 10 per cent where they refused to maintain

his price. In other words, the manufacturer says to the jobbers of the country; "I manufacture a medicine that I will sell for \$1 a bottle, and it is my desire that it shall be sold at that price per bottle throughout the country. If you will take consignments of this medicine from me, billed to you, at that price per bottle, I will allow you a rebate of 10 per cent; and, if I find that you are selling at a lower price than billed to you, I will allow no rebate. If this arrangement is not satisfactory to you, I prefer to keep my manufactured stock on hand. These are the only conditions under which I will ship my manufactured article." Surely there is nothing in this approaching restraint of trade or the violation of the principle of public policy. It is simply allowing a man to do what he will with his own.

I do not understand that the complaint charges that the manufacturers were compelled to adopt the plan by reason of threats or intimidation on the part of the members of the association. It is true that the complaint contains the allegation, repeated a number of times, to the effect that the proprietors or manufacturers were prevented from selling the plaintiff proprietary goods for the reason that they wished to protect themselves "with the wholesale and jobbing druggists," and also that at one of the meetings of the association the committee on proprietary goods reported that, with a few exceptions, the proprietors of all the prominent proprietary medicines had adopted the contract or rebate plan for the sale of their goods, and then concluded its report with the recommendation "that continued and untiring opposition be shown to the sale of the articles of those proprietors who do not adopt said contract or rebate plan for the sale of their goods, or who withdraw from the plan." There is no allegation, however, that this resolution was served upon the proprietors, or was otherwise presented to them. The first allegation alluded to does not, as I understand it, amount to a threat, when taken in connection with the other allegations of the complaint with reference to the plan devised for the conduct of the business. The proprietors might well deem it to be for their best interests to act in accord with the wishes of the druggists, rather than those of the plaintiff. As to the second allegation, untiring opposition was to be continued against the sale of articles of proprietors who did not accept the contract plan, or, in other words, to the sale of proprietary goods under the old system. I do not understand that by this allegation it was intended to charge that the plan adopted prohibited druggists from dealing with proprietors or manufacturers who did not adopt the contract plan with reference to

the sale of proprietary goods, for, under other allegations of the complaint, it appears that the failure of a manufacturer to adopt the plan simply left his goods upon the unrestricted list, for which druggists could contract in such manner as they saw fit. This is apparent from the resolution adopted by the association at its Washington meeting in 1890.

Is there any boycott of the plaintiff? It is true, many of the proprietors refused to sell to the plaintiff proprietary goods except at the long price, which I understand to be the selling price. They have refused to allow it commissions or a rebate upon the goods purchased, but this refusal is based upon the ground that the plaintiff refused to sell at the prices fixed by the proprietors. The plaintiff can at any time avail itself of the right to purchase upon the contract plan by complying with the requirements of the proprietors. The reply made by one of the proprietors to a letter of John D. Park & Sons under date of January 25, 1889, annexed to and made a part of the complaint, answers this question so completely that I here repeat it: "We think you are in error in calling the action of the association, or the action of any one of its members, 'boycotting.' A boycott means to refuse to sell or do business with a concern, and to prevent anybody else from doing business with a concern on any conditions. This is not the attitude of the association with you. The association has implored you over and over again to abide by your contracts and sell goods as your neighbors do, and you have distinctly defied them and told them that you would do just exactly as you liked. There is no 'boycott' in this, good friends, and nobody knows it better than you do; and you also know that, even if you choose to call it a boycott, you can end the boycott in twenty-four hours by simply agreeing when you sign a document that you will keep it."

Complaint is made with reference to the watching or spying upon plaintiff's business. All there is of this is the watching for the purpose of determining who the druggists were that furnished the plaintiff with proprietary goods in violation of the contract plan under their agreements with the proprietors. I think there is nothing in this calling for the intervention of a court of equity. The whole success of the plan adopted for conducting the business depended upon the faithful observance of the contract of the druggists with the proprietors, for whom they were acting as agents. If one could be permitted to violate his contract, it would seriously prejudice all the dealers who lived up to the provisions of their contract, and carried it into execution in good faith. As was said in the letter

of Parke Davis & Co. to plaintiff's predecessor under date of February 12, 1889: "The contract in force between us and the members of the Wholesale Drug Association during the three years prior to 1887 was objectionable to many because of the opportunities offered to those so disposed for an evasion of its provisions; thus, those who lived up rigidly and honestly to their agreement were made to suffer for the benefit of those disposed to regard their agreement and promises simply as a means for taking advantage of others who fulfilled their agreements."

I am thus brought to a consideration of the reasons for objecting to the plan by the plaintiff. As stated in the allegations of the complaint, they are as follows: "That all of the said manufacturers and proprietors who have adopted the said rebate or contract plan for the sale of their respective proprietary goods were persuaded to adopt it entirely by the representation of the benefit which would accrue to the majority of their distributing agents or vendees, the wholesale and jobbing druggists, who were unable to handle the goods as cheaply as the few who could command large capital." It is also alleged that the firm of John D. Park & Sons, and this plaintiff, since its organization, before the happening of the matters alleged in the complaint, had made large purchases, as wholesale and jobbing druggists, of the proprietary goods of all or nearly all of the various manufacturers, and, had it not been for the happening of the matters set forth in the complaint, it would have continued to make large purchases, as wholesale and jobbing druggists, of such goods, and would have been an active and constant competitor of all the other wholesale and jobbing druggists in the United States. The meaning of these allegations is obvious. It is that the plaintiff, or the firm of John D. Park & Sons, of which the plaintiff is successor, could command large capital, and by reason of this they could purchase proprietary goods in larger quantities and more cheaply than the other wholesale and jobbing druggists, and that by reason of the adoption of the contract plan the plaintiff was unable to so do. Under the contract plan the prices of these goods were made uniform for fixed quantities, and dealers possessing large capital, and thereby enabled to purchase in large quantities, could not purchase for a less sum than the ordinary wholesale and jobbing druggist, and, not being able to purchase for a less sum, could not handle the goods more cheaply. The situation is not new. It is one to which the attention of the public has been frequently drawn in recent years. The great merchants, possessed of large capital, 62 L. R. A.

will persuade and induce manufacturers to sell to them more cheaply in consequence of their taking large quantities, and thus they are enabled to undersell and drive out of business the small merchants in their vicinity. I am not here going to question the right of the big fish to eat up the little fish,—the big storekeeper to undersell and drive out of business the little storekeeper,—but I do believe that the little fellows have the right to protect their lives and their business, and if they can, by force of argument and persuasion, induce manufacturers to establish a uniform price for fixed quantities, so that they can purchase as cheaply as the great merchants, and thus compete with them in the retail trade, they have the right to do so, and that no court of equity ought to interfere and restrain them from the exercise of this privilege.

The authorities have been largely discussed by my associates. I do not understand that we widely differ with reference to the law. Our chief controversy appears to arise out of the different conclusions to which we have arrived with reference to the allegations of facts contained in the complaint.

The judgment should be affirmed, with costs.

Parker, Ch. J., concurring:

It does not seem to me that this case comes within the principle of the *Union Blue Stone Co. Case*, 164 N. Y. 401, 52 L. R. A. 262, 58 N. E. 525, the *Berlin & J. Envelope Co. Case*, 166 N. Y. 292, 59 N. E. 906, and kindred cases; and I am not without some acquaintance with those cases, inasmuch as the judgment affirmed in the first case was directed by me at circuit, and the opinion in the last written by me. Nor is there any case in this court, so far as we have found, precisely analogous; but the principle underlying the decision in *National Protective Assn. v. Cumming*, 170 N. Y. 315, 58 L. R. A. 135, 63 N. E. 369, is applicable, for reasons which I shall, as briefly as possible, suggest.

It will be observed that this is not a case where the manufacturers have combined for the purpose of raising prices to the consumer of the remedies they manufacture, nor does it appear that it is the object of the wholesale dealers, who form the aggressive part of this association, to increase the price to the consumer. If the object be to raise the price to the consumer, and thus increase the profits of the manufacturer and the agency by which he passes his goods on to his retail dealers, then it may well be that it is void because in restraint of trade, within the principle of the *Union Blue Stone Co. Case*, 164 N. Y. 401, 52 L. R. A. 262, 58 N. E. 525, and the *Berlin & J. Envelope Co.*

Case, 166 N. Y. 292, 59 N. E. 906, notwithstanding the impression that there may be in some judicial minds, and possibly in others, that proprietary remedies are not entitled to be classed among the necessities of life. The phrase "necessaries of life," as used in connection with the subject of restraint of trade, must certainly be regarded as broad enough to include articles of which the public consume \$60,000,000 worth in a year. The object of this association, however, is not to fix prices at which the manufacturer's goods must be sold. It attempts no restraint whatever upon the manufacturer in making prices. He may lower or increase the price at his pleasure. In that respect he is precisely as free as he was before the association was formed and he became a member of it. He may name the price which the consumer shall pay for his article now, as he could then, which means that he can both make the price, and enforce it by contract. *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174; *Fowle v. Park*, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 658; *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91. That being so, the query naturally is, What restraint does the association put upon the manufacturer, and what can be the purpose of this association, which does not seek an increased profit at the expense of the masses? The answer, as I read the complaint, is that the distributing agencies—the wholesale dealers—by which the manufacturer's goods are passed on to the retailer, where the public may obtain them, have been taught by experience two things: First. That manufacturers have favorites, to whom they will give a larger rebate than to wholesale dealers as a class; and generally the favorite is the person or corporation buying the greatest amount of goods, as strong firms or corporations like this plaintiff, with a business of such dimensions that it claims damages in this case of one-half million of dollars. Second. That there are wholesale dealers who, for the purpose of getting clients away from their competitors, will give them some part of such extra rebate. To remedy this difficulty was the leading object of the association, and it was sought to be accomplished by placing all the wholesalers upon an equality, so that one should have no advantage over the other in dealing with retail dealers,—a result which seems altogether desirable, because it is in line of fair dealing. Indeed, the principle which they undertake to secure in this case by contract is like that which the Sherman act attempted to secure in part, namely, equal freight rates to all interstate commerce shippers from common carriers. Before that act was passed, the claim was made (and evidence was adduced in support

of it) that rebates of such magnitude were allowed in occasional instances to favorite shippers that it contributed largely, if not entirely, toward driving others out of business, which was deemed so against public policy that Congress set about placing all parties on an equality as to the cost of shipping goods by interstate common carriers. Assuming, as we must, that this legislation was along proper lines, for the purpose of protecting the principle of competition at a point where it seemed to be open to attack, it necessarily follows that it is in accord with public policy that these wholesale dealers may attempt to secure to themselves by contract like fair dealing on the part of the manufacturers, namely, that the rebate from the latter's "long prices," which the manufacturer allows as compensation to the wholesaler for distributing the goods to the retailers, shall be alike to all of them.

Before this association was formed, the complaint alleges, there was no fixed rebate, so that the manufacturer could and did allow to some a greater rebate than he did to others; and that such a course of dealing might operate to enable one wholesaler to profit greatly at the expense of the others goes without saying. These agencies for distribution between the manufacturer and the retailer, called the "wholesale dealers," set about protecting themselves against what they deemed unfair competition which resulted to them when a manufacturer saw fit to give some one dealer a much larger rebate than allowed to them as a class. After forming the association, they adopted first what is called in the complaint the "rebate plan." By that plan the proprietor fixes the price of his article, known as the "long price," and agrees to pay expressage and cartage to any point from which it may be ordered. The result is that if the long price is \$1, the article is sold to the consumer at exactly that price in all parts of the country, which is very important to the proprietors, as they view it; and it must be borne in mind steadily that it is settled by authority that the proprietor of patent medicines has the right to fix the price at which his article shall go to the consumer, and a druggist who takes his articles for sale under an agreement that he will maintain the price is liable to respond in damages if he violates the contract. *Garst Case*, and others, *supra*. This plan was found to be insufficient to accomplish the desired result, because distributors violated their contracts to sell at the "long price." The Detroit plan was then devised, and all the proprietors were to sell their goods only to wholesale or jobbing druggists, and not to the retail trade; and the committee on proprietary goods, which was composed of

wholesale druggists, members of the association, agreed to furnish proprietors lists of wholesalers who could be depended upon to keep their contracts, and cut off lists of dealers who did not keep their contracts, or who bought as a mere cover for dealers who were known not to keep their contracts. Under this plan every wholesaler is at liberty to buy all the goods he chooses of the manufacturers, and can secure the same rebate as any member of the association, but he has to agree to the plan, and he has to keep his agreement. This the plaintiff refuses to do, and, under the agreement which the manufacturers have with this association, they are not at liberty to give plaintiff the benefit of the rebate rate which they give members of the association, so long as he insists upon it that he will not abide by the rules of the association. He can have all the goods that he wishes, provided he pays "long prices" for them, but he cannot buy goods of the manufacturers who belong to this association at any less than the "long price." In other words, he cannot get the benefit of the rebate unless he will agree to come in and be bound by the rules of the association. Wholesalers of whom complaint is made are not, therefore, attempting to prevent plaintiff from enjoying all the opportunities for profitable trade which they enjoy, for they have invited him to become a member,—indeed, have urged him to do so, and assured him, in common with them, of every advantage which they possess; but they do attempt to prevent him or any other dealer from making uncertain in its rewards, if not wholly unprofitable, the business of distributing proprietary articles among retail dealers. Plaintiff once attempted to do business in accord with the association, but apparently reached the conclusion that it would be more profitable to him, in the end, to deal independently, and so he refused longer to be bound by the rules of the association; and, hence, the strife between the association and the plaintiff, which has culminated in this suit,—plaintiff seeking to get the benefit of the same or a larger rebate than the members of the association, without being bound by its rules, and the association doing its utmost to persuade the manufacturers not to give him the benefit of the rebate so long as he continues to oppose the policy of the association.

The position of the respective contestants is not far different, it will be seen, from that of the parties to the action of *National Protective Asso. v. Cumming*, 170 N. Y. 315, 58 L. R. A. 135, 63 N. E. 369. Each is striving, as against others, to help itself or himself, and the question is here, as in that case, whether defendants, in taking such ac-

tion as they did to prevent plaintiff from getting the business they wanted, are violating any rule of law. The wholesale dealers had the right to contract to secure such amount of rebate from the manufacturers as would reasonably compensate them for their services in distribution, together with the money invested. It is not claimed that the rate of compensation agreed upon was unfair, and, if there could be such complaint, it is difficult to see who could make it, except the manufacturers themselves, and they do not. It was clearly legal for any one of the wholesale dealers to sign the agreement, and to bind himself to sell at such prices as the manufacturer of the article should see fit to name as the selling price. The right to fix the price belonging to the manufacturer, it was proper for the wholesaler to agree to recognize that right, and govern himself accordingly. He had the right to insist that, in consideration of his performing those conditions in accordance with the wishes of the manufacturer, the latter should not give to other dealers the rebate provided for members of the association, unless such dealer should agree to be bound by the same conditions the members of the association took upon themselves; and he had a right to agree that, in order to secure the due carrying out of the agreement according to the spirit thereof, he would furnish to the manufacturer such evidence as he might secure from time to time, tending to show that members of the association were directly or indirectly violating its rules; and that which he could do alone, he and they could do as members of the association, provided, of course, their coming together did not operate against the rights of the general public; but as against other selling agents like themselves, no other public interest being affected, there could be no doubt of their right to agree with each other to do what any of them could do alone, so long as the motive was proper. The members of the association not only had the right to inform the manufacturers about those members within it, and the dealers without it, who were violating the plans agreed upon; but they also had the right to take such legitimate and honorable means as were within reach to ascertain what persons were violating the rules, and to give notice of it to all of the members of the association. "But that course operated," says the plaintiff, in effect, "to deprive me of the opportunity of buying goods on terms as favorable as the defendant wholesale dealers bought them." True, but it may be answered that "you could buy them on the same terms as the members of the association, which terms contain conditions governing the sale and the conduct of the members. Instead, you

prefer to take the business chances to be found outside of the association; and, before the courts will help you, you must show that the plans of the association, or its conduct under those plans, are unlawful as against you."

The position attempted to be taken at this juncture by the plaintiff is that, granting the plans which the members of the association adopted were legal, nevertheless the wholesale dealers can be proceeded against in this suit, because they compelled some or all of the manufacturers, against their will and inclination, to refuse to sell their goods to plaintiff, by threats, intimidation, blacklisting, and other unlawful acts of the association. This language has a formidable sound, but, subjected to the same analysis as was given to the word "threats" in the connection in which it was used in the *National Protective Assn. Case*, 170 N. Y. 315, 58 L. R. A. 135, 63 N. E. 369, it will prove to be without force. There are no threats alleged in this complaint on the part of defendants to do anything except that which they have a right to do, if the views so far expressed be sound; and we said in that case, and it is proper to repeat here, that a man may threaten to do that which the law says he may do, provided that, within the rules laid down in certain cases therein cited, his motive is to help himself. If there be any other "intimidation" of manufacturers than that to be found in the agreements and written plans of this association, and the steadfast purpose on the part of its members to carry them out according to their letter, it is not to be found in the complaint. The term "blacklisting" refers to the course of defendants in notifying the trade, in effect, that the plaintiff is outside of the association, and prefers to stay out of it rather than be bound by the rules and regulations which other members of the trade regard as fairest and best to all, and insisting that the penalties of such a course shall be meted out to him, namely, that he shall not be allowed any rebate upon any of the manufacturers' goods so long as he shall retain that position. The facts alleged by them are true. The notification is a part of the plan agreed upon by all, and the plaintiff courted it rather than do business on the same basis as his competitors, who together handled about 90 per cent of the proprietary articles sold.

The plaintiff's characterization of the acts of the defendants does not establish a cause of action against the defendants if the acts themselves do not, and clearly their acts do not, inasmuch as they are not aimed at preventing the plaintiff or any one else from participation in the trade to the same extent and on the same basis as themselves, 62 L. R. A.

but are intended simply to prevent plaintiff and others from enjoying the same or greater rebates than they get without bearing the burdens which they assume as a condition of receiving them, unless it may be said that the fact that they have agreed upon a basis of transferring the goods from the manufacturer that insures only reasonable profit and security to them as distributing agents is illegal and void. And this would seem to be impossible, in view of the fact that the wholesale dealers have not secured the authority to, nor attempted to, restrict either the price or the quantity sold of the goods dealt in. One of these elements has always been present in the cases of the past in this state, in which it has been held that there existed a combination in restraint of trade, which was against public policy and void.

It will be seen, therefore, that this is a controversy between opponents in business, neither side trying to help the public. Nor will the public be the gainer by the success of either. The motive behind the action of each party is self-help. It is the usual motive that inspires men to endure great hardships and take enormous risks that fortune may come. In the struggle which acquisitiveness prompts, but little consideration is given to those who may be affected adversely. Am I within my legal rights? is as near to the equitable view as competitors in business usually come. When one party finds himself overmatched by the strength of the position of the other, he looks about for aid. And quite often he turns to the courts, even when he has no merit of his own, and makes himself for the time being the pretended champion of the public welfare, in the hope that the courts may be deceived into an adjudication that will prove helpful to him. Now, while the courts will not hesitate to enforce the law intended for the protection of the public because the party invoking such protection is unworthy, or seeks the adjudication for selfish reasons only, they will be careful not to allow the process of the courts to be made use of under a false cry that the interests of the public are menaced, when its real purpose is to strengthen the strategic position of one competitor in business as against another.

I concur with Judge **Haight**. The judgment should be affirmed, with costs.

O'Brien and Bartlett, JJ., concur with **Haight, J.**, and **Parker, Ch. J.**

Martin, J., dissenting:

I am unable to concur in the opinion of the learned appellate division, or in the conclusion reached by a majority of this court. The demurrers to the amended complaint were sustained, both at the special term and

in the appellate division, upon the ground that the complaint did not state facts sufficient to constitute a cause of action, although apparently for different reasons. Several of the defendants stated, as additional grounds of demurrer, that the court had no jurisdiction over them, and that it had no jurisdiction of the subject of the action. The latter grounds were not considered or passed upon by either court, and obviously cannot be sustained.

The amended complaint was served in September, 1898. The defendants demurred, and the issue arising upon such demurrers was decided by the special term in May, 1900, and subsequently the final judgment was entered. The complaint is exceedingly lengthy, containing about 150 pages and about 600 folios. The labor necessary to a careful analysis of the multifarious allegations in this lengthy complaint is well-nigh appalling, and would naturally provoke a desire to avoid it if possible. But as the case is important, affecting not only the parties to this particular litigation, but involving a principle which affects the general public, its dealings in a large class of merchandise, the legality of monopolies organized to prevent competition in articles in common use, and the right to employ as a means to secure that end the boycotting or intimidation of persons engaged in the same general business, our duty demands the performance of that labor, however burdensome. Therefore, although it is impossible within the limits of this opinion to state all the material allegations of the complaint, yet a brief statement of the general and most material, including a general outline or history of the transactions upon which it is based, is quite essential to an understanding of the case.

The plaintiff is a Kentucky corporation, and its principal place of business is in Cincinnati. Its business consists of the manufacture of proprietary articles or patent medicines, the purchase of the same class of articles from other manufacturers, and in selling such goods to retail dealers. Before the acts complained of, its trade was large and profitable. The defendant association was organized in 1876 under the name of the Western Wholesale Drug Association. Its name was changed in 1882, and it is an unincorporated association. It consists of active and associate members. The former are wholesale and jobbing druggists, and druggists who also own and manufacture certain proprietary goods, who alone comprise the active members of the association. Proprietors of proprietary articles, who only manufacture and sell their own goods, and manufacturers of chemical or pharmaceutical preparations, not interested in proprie-

tary goods, constitute the associate members, but have no control or voice in the business or affairs of the association. The active membership includes at least two thirds of the wholesale dealers in the United States, who control more than 90 per cent of the wholesale and jobbing trade. Formerly patent medicines and proprietary articles were sold by the manufacturers through agents who received a commission for their compensation. The trade, however, is now almost exclusively carried on through wholesale dealers and jobbers. The rebate or discount allowed to the wholesale dealers constitutes their profit. Before the acts complained of, the discounts or commission allowed by manufacturers were not fixed or uniform, nor was the custom as to delivery and charges allowed, in all instances, the same, and there was then an active competition between the various wholesale dealers. With this situation and method of transacting the business the manufacturers were content, but the wholesale dealers and jobbers were dissatisfied. In March, 1876, the association adopted a schedule of prices at which proprietary goods should be sold by each wholesale and jobbing druggist, and they were to be sold at the prices thus established without competition. Afterwards, and in 1882, the association adopted a plan under which the manufacturers were to be required to sell their goods. By it there was to be a contract between the manufacturer and buyer, in accordance with which the latter was to maintain certain prices, fixed by the proprietor; the articles to be charged and invoiced at the full jobbing prices; the difference between the proprietor's price and the jobber's to be allowed to the buyer, provided he entered into a contract to maintain prices; the rebate to be not less than 10 per cent; and, wherever sent, the manufacturers to pay freight on all the goods sold.

In October, 1883, the association, by its active members, declared its purpose to pursue a continued and untiring opposition to the sale by its members of articles of such manufacturers as should not adopt its plan, or, having adopted it, should withdraw therefrom. Thereupon many of the manufacturers, at the solicitation of the officers, active members, and agents of the association, adopted its plan, until nearly all the manufacturers in the United States were induced by the association to do so. This was procured entirely by the representation of the association as to the benefit which would accrue to the majority of their distributing agents or vendees, who were unable to handle the goods as cheaply as the few who could command large capital; and the manufacturers were compelled to adopt it to pro-

tect themselves against the association and its active members, who constituted a great majority of their customers. All the active members of the association agreed and bound themselves to buy goods only of manufacturers who adopted the rebate plan, and not to cut or vary prices, save by the discounts and terms of credit mentioned in the contract. The manufacturers who adopted this plan have adopted substantially the form of contract required by the association, except in states having anti-trust laws, where written contracts are not required, but the purchaser is required to make a verbal agreement to the same effect, or to send letters agreeing thereto. The manufacturers who adopted that plan were compelled to do so to protect themselves with the wholesale dealers. The latter have bound themselves to give to retailers who are their customers only the terms of credit and discounts fixed by the contract, and not to pay freight, or to deliver the goods. The active members of the association are combining and conspiring to obtain an exclusive control of the wholesale and jobbing trade, as between the manufacturer and the retailer, in all classes of patent medicines or proprietary goods; to regulate and control the methods upon which such trade shall be carried on; to control the prices, discounts, allowances for freight, and terms of credit upon which such goods shall be sold to the various retail druggists throughout the United States; and also to destroy and prevent competition between the wholesale and jobbing druggists in the sale of such medicines or goods, and to limit and restrict the business of each of the wholesale dealers, or such of them as are in one locality, to certain exclusive territory, tributary or proximate to each.

Prior to the matters set forth, many of the wholesale dealers were purchasers of goods of the plaintiff, and, but for the action of the association, would now be. Before its action, the plaintiff was a large purchaser, as a wholesale dealer, of nearly all the manufacturers of such goods, especially of those who have adopted the plan of the association, and would have continued, but for the matters stated in the complaint. The plaintiff, so far as able, always has been an active competitor in the wholesale and jobbing drug trade, and has refused to combine and conspire with the defendants for the control of the trade and the destruction of competition therein, or to restrict its business to a limited territory. It has sold the goods of all the manufacturers at such prices and upon such terms as to credits, discounts, allowances for boxing, cartage, and for freight as it deemed advisable. The active members of the association now claim

that the manufacturers are bound not to sell to any wholesale dealer except upon the terms and conditions imposed by the association, nor unless he signs such contract. They also claim that any person who purchases of a rebate manufacturer, unless he complies with the terms of the contract, is not to be trusted or allowed to handle the goods of such manufacturer.

In 1885 a committee of the association was authorized to and called upon rebate manufacturers to decline all the plaintiff's orders until it was reinstated by that committee. Thereupon many of them, to protect themselves against the action of the association, declined to sell goods to the plaintiff. In September, 1886, the association resolved that no agreement unaccompanied by the rebate contract should be considered on the rebate plan, and that where a firm had, by the committee, been found guilty of violating it, the manufacturers should withhold supplies. Thereafter the committee, charging the plaintiff with a violation of the plan, sent circulars to that effect to the manufacturers, urging them to carry out the wishes of the association, and sent various letters to the same effect to rebate manufacturers, and to others who had not adopted the plan, and the association, by resolution, also declared that any member who should sell to a dealer whose orders had been declined at the request of the committee should be expelled; and thereupon every effort was made to induce all the members of the association and all the manufacturers to refuse to sell goods to the plaintiff, or to any person who would sell it goods. In 1887 it sent out another circular to the effect that any member who supplied goods to a dealer whose orders had been declined at the request of the committee was guilty of violating the spirit of his contract, and should be expelled, and advised the manufacturers to scrutinize orders coming from unusual quarters, and predicted that the firm now in warfare against the rebate plan could not long continue its methods. After receiving these various notices and resolutions, many of the defendants, both wholesale dealers and manufacturers, refused to sell to the plaintiff, or to any person who had supplied it with goods, and many of them demanded from each customer a contract by which he agreed not to sell to the plaintiff until it should be reinstated.

In 1888 a subcommittee of three was appointed by the association, with power to order all supplies withheld from any firm or individual whom it found guilty of violating its contracts, until the committee should become satisfied that such practices would be discontinued, and to request manufacturers to refuse supplies to any person

thus found guilty. The association also authorized the omission from future official lists of rebate articles the goods of such proprietors as should continue selling to violators of the agreement, and gave a committee power to employ persons to investigate charges against any dealer. Such committee ordered all supplies of rebate goods to be withheld from the plaintiff, sent a circular to each manufacturer calling upon him to comply with such order, and many of such manufacturers thereafter refused to sell to the plaintiff, being compelled thereto to protect themselves against the wholesale dealers' association and its active members. The committee also made efforts to ascertain from whom the plaintiff purchased supplies, and employed detectives for that purpose, who spied upon the plaintiff's business, and reported to the committee the names and places of business of persons shipping it goods. It thereupon sent, and is about to continue sending, circulars to manufacturers and wholesale dealers, known as "cut-off lists," containing the names of persons reported as selling to the plaintiff, and it thereupon made efforts, and is about to continue its efforts, to induce manufacturers not to sell to persons on such cut-off lists, and by reason thereof many manufacturers have refused to sell to persons thereon.

In 1893 the association adopted the Detroit plan, by which it required the manufacturers to compel the purchasers of their goods to accept a contract to become selling agents, to take the goods in fixed quantities, and in consideration of their maintaining fixed selling prices and complying with all the regulations of the association they were to receive a fixed per cent for selling and a fixed discount for cash; the manufacturer to pay the freight; the prices not to be cut, and, if cut, the agency to be withdrawn; and all other agents notified not to sell them; and the manufacturers to sell only through selling agents. It then provided for the organization of a similar association in each town, which was to be given a list of all rebate goods. Thereafter the manufacturers were, in effect, required to submit full lists of all their customers to the association.

In December, 1893, the committee sent a circular to manufacturers and wholesale dealers, asking the former to furnish it a list of all their customers, and with this circular was a list of all persons who were entitled to purchase rebate goods, which did not include the plaintiff or persons selling to it. Thereupon many rebate proprietors, at the instance of the committee, agreed to confine their sales to the persons named on the lists, refused to allow to others any rebate, allowances, or discounts, and furnished the committee with full lists of their customers

not named on the list from whom they received orders for any of their goods. The committee is making every effort to ascertain what manufacturers are still selling to the plaintiff, and is employing detectives for that purpose, who watch and spy upon shipments made to the plaintiff and report the names of rebate manufacturers who are selling it goods. Similar action on the part of the committee was continued through 1894, which directly pointed to the business of the plaintiff, and the committee was authorized to continue its aggressive work against those who should not comply with the rules of the association, and funds were provided for that purpose.

In October of that year circulars were sent by the association to all manufacturers and wholesale dealers, whether members of the association or not, embodying the substance of its resolutions, which, in effect, were a reaffirmance of its intention to uphold its plan; that its committee should notify its members of the action of manufacturers who, having had their attention called to the matter, continued shipping their goods to the "Cincinnati cutter" (meaning the plaintiff), or to those who supply him, and notify such manufacturers that their articles would be taken from the rebate list, and in publishing the official list of rebate articles issued by it such names would be omitted therefrom; that the committee on proprietary goods be authorized to continue the aggressive work against cutters inaugurated during last year, and, to enable them to do this most effectually, means fully adequate to provide assistance be placed at their disposal. With such circulars, letters were sent for those receiving them to sign, by which they should agree not to ship goods to violators of the contract until they received assurances that such violations were discontinued, and, further, to furnish the committee with lists of their quantity buyers. Nearly all the wholesale dealers and manufacturers signed and returned such letters to the committee, being compelled to do this in order to protect their own business. Nearly all the wholesale and jobbing druggists are making, and will continue to make, every effort to induce manufacturers to confine the sale of their goods to the persons named in the list containing the names of persons claimed to be entitled to rebate goods, and all or nearly all the rebate manufacturers have refused to sell goods to the plaintiff, some of them stating that they would like to fill its orders, but that their relations with the association prevented, and that it would not pay them to antagonize the trade by selling to the plaintiff. The correspondence alleged in, or annexed to, the complaint shows clearly that many of the

manufacturers who formerly sold to the plaintiff were compelled by the association to forego their own desires and disposition in that respect, and to refuse the plaintiff's orders by reason of the pressure to which they were subjected by the association and its active members.

The various resolutions, contracts, and agreements adopted by such association to prevent the plaintiff from conducting a wholesale and jobbing business in proprietary goods tended to injure and destroy its business, and the plaintiff's business is being injured and destroyed by the unlawful acts of the defendants. Nearly all the rebate manufacturers who have been willing to sell to the plaintiff or to persons who would supply it are refusing to do so, and will refuse unless the acts of the association and its active members are restrained; and that their acts are such as to irreparably damage the plaintiff's business, and it cannot obtain adequate relief at law without a multiplicity of suits.

With other relief demanded, the plaintiff seeks by this action to restrain the association, its active members, committees, and agents, from making and continuing its and their efforts to prevent the plaintiff from purchasing, and the manufacturers from selling their goods to the plaintiff, by threats, intimidation, or other improper means, from continuing a monopoly of such business, and from performing any act or acts that will impair or destroy competition in the sale thereof.

While this is a meager and brief synopsis of the complaint, and falls far short of containing all the material allegations therein, yet, as it gives a general outline thereof, it is perhaps ample to enable us to consider the question of its sufficiency. As all the allegations of the amended complaint, as well as all that can by reasonable and fair intentment be implied therefrom, are admitted by the defendant's demurrer, we are presented with the question whether they constitute a cause of action entitling the plaintiff to any relief whatever. *Marie v. Garrison*, 83 N. Y. 14; *Sanders v. Souther*, 126 N. Y. 193, 27 N. E. 263; *Coatsworth v. Lehigh Valley R. Co.* 156 N. Y. 451, 51 N. E. 301; *Standard Fashion Co. v. Siegel-Cooper Co.* 157 N. Y. 60, 43 L. R. A. 854, 51 N. E. 408; *Ahrens v. Jones*, 169 N. Y. 555, 559, 62 N. E. 666. Under the recent authorities, pleadings are not to be strictly construed against the pleader, but averments which sufficiently point out the nature of the plaintiff's claim are sufficient if, under them, he would be entitled to give the necessary evidence to establish a cause of action. *Rochester R. Co. v. Robinson*, 133 N. Y. 242, 246, 30 N. E. 1008; *Coatsworth v. Lehigh Valley R. Co.* 62 L. R. A.

156 N. Y. 451, 457, 51 N. E. 301. In determining that question we must assume that the association was organized and continued for the purpose of monopolizing and controlling the business of wholesale druggists and jobbers in the sale of proprietary articles or patent medicines in the entire United States, to prevent competition therein, and to compel the payment of greater and uniform commissions for the sale thereof. This was accomplished by forming a combination of two thirds in number of all the wholesale druggists and jobbers in the United States, transacting more than 90 per cent of all that business, and then by requiring them to refrain from selling such goods for a less commission or a lower compensation than was established by the association, and to decline to purchase goods of any manufacturer who should refuse to comply with its demands, or who refused to transact his own business in accordance with such rules and regulations as the association had, or from time to time might adopt. Thus, as is usual in the creation of such trusts or monopolies, the purpose of the association was to be accomplished by a combination to ruin and destroy the business of any manufacturer or wholesale dealer who should refuse to be controlled by the association in the transaction of his own business.

It is a plain perversion of the complaint to say that it states a claim or cause of action involving merely the right of a manufacturer to sell his goods to whom he will. The question presented by the complaint is whether individuals, firms, or corporations have a right to enter into a combination or conspiracy to prevent manufacturers of patent medicines from maintaining competition with others in the sale of their goods, or from selling them in such manner and upon such terms as they shall desire or agree upon with their customers, and, in case they do, whether the members of the combination have a right to boycott such articles and the manufacturer as well. That such was the purpose of the association, and that it and its active members have carried that purpose into effect, is plainly alleged, and not denied. It is also alleged that any person engaged in the manufacture of such commodities, who does not agree to enter into the arrangement required by that combination, or does not fulfil such agreement, is to be blacklisted by them, and they are to make every effort in their power to destroy his business. Moreover, the association maintains a committee to spy out the business transactions of manufacturers, to ascertain if they sell to the plaintiff or to persons not members of the association or to persons who sell to others not such members, and, if it decides such to be the case, to

send to practically all the wholesale dealers in the United States a notice in effect requiring them to refuse to deal with such manufacturers, and the penalty to such dealers for refusal is that all the members of the association will decline to purchase any of their goods.

It is to be observed that the claim of the plaintiff is, not that the manufacturers have voluntarily committed any wrongful acts of which it complains, as it is plainly alleged that they desire to sell it goods, and would do so but for the wrongful acts of the association and its active members. Its claim is that the National Wholesale Druggists Association and such members have committed the wrong from which it has suffered by unlawfully combining together for the purpose, and by requiring manufacturers to refuse to sell goods to the plaintiff, and by enforcing that requirement by requiring a refusal by all its members to deal in such manufacturers' goods, to procure others to refuse to deal in them, and to publicly advertise such manufacturers as unworthy dealers, and thus injure or destroy their business. It is alleged and admitted that many, if not most, of the manufacturers, have been compelled, against their will or inclination, to refuse to sell their goods to the plaintiff by threats, intimidation, blacklisting, and other unlawful acts of the association and its active members. From the outset the action of the association and of its active members has been aggressive, persistent, and continuous to ruin or exclude from business any manufacturer or dealer who should sell any of this class of goods to the plaintiff or others similarly situated. This scheme was planned, originated, and forced upon the manufacturers by the association and its active members. The manufacturers did not seek or inaugurate this plan, and adopted it only because they were compelled to do so to protect their business against the acts and threats of such active members, who alone desired its adoption and enforcement to obtain increased compensation, and to maintain prices without regard to the expense of conducting business. Under it the business of the manufacturers was to be and has been controlled by a combination of their customers. It is true that there was reserved to the manufacturers the right to establish a single price at which their goods might be sold, but it must be uniform and fixed, without regard to the expense of delivery or the amount of the sale. The rights to establish the amount of commissions to be paid, and to determine to whom their goods should be sold, were withdrawn, and no right was left them to make any agreement on the subject of their own property, or to make any agreement in regard to sell-

ing it, with any person other than those that were selected by the combination. In other words, the manufacturers were compelled by their customers to surrender to the latter practically all authority as to the manner of the sale of their own property and the selection of their customers, and, unless they did, their business was to be destroyed.

The foregoing facts are, in substance, alleged and admitted, and hence the question arises whether the association and its officers, agents, employees, and active members, by thus interfering with the plaintiff's business, have pursued a course of action that constitutes an invasion of or trespass upon its rights which renders them liable therefor. If this combination was formed to accomplish an unlawful purpose, or if its purpose has been accomplished by unlawful means, the plaintiff, who has alleged special damage, can maintain an action to recover by reason thereof. Therefore, in the further discussion of this case we are led to consider: First, whether the purpose for which the combination was formed was lawful; and, second, whether it was to be accomplished by lawful means.

As to the purpose, it is obvious from the facts alleged that the conspiracy or combination was formed to restrain trade or commerce, to monopolize the sale of goods in common use, and to prevent competition therein. Such being its plain purpose, it is equally clear that it was unlawful. From a very early day it has been the policy of this state and most other jurisdictions that free and unrestricted competition in all business pursuits must be maintained, and the business maxim that "competition is the life of trade" has been established and sustained by their courts and legislation. While this principle has not been thus firmly and universally settled without discussion as to whether it does not work a greater hardship than advantage by crushing out weaker competitors and causing disaster to others by reduction of prices, yet, notwithstanding these arguments, the consideration which the question has received has led to the conclusion that public policy requires the continuance and enforcement of the rule of competition as a principle controlling business affairs in the various commonwealths. This principle of political economy is not based alone upon the theory that combinations to prevent competition will, of necessity, enhance the price, as there are notable instances where such combinations have, even permanently, reduced the price of articles thus traded in or manufactured: but it is founded upon the theory that such combinations may, as they usually will, enhance the price, and also drive small and worthy dealers out of business. In *People v. Shel-*

don, 139 N. Y. 251, 263, 23 L. R. A. 221, 34 N. E. 785, Andrews, Ch. J., said: "The question is, Was the agreement, in view of what might have been done under it, and the fact that it was an agreement the effect of which was to prevent competition, . . . one upon which the law affixes the brand of condemnation? It has hitherto been an accepted maxim in political economy that competition is the life of trade.' The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid. . . . The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used." The right of the plaintiff to recover in this action does not rest upon the common law alone, as the Revised Statutes provided: "If two or more persons shall conspire . . . to commit any act injurious . . . to trade or commerce, . . . they shall be deemed guilty of a misdemeanor" (2 Rev. Stat. 1st ed. pt. 4, chap. 1, title 6, § 8, subd. 6), and this was re-enacted in subdivision 6 of § 168 of the Penal Code; while subdivision 5 provided: "If two or more persons conspire . . . to prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats [or] intimidation, . . . each of them is guilty of a misdemeanor." In 1897 the legislature passed an act which provided: "Every contract, agreement, arrangement, or combination whereby a monopoly in the manufacture, production, or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby, for the purpose of creating, establishing, or maintaining a monopoly within this state of the manufacture, production, or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade, or occupation is or may be restrained or prevented, is hereby declared to be against public policy, illegal and void." Laws 1897, p. 310, chap. 383, § 1. That the acts alleged to have been committed by the defendants were injurious to trade and commerce, created a combination to monopolize the sale of articles in common use, restrained competition in the supply of articles or commodities, and established and maintained a monopoly restricting or preventing trade, is manifest, and therefore the combination or conspiracy of the defendants was for an illegal purpose, and the acts per-

formed by them under it were also illegal. *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Clancey v. Onondaga Fine Salt Mfg. Co.* 62 Barb. 395; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282; *Leonard v. Poole*, 114 N. Y. 371, 4 L. R. A. 728, 21 N. E. 707; *People v. Fisher*, 14 Wend. 9, 14, 28 Am. Dec. 501; *People v. Sheldon*, 139 N. Y. 251, 261, 23 L. R. A. 221, 34 N. E. 785; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *Curran v. Galen*, 152 N. Y. 33, 37, 37 L. R. A. 802, 46 N. E. 297; *People v. Milk Exchange*, 145 N. Y. 267, 27 L. R. A. 437, 39 N. E. 1062; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 7 L. R. A. 46, 23 N. E. 530; *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790; *Cummings v. Union Blue Stone Co.* 164 N. Y. 401, 52 L. R. A. 262, 58 N. E. 525; *Cohen v. Berlin & J. Envelope Co.* 166 N. Y. 292, 59 N. E. 906; *Re Davies*, 168 N. Y. 89, 101, 56 L. R. A. 855, 61 N. E. 118; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 322, 41 L. ed. 1007, 1021, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Beach, Modern Law of Contracts, § 1582; *Richardson v. Buhl*, 77 Mich. 632, 658, 6 L. R. A. 457, 43 N. W. 1102; *State v. Nebraska Distilling Co.* 29 Neb. 700, 715, 46 N. W. 155; *Craft v. McConoughy*, 79 Ill. 346, 350, 22 Am. Rep. 171; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 298, 8 L. R. A. 497, 22 N. E. 798; *Hawarden v. Youghiogheny & L. Coal Co.* 111 Wis. 545, 55 L. R. A. 828, 87 N. W. 472; *United States v. Jellico Mountain Coke & Coal Co.* 12 L. R. A. 753, 3 Inters. Com. Rep. 626, 46 Fed. 432. In *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 132, 43 L. R. A. 264, 51 N. E. 1006, Parker, Ch. J., very properly said: "In this one [jurisdiction] it is well established that the public welfare is best subserved by the encouragement of competition." It was held in the *Arnot Case* that a contract by one producer with another to withhold his supply from the market was against public policy, and void; in the *Curran Case*, that contracts or arrangements with employers to coerce other men to join an organization under the penalty of the loss of their positions were against public policy, unlawful, and in conflict with the principle of public policy which prohibits monopolies and exclusive privileges; and in the *Milk Exchange Case* that a corporation to fix the price of milk justified a finding that the corporation was a combination, the purpose of which was inimical to trade, and therefore unlawful. In the *McMillin Case* a combination was entered into for the management and control

of the business of manufacturing carbon, by which several corporations combined, the proceeds to be divided in accordance with the contract, and it was held illegal and void. In the *Judd Case* an agreement was made for the purpose of suppressing competition in the sale of sheep and lambs, and it was held contrary to public policy, and void, and also that the fact that it was entered into for the purpose of protecting those interested from loss by unreasonable competition made no difference; that, the agreement being intended to control the markets, it was invalid, as the public might be prejudiced thereby, and whether they were in fact was immaterial. The *Blue Stone Case* involved a contract by which nearly all that kind of stone was to be sold at prices to be fixed and uniform, the sales to be apportioned between the producers, and it was held that it was void, in that it threatened a monopoly whereby trade in a useful article might be restrained, and its price unreasonably enhanced. In the *Cohen Case* there was an agreement between the manufacturers of 85 per cent of the envelopes manufactured in the country and an outside manufacturer, which provided that the selling price of all envelopes manufactured by them should be fixed by a corporate agent, and it was held that the combination threatened a monopoly, whereby trade in a useful article might be restrained, and hence it was invalid. In the *Freight Asso. Case* there was a contract between common carriers, which resulted in increasing fare or freight beyond that which would exist if competition was free, and it was held to be invalid. In Beach, *Modern Law of Contracts*, § 1582, it is said: "Combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessities of life, are monopolies, and intolerable, and ought to receive the condemnation of the courts. Monopoly in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise or public work under governmental control in the interest of the public. But its tendency is destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the Federal Constitution." Thus we see that agreements and acts injurious to trade or commerce, combinations to restrain competition in articles or commodities in common use, and monopolies restraining or preventing trade have, by a long line of authorities, been held to be illegal.

This brings us to consider whether the means the association and its active mem-

bers employed to accomplish their purpose were lawful. It will be remembered that the means adopted by them were that, if any dealer or manufacturer sold goods to the plaintiff or any other person not conforming to the requirements of the association, all its active members were required to and refused to sell the goods of such manufacturer, procured others to refuse to deal in his goods, publicly advertised him as an unworthy dealer, and thus sought to injure and ruin his business. Thus it was that the members of the association accomplished their purpose of preventing other manufacturers from selling goods to the plaintiff. Such means were clearly unlawful. *Temperton v. Russell* [1893] 1 Q. B. 715; *Rourke v. Elk Drug Co.* 75 App. Div. 145, 77 N. Y. Supp. 373; *People v. Fisher*, 14 Wend. 9, 14, 28 Am. Dec. 501; *People v. North River Sugar Ref. Co.* 54 Hun, 354, 5 L. R. A. 386, 7 N. Y. Supp. 406, 54 Hun, 355, note, 2 L. R. A. 33, 3 N. Y. Supp. 401, Affirmed in 121 N. Y. 582, 9 L. R. A. 33, 24 N. E. 834; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. 48; *Casey v. Cincinnati Typographical Union No. 3*, 12 L. R. A. 193, 45 Fed. 135, 146; *Boutwell v. Marr*, 71 Vt. 1, 7, 43 L. R. A. 803, 42 Atl. 607; *Doremus v. Hennessy*, 176 Ill. 608, 614, 43 L. R. A. 797, 802, 52 N. E. 924, 54 N. E. 524; *Brown v. Jacobs' Pharmacy Co.* 115 Ga. 429, 57 L. R. A. 547, 41 S. E. 553. In *Temperton v. Russell* a firm of builders refused to obey certain rules of the trade unions with regard to building operations, and the unions sought to compel them to do so by preventing the supply to them of building materials. In furtherance of this purpose, they requested the plaintiff, who supplied building materials to the firm, to cease supplying them, which he refused to do. Thereupon, with the object of injuring the plaintiff in his business, in order to compel him to comply with such request, the defendants induced persons who had entered into contracts with him for the supply of materials to break their contracts, and not to enter into further contracts with the plaintiff, by threatening that the workmen would be withdrawn from their employ. The plaintiff sustained damage by reason thereof, and the court held that an action was maintainable by the plaintiff against the defendants for maliciously procuring such breaches of contract, and for maliciously conspiring together to injure him by preventing persons from entering into contracts with him. In the *Fisher Case*, Savage, Ch. J., in effect said that the owner of an article was not required to sell it for any particular price, or for less than a stated price, but he had no right to state the price at which others should sell their goods, and that all com-

binations to effect such a purpose were illegal. In the *McKenna* and *Casey Cases* it was held that all associations designed to interfere with the management and control of lawful business, or in dictating the particular terms upon which its owners should conduct it, by means of threats of injury or loss, by interfering with their property or traffic, or with their lawful employment of other persons, are *pro tanto* illegal combinations or associations. The same principle was involved in the case of *Curran v. Galen*, 152 N. Y. 33, 37, 37 L. R. A. 802, 46 N. E. 297. In the *Boutwell Case* it was said: "Without undertaking to designate with precision the lawful limit of organized effort, it may safely be affirmed that when the will of the majority of an organized body in matters involving the rights of outside parties is enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats or intimidation. The withdrawal of patronage by concerted action, if legal in itself, becomes illegal when the concert of action is procured by coercion." In *Dorcmus v. Hennessy* it was said: "No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require. Losses wilfully caused by another, from motives of malice, to one who seeks to exercise and enjoy the fruits and advantages of his own enterprise, industry, skill, and credit, will sustain an action. . . . Malice, as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and, if a wrongful act is done to the detriment of the right of another, it is malicious, and an act maliciously done, with the intent and purpose of injuring another, is not lawful competition." In *Brown v. Jacobs' Pharmacy Co.* it was said: "Suppose that a number of merchants should agree to fix the price of certain goods, and not to sell below that price. If there were no statute on the subject, and the case rested on the common law, the agreement would simply be nonenforceable; but if they went further, and agreed that, if any other merchant sold at a less price they would force him to their terms, or drive away those dealing with him by violence, threats, or boycotting, it would cease to be a mere nonenforceable contract, and if, in its execution, damages proximately resulted to such other merchant, he would have a right of action."

Before concluding this discussion, there is

another aspect of the situation which seems worthy of consideration, or of mention, at least. If the decision of the court below shall be affirmed, it obviously results in an unfair and unjust discrimination by this court in favor of capital or business and against labor by enforcing the law as to one and refusing as to the other. As we have already seen, this court, in *Curran v. Galen*, unanimously held that a combination or association of workmen, whose purpose was to hamper or restrict the freedom of the citizen in pursuing his lawful trade or calling, through contracts or arrangements with employers to coerce workmen to become members of the organization and to come under its rules and conditions under penalty of loss of their positions and of deprivation of employment,—was against public policy, and unlawful; while in this case it is held that a combination or association of wholesale dealers in useful articles, whose purpose is to hamper and destroy the freedom of the plaintiff and others to pursue their lawful business by contracts or arrangements with manufacturers to coerce them to become members of their organization and to come under its rules and conditions under penalty of the destruction of their business,—was not against public policy nor unlawful. As these decisions could not be harmonized, they would result in a discrimination in favor of capital or business which could not be sustained upon any just or legal principle known to, or established by, statute or common law. With the existing conflict between capital and labor, such a distinction would not only be unjust, but extremely unfortunate, especially as it can be justified upon no principle of ethics, law, or equity.

Thus far we have discussed the illegality of contracts involving the creation of monopolies, agreements that prevent competition, and the right of individuals or corporations by threats, intimidation, or interfering with the business or traffic of others to enforce or compel parties to enter into contracts in restraint of trade, under the general principles of the common law and the statutes, and upon the broad ground that they apply to all lawful contracts or business, subject to very slight limitations. We have regarded the principle of the cases cited and the provisions of the statute as sufficiently broad to apply to all transactions relating to trade and commerce, to the free pursuit of any lawful business, trade, or occupation, and to the sale of any article or commodity in common use. The learned court at special term, however, seems to have emphasized and placed great reliance upon the fact that the articles to which this controversy relates were not the prime

necessaries of life, or articles which were necessary to the existence of man, and also upon the ground that, as they were patent medicines, each owner possessed a greater right as to their disposition than he otherwise would, including their sale free from competition among dealers to whom they were sold; while the learned appellate division seems to have based its decision upon the ground that patent medicines are not necessaries of life as to which public policy might restrain a combination to fix an exorbitant price.

Obviously the provisions of the statutes and the principles of the decisions to which we have referred are not limited in their application to the necessities of life, but, as we have already seen, they have a much broader application, and include all articles and commodities in common use, or that are the subject of lawful trade or commerce. In determining whether there has been a conspiracy in restraint of trade, the character of the trade sought to be monopolized is immaterial, so long as it is a lawful one. *People v. Duke*, 19 Misc. 292, 296, 44 N. Y. Supp. 336. Nor is the operation of the rule forbidding contracts restraining competition limited to trade in necessities of life, but it extends equally and alike to all commodities of commerce. *Wire Cloth Case*, 19 N. Y. Supp. 413, note. It is apparent from the character of this litigation that the articles and commodities to which it relates are both articles of trade and commerce, and such as are in common use. This is obvious when we consider the fact that they amount annually to about \$60,000,000, and constitute more than two thirds of all the drugs and medicines sold in the United States. Therefore the fact that they may not be necessities of life in the strictest sense is not controlling, and the decision of the courts below cannot be sustained upon that ground.

Moreover, the fact that the medicines may have been patented or copyrighted, so as to give the owners the exclusive right of sale, can make no difference. It must be constantly borne in mind that the purpose of this action is not to compel the manufacturers, against their will or disposition, to sell their goods to the plaintiff, but its purpose is to enjoin the association, its active members, committees, and agents, from compelling manufacturers or dealers, against their will, to refuse to sell their property to the plaintiff, by a system of intimidation and boycotting. It is not and cannot be properly claimed that the plaintiff can compel the manufacturers to sell it their merchandise without their consent or against their will, and the fact that it consists of proprietary articles or patent medicines can make no difference whatever. With few excep-

tions, which have no application here, courts can compel no owner of property to sell or part with his title to it without his consent, or to sell or deliver it to any particular person. So that the rule is the same where a party is the exclusive owner of the property, whether it is patented or not, at least so far as the question here involved is concerned. Besides, there are authorities which hold that patentees or owners of patents cannot legally enter into a combination in restraint of trade, or for the creation of monopolies in the sale of their goods, and that such contracts are unlawful. It is said: "Patents confer a monopoly as respects the property covered by them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade. Patented property does not differ in this respect from any other." *National Harrow Co. v. Hench*, 39 L. R. A. 299, 27 C. C. A. 349, 55 U. S. App. 53, 83 Fed. 36, 38, 76 Fed. 667; *John D. Park & Sons Co. v. National Wholesale Druggists' Assn.* 50 N. Y. Supp. 1064; *Vulcan Powder Co. v. Hercules Powder Co.* 96 Cal. 510, 515, 31 Pac. 581; *National Harrow Co. v. E. Bement & Sons*, 21 App. Div. 290, 47 N. Y. Supp. 462; *Beach, Monopolies & Industrial Trusts*, § 175; 1 *Tiedeman, State & Federal Control of Persons & Property*, p. 412.

If, however, it was conceded that the possession of their patents authorized the manufacturers to enter into combinations which otherwise would be illegal, still that principle would have no application whatever to this case. Here it is not the manufacturers or the patentees who have organized the combination complained of, or who have sought to create a monopoly and prevent competition. The patentees have not forced, or attempted to force, the wholesale druggists to transact their business in any particular manner. But it is the wholesale druggists' association, organized and controlled by the druggists, who have no special property or interest under the manufacturers' patents, who seek to and have enthralled the patentees themselves and such of their customers as will not bow in subjection to a method of transacting their own business, inaugurated and enforced by the association. In other words, the plaintiff desires relief, not from the voluntary act of the patentees, or from any combination into which they have voluntarily entered or which they control, but as to be relieved from a combination of their customers who have by threats and intimidation compelled them, notwithstanding their desire to do so, to refrain from selling their property to the plaintiff or other customers without the consent of the association. Hence, by the allegations

of the complaint, it is made apparent, not only that the defendants entered into and formed an illegal combination or conspiracy to interfere with the plaintiff's trade by preventing the various manufacturers of these goods from selling them to it, and thereby seriously interfered with and injured its business, but it is equally clear that the means employed by them to accomplish that purpose, by threats, intimidation, boycotting, and continued and persistent efforts to injure any manufacturer who should continue to deal with it, were also illegal. Therefore the defendants were not only guilty of an illegal act in combining to injure the plaintiff's business, but were likewise guilty of an illegal combination to accomplish the plaintiff's ruin by illegal and improper means. The purpose being illegal, and the means by which it was accomplished being also illegal, it follows that the action of the defendants was illegal, and, as against the plaintiff, should be restrained. These considerations lead to the conclusion that the facts alleged in the amended complaint and admitted by the demurrer were sufficient to constitute a cause of action, and that the courts below erred in holding to the contrary and in dismissing the complaint.

It follows that the final and interlocutory judgments herein, and the order dissolving the preliminary injunction, should be reversed, and the demurrer to the complaint overruled, with costs in all the courts, but with leave to the defendants, upon the payment of one bill of costs, within twenty days, to file and serve an answer to the amended complaint herein.

Cullen, J., dissenting:

I concur in the opinion of Martin, J., for reversal, but I wish to add a word as to my position on a question discussed in the opinion of Judge Haight. I agree with him that the combination between the jobbers to force the manufacturers to sell to each of their number at exactly the same price and upon the same terms, and to sell to no one else on any better terms, was entirely legal, and that it was within their rights to accomplish this result by refusing to deal with or handle the goods of any manufacturer who would not comply with their demand. If the object of the combination ceased here, it would not be subject to criticism. But the scheme adopted goes further. It requires the manufacturer, not only to sell at the same price to each jobber, but to compel each jobber to sell to the consumer at the same price, by refusing to sell goods to any one who would not comply with these requirements. It is in this respect that the agreement is vicious and operates in re-

straint of trade, for it destroys competition among the jobbers.

Vann, J., concurs with **Martin and Cullen, JJ.**

Judgment affirmed.

Frank HUSTACE *et al.*, *Respts.*,
v.

PHENIX INSURANCE COMPANY OF
BROOKLYN, *Appt.*

(175 N. Y. 292.)

The fall of a building because of an explosion in a burning building in the vicinity is not within the protection of a policy insuring against direct loss or damage by fire, where the policy also provides that the insurer shall not be liable for loss caused, directly or indirectly, by explosion of any kind.

(*Bartlett, J.*, *dissents.*)

(June 9, 1903.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, in favor of plaintiff, entered upon an agreed statement of facts prepared for its opinion, as to liability upon a fire insurance policy. *Reversed.*

The facts are stated in the opinion.

Messrs. Cardozo & Nathan, for appellant:

Under the New York standard fire insurance policy the insurer is not liable for loss or damage to a building caused by explosion.

St. John v. American Mut. F. & M. Ins. Co. 11 N. Y. 516; *Briggs v. North American & M. Ins. Co.* 53 N. Y. 446; *Miller v. London & L. F. Ins. Co.* 41 Ill. App. 395; *German F. Ins. Co. v. Roost*, 55 Ohio St. 581, 36 L. R. A. 236, 45 N. E. 1097; *United Life, F. & M. Ins. Co. v. Foote*, 22 Ohio St. 340, 10 Am. Rep. 735; *Heuer v. North Western Nat. Ins. Co.* 144 Ill. 303, 19 L. R. A. 504, 33 N. E. 411; *Phœnix Ins. Co. v. Greer*, 61 Ark. 509, 33 S. W. 840; *Stanley v. Western Ins. Co.* L. R. 3 Exch. 71; *Beakes v. Phœnix Ins. Co.* 143 N. Y. 402, 26 L. R. A. 267, 38 N. E. 453; *Mitchell v. Potomac Ins. Co.* 183 U. S. 42, 46 L. ed. 74, 22 Sup. Ct. Rep. 42.

The explosion, and not the fire in the Tar-

NOTE.—As to liability of insurer for loss caused by explosion, see also, in this series, *Heuer v. Northwestern Nat. Ins. Co.* (Ill.) 19 L. R. A. 594, and *note*; *American Steam Boiler Ins. Co. v. Chicago Sugar Ref. Co.* (C. C. App. 7th C.) 21 L. R. A. 572; *Germania F. Ins. Co. v. Roost* (Ohio) 36 L. R. A. 236; *Leonard v. Orient Ins. Co.* (C. C. App. 7th C.) 54 L. R. A. 706; and *Vorse v. New Jersey Plate-Glass Ins. Co.* (Iowa) 60 L. R. A. 838.

rant building, was the proximate and direct cause of the plaintiffs' damage, and hence the defendant is not liable.

Briggs v. North American & Mercantile Ins. Co. 53 N. Y. 446; *New York & B. Despatch Exp. Co. v. Traders' & M. Ins. Co.* 132 Mass. 377, 42 Am. Rep. 440; *Bacon's Maxims*, Reg. 1; *Caballero v. Home Mut. Ins. Co.* 15 La. Ann. 217; 1 Wood, *Fire Ins.* p. 245; *Everett v. London Assur. Co.* 19 C. B. N. S. 126; *Maraden v. City & County Assur. Co.* L. R. 1 C. P. 232; *Transatlantic F. Ins. Co. v. Dorsey*, 56 Md. 70, 40 Am. Rep. 403; 3 Joyce, *Ins.* § 2772, p. 2709; 2 Biddle, *Ins.* chap. 8, pp. 768, 770, 772; *Hoffman v. King*, 160 N. Y. 618, 46 L. R. A. 672, 55 N. E. 401; *Rider v. Syracuse Rapid Transit R. Co.* 171 N. Y. 139, 58 L. R. A. 125, 63 N. E. 836; *Seifter v. Brooklyn Heights R. Co.* 169 N. Y. 254, 62 N. E. 349; *Laidlaw v. Sage*, 158 N. Y. 73, 44 L. R. A. 216, 52 N. E. 679; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 19 L. ed. 65; *Scheffer v. Washington City, M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Howard F. Ins. Co. v. Norwich & N. Y. Transp. Co.* 12 Wall. 194, 20 L. ed. 378; *The G. R. Booth*, 171 U. S. 450, 43 L. ed. 234, 19 Sup. Ct. Rep. 9.

The plaintiffs' building fell, not as the result of fire; and with such fall the defendant ceased to be liable on its policy.

Western Assur. Co. v. J. H. Mohlman Co. 40 L. R. A. 561, 28 C. C. A. 157, 51 U. S. App. 577, 83 Fed. 811; *Fred. J. Kiesel & Co. v. Sun Ins. Office*, 31 C. C. A. 515, 60 U. S. App. 10, 88 Fed. 243.

The fire which ensued in the ruins after the plaintiffs' building had become a total loss, by reason of the explosion in the Tarrant building, caused no damage to the insured property, and, therefore, the defendant is not liable for such loss.

Corbett v. Spring Garden Ins. Co. 155 N. Y. 389, 41 L. R. A. 318, 50 N. E. 282.

Mr. William H. Sage, for respondents:

The fire in the Tarrant building was, in legal effect, the proximate cause of the plaintiffs' loss, and the defendant company is liable under the policy.

The proximate cause is the efficient cause, the cause that necessarily sets the other and incidental causes in motion. Causes that are merely incidental, or are instruments of a controlling agency, are not the proximate causes, though nearer in time to the result.

Brady v. North Western Ins. Co. 11 Mich. 445; *Lynn Gas & Electric Co. v. Meriden F. Ins. Co.* 158 Mass. 570, 20 L. R. A. 297, 33 N. E. 690; *Scripture v. Lowell Mut. F. Ins. Co.* 10 Cush. 356, 57 Am. Dec. 111; *Hapeman v. Citizens' Mut. F. Ins. Co.* 126 Mich. 191, 85 N. W. 454; *Queen Ins. Co. v. Hudson Co.* 8 Ind. App. 22, 35 N. E. 397; *Ætna F. Ins. Co. v. Boon*, 95 U. S. 117, 24 L. ed. 62 L. R. A.

395; *Howard F. Ins. Co. v. Norwich & N. Y. Transp. Co.* 12 Wall. 194, 20 L. ed. 378; *Tilton v. Hamilton F. Ins. Co.* 1 Bosw. 367; *Phillips, Ins.* § 1097; *Montoya v. London Assur. Co.* 6 Exch. 451.

It is the duty of an insurance company seeking to limit the operation of its contract for injury by special provisos to make such limits in clear terms, and not leave the insured in a condition to be misled.

Wood, *Fire Ins.* 2d ed. p. 258; *Rann v. Home Ins. Co.* 59 N. Y. 387; *Herrman v. Merchants' Ins. Co.* 81 N. Y. 184, 37 Am. Rep. 488; *Washburn v. Miami Valley Ins. Co.* 2 Flipp. 664, 2 Fed. 633; *Ethington v. Dwelling House Ins. Co.* 55 Mo. App. 129; *Fireman's Fund Ins. Co. v. Western Refrigerating Co.* 55 Ill. App. 329; *Phenix Ins. Co. v. Wilcox & G. Guano Co.* 13 C. C. A. 88, 25 U. S. App. 201, 65 Fed. 724; *Western & A. Pipe Lines v. Home Ins. Co.* 145 Pa. 346, 22 Atl. 665; *Germania F. Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868; *Devitt v. Providence Washington Ins. Co.* 61 App. Div. 393, 70 N. Y. Supp. 654; *Heffron v. Kittanning Ins. Co.* 132 Pa. 584, 20 Atl. 698.

The wreck of plaintiff's building by the explosion in the Tarrant building was "direct loss or damage by fire" within the meaning of the policy.

Case v. Hartford F. Ins. Co. 13 Ill. 676; *Babcock v. Montgomery County Mut. Ins. Co.* 6 Barb. 640; *Geisek v. Crescent Mut. Ins. Co.* 19 La. Ann. 297; *Lewis v. Springfield F. & M. Ins. Co.* 10 Gray, 159; *Whitehurst v. Fayetteville Mut. Ins. Co.* 51 N. C. (6 Jones L.) 352; *Tilton v. Hamilton F. Ins. Co.* 1 Bosw. 367; 13 Am. & Eng. Enc. Law, 2d ed. p. 138; *White v. Republic F. Ins. Co.* 57 Me. 91, 2 Am. Rep. 22; *New York & B. Despatch Exp. Co. v. Traders' & M. Ins. Co.* 132 Mass. 377, 42 Am. Rep. 440; *City F. Ins. Co. v. Corlies*, 21 Wend. 367, 34 Am. Dec. 258; *Pentz v. Ætna F. Ins. Co.* 9 Paige, 568; *New York v. Lord*, 17 Wend. 235; *Witherell v. Maine Ins. Co.* 49 Me. 200; *Independent Mut. Ins. Co. v. Agnew*, 34 Pa. 96, 75 Am. Dec. 638.

In determining whether loss is attributable to fire, or to explosion, when one follows the other in a single catastrophe, the courts have with great uniformity looked beyond the immediate cause, and held the loss due to the primary event.

Waters v. Merchants' Louisville Ins. Co. 11 Pet. 213, 9 L. ed. 691; *American Steam Boiler Ins. Co. v. Chicago Sugar Ref. Co.* 21 L. R. A. 573, 6 C. C. A. 336, 9 U. S. App. 186, 57 Fed. 294; *Renshaw v. Missouri State Mut. F. & M. Ins. Co.* 103 Mo. 595, 15 S. W. 945; *La Force v. Williams City F. Ins. Co.* 43 Mo. App. 518; *Millaudon v. New Orleans Ins. Co.* 4 La. Ann. 15, 50 Am. Dec. 550;

Scripture v. Lowell Mut. F. Ins. Co. 10 Cush. 356, 57 Am. Dec. 111; *Grim v. Phoenix Ins. Co.* 13 Johns. 451; *City F. Ins. Co. v. Corlies*, 21 Wend. 367, 34 Am. Dec. 258; *Briggs v. North American & M. Ins. Co.* 53 N. Y. 446; *Phoenix Ins. Co. v. Greer*, 61 Ark. 509, 33 S. W. 840; *Mitchell v. Potomac Ins. Co.* 183 U. S. 51, 52, 46 L. ed. 77, 78, 22 Sup. Ct. Rep. 42; *Beakes v. Phoenix Ins. Co.* 143 N. Y. 402, 26 L. R. A. 267, 38 N. E. 453; *Heuer v. North Western Nat. Ins. Co.* 144 Ill. 393, 19 L. R. A. 594, 33 N. E. 411; *St. John v. American Mut. F. & M. Ins. Co.* 11 N. Y. 510; *Evans v. Columbian Ins. Co.* 44 N. Y. 146, 4 Am. Rep. 650; *United Life F. & M. Ins. Co. v. Foote*, 22 Ohio St. 340, 10 Am. Rep. 735; *Beakman's F. & M. Ins. Co. v. Parker*, 23 Ohio St. 85, 13 Am. Rep. 228; *Montgomery v. Firemen's Ins. Co.* 16 B. Mon. 427; *Roe v. Columbus Ins. Co.* 17 Mo. 301; *Tanneret v. Merchants' Mut. Ins. Co.* 34 La. Ann. 249; *Transatlantic F. Ins. Co. v. Dorsey*, 56 Md. 70, 40 Am. Rep. 403; *Hayward v. Liverpool & L. F. & L. Ins. Co.* 7 Bosw. 385; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 19 L. ed. 65; *Metallic Compression Casting Co. v. Fitchburg R. Co.* 109 Mass. 277, 12 Am. Rep. 689; *Atkinson v. Newcastle & G. Waterworks Co.* L. R. 6, Exch. 404.

The stipulation that the defendant should not be liable for loss caused by "explosion of any kind" cannot refer to an explosion occurring as an incident of a fire.

Briggs v. North American & M. Ins. Co. 53 N. Y. 446; 1 Wood, Fire Ins. 2d ed. p. 253; *Heuer v. North Western Nat. Ins. Co.* 144 Ill. 393, 19 L. R. A. 594, 33 N. E. 411; *Mitchell v. Potomac Ins. Co.* 16 App. D. C. 241, 183 U. S. 42, 46 L. ed. 74, 22 Sup. Ct. Rep. 42; *Washburn v. Artisans' Ins. Co.* 27 Pittsb. L. J. N. S. 55, Fed. Cas. No. 17,212; *Washburn v. Union F. Ins. Co.* Fed. Cas. No. 17,215; *Dows v. Faneuil Hall Ins. Co.* 127 Mass. 346, 34 Am. Rep. 384; *Washburn v. Western Ins. Co.* 9 Ins. L. J. 424, Fed. Cas. No. 17,216; *Transatlantic F. Ins. Co. v. Dorsey*, 56 Md. 70, 40 Am. Rep. 403.

Irrespective of any question of proximate or remote cause, liability for the damage resulting from an explosion caused by fire was within the intention of the parties upon a correct construction of the policy.

Renshaw v. Missouri State Mut. F. & M. Ins. Co. 103 Mo. 595, 15 S. W. 945; *Washburn v. Miami Valley Ins. Co.* 2 Flipp. 664, 2 Fed. 633; *German F. Ins. Co. v. Roost*, 55 Ohio St. 581, 36 L. R. A. 236, 45 N. E. 1097; *Minis v. United States*, 15 Pet. 445, 10 L. ed. 790; *United States v. Cook*, 17 Wall. 177, 21 L. ed. 540; *Mitchell v. Potomac Ins. Co.* 183 U. S. 42, 46 L. ed. 74, 22 Sup. Ct. Rep. 42; *Commercial Ins. Co. v. Robinson*, 64 Ill. 265, 10 Am. Rep. 557; *Virginia v.* 62 L. R. A.

Tennessee, 148 U. S. 519, 37 L. ed. 543, 13 Sup. Ct. Rep. 728; *Neal v. Clark*, 95 U. S. 709, *sub nom. Neal v. Scruggs*, 24 L. ed. 587; *Barlow v. United States*, 7 Pet. 411, 8 L. ed. 731; *Hall v. United States*, 9 Ct. Cl. 273; *Newport News & M. Valley Co. v. United States*, 9 C. C. A. 579, 22 U. S. App. 145, 61 Fed. 488; *Miller v. London & L. F. Ins. Co.* 41 Ill. App. 395; *White v. Republic F. Ins. Co.* 57 Me. 91, 2 Am. Rep. 22.

The provision in the policy that, "if a building fall, except as the result of fire, all insurance shall cease," does not relieve defendant. The fall was the result of fire.

Ermentrout v. Girard F. & M. Ins. Co. 63 Minn. 305, 30 L. R. A. 346, 65 N. W. 635; *Johnston v. West of Scotland Ins. Co.* 7 Shaw & D. 52; *Dows v. Faneuil Hall Ins. Co.* 127 Mass. 346, 34 Am. Rep. 384; *Leonard v. Orient Ins. Co.* 54 L. R. A. 706, 48 C. C. A. 389, 109 Fed. 286.

Parker, Ch. J., delivered the opinion of the court:

The Tarrant building on the northwest corner of Warren and Greenwich streets, New York, began to burn at 12:15 P. M., October 19, 1900. It was occupied by dealers in drugs and chemicals. Within thirty minutes after the fire started, a terrific explosion took place in that building, caused by the ignition of such chemicals and drugs, which wrecked it and other buildings, including the buildings between the Tarrant building and that of plaintiffs. The latter, known as 275 Washington street, was separated from the Tarrant building by an alleyway 3 feet wide and two buildings, the total distance between the Tarrant building and that of plaintiffs being 56 feet 11 inches. As the effect of the concussion, the plaintiffs' building fell, and, in the language of the stipulation, "became a total loss, and thereafter nothing remained of said building but the ruins thereof." Prior to such destruction of plaintiffs' building there was no fire there, and no damage thereto had been caused by the fire. The value at the time of its destruction, as fixed by the agreed statement of facts in this case, was \$4,750, and for that sum plaintiffs have secured judgment against defendant under a fire insurance policy. The question is whether the judgment can stand.

It is true that, after the building had fallen, and had become, in the language of the stipulation, "a total loss," the *débris* was consumed by the fire which originated in the Tarrant building. But plaintiffs do not claim to recover for such burning. If they did, it would be necessary for this court to consider the effect upon the situation of the provision of the policy that "if a building, or any part thereof, fall, except as the

result of fire, all insurance by this policy on such building or its contents shall immediately cease." The bearing of this clause of the policy is apparent when we recall that, according to stipulation, plaintiffs' building had not been damaged by fire, nor was it on fire prior to its falling. The question would, of course, be presented whether the policy did not cease upon the collapse of the building. And again, within the language of the stipulation, the fire which afterward reached the building caused no damage, for the stipulation is that the explosion "caused said building to fall and become a total loss," a phrase which has a well-understood meaning in matters relating to fire insurance. This judgment necessarily rests upon the view that, under the policy issued by defendant, there may be a recovery for destruction by explosion occurring in another property, provided the explosion would not have happened but for the existence of fire in such other property.

Now, having presented the situation, we turn to the policy of insurance by which the rights of the respective parties are to be determined. It is a standard policy, the provisions of which have been formulated pursuant to legislative authority, with the intention of creating a plain and unambiguous contract, which should be just to both insured and insurer. The special provisions applicable to this situation are (1) the insurance clause by which the company undertakes to insure "against all direct loss or damage by fire except as hereinafter provided for;" and (2) the following: "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection; riot; civil war or commotion; military or usurped power; or by order of any civil authority; or by theft; or by negligence of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by a fire in neighboring premises; or (unless fire ensues, and in that event for damage by fire only) by explosion of any kind; or lightning, but liability for direct damage by lightning may be assumed by specific agreement hereon." Now, this building was destroyed by explosion of some kind; and, inasmuch as the policy expressly provides that "this company shall not be liable for loss caused, directly or indirectly, . . . by explosion of any kind," "unless fire ensues, and in that event for the damage by fire only," it would seem as if—reading this provision of the contract according to the rule laid down by this court in *Schoonmaker v. Hoyt*, 148 N. Y. 425, 42 N. E. 1059, Judge Martin writing: "Contracts or statutes are to be read and understood according to the natural and obvious import 62 L. R. A.

of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their operation. Courts cannot correct suspected errors, omissions, or defects, or by construction vary the contract of the parties"—the conclusion would be reached that an explosion on other premises, which produced such a violent concussion as to destroy a building 57 feet distant, would be plainly within the terms of such provision of the policy. Plaintiffs contend that the language employed indicates that the exemption was not intended to apply to an explosion caused by a preceding fire, whether in distant premises or not, and argues that, if the legislature had intended to exempt from explosion, whether caused by fire or not, it would have omitted the words "unless fire ensues," etc., and merely said that the company "shall not be liable for loss sustained directly or indirectly by explosion of any kind." Thus, according to their view, the clause should be construed as if it read: "Or (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind, excepting explosion caused by fire." Such a clause should not, of course, be read into a contract that is plain and unambiguous, particularly when it has been framed pursuant to a direction of the legislature, and when, necessarily, care has been observed to select language which should aptly express the scope of the contract, as well as the limitations upon the liability of the insurer. The occasion for the insertion of this exemption clause in the standard policy was found in the decisions of the courts holding the insurer liable for loss caused indirectly by invasion, insurrection, riot, etc., for loss by order of civil authority directing that a building be blown up to stop the spread of a fire, for loss by theft, by lightning, and in some jurisdictions for loss by explosion. In view of these authorities the insertion of this exemption provision must have been for the purpose of overcoming the decisions. And fire insurance companies had the right to limit their risks to loss or damage by fire direct, if they so chose, rather than against damage by riot, theft, explosion, lightning, and all other causes by which property could be accidentally destroyed.

It should be noted that the insuring clause is "against all direct loss or damage by fire, except as hereinafter provided for." Plaintiffs argue that this phrase does not convey the same meaning as would a phrase "against all loss or damage by fire direct;" and their argument is that the adjective "direct" refers to and qualifies the noun "loss," and not the noun, "fire." It would seem as if the adjective "direct," in the connection in which it is employed, qualifies, not alone

"loss," but also "damage by fire," and hence the phrase has precisely the same meaning as if the insurance was "against loss or damage by fire direct." And, to meet situations where an explosion might occur, it provided against liability unless fire ensued, and, in that event, for the damage occasioned by the fire, and not for damage resulting from the explosion. This provision of the contract is in substantially the same language, and has precisely the same meaning, as a clause in an insurance contract that was before this court in *Briggs v. North American & M. Ins. Co.* 53 N. Y. 446. That policy contained this provision: "This company shall not be liable for loss caused by invasion, insurrection, riot, civil commotion, military or usurped power, or for loss caused by lightning or explosions of any kind, unless fire ensues, and then for the loss or damage by fire only." The building insured was used in rectifying spirits. A person repairing the machinery brought in a lamp. The vapor coming into contact with the burning lamp resulted in an explosion, which did great damage. Fire resulted from the explosion, but the damage by fire was slight as compared with that caused by the explosion. Under the direction of the court, the jury found separately the damages caused by the explosion and the fire. The general term granted a new trial unless plaintiff deducted the damages caused by the explosion. This court affirmed the judgment of the general term, holding that plaintiff was not entitled to recover for the explosion, and it said: "If it was in fact an explosion, then the policy provides that the defendant shall not be liable for damages caused thereby. The plaintiffs insist, however, that an explosion caused by fire is a fire, and therefore the defendant is liable for the explosion as for a fire. But that reasoning gives no force to the exception. It allows a recovery for the explosion when the policy expressly stipulates that the defendant will not be liable for that. It may be conceded that, in the absence of this exception, a recovery could have been had for the whole damage as for a loss by fire. The authorities referred to by the plaintiffs' counsel tend to that result. I do not think that position will aid the plaintiffs. An explosion without this exception, if it come under the general head of fire, might have afforded ground for recovery; but the defendant guarded against that result by this express stipulation. The exception, too, is general, including explosions by fire as well as others." As will be seen by comparison of the exemption clause in that policy with the one under consideration, that decision, as well as the argument of the court, in which all concurred, is equally applicable to the clause

in this policy and to this situation. The *Briggs Case* is the only authority in this court precisely in point as to the construction to be given to this exemption clause, and in that case the fire followed the explosion; but the court said of the exemption clause that it included explosions caused by fire as well as others.

In an earlier case (*St. John v. American Mut. F. & M. Ins. Co.* 11 N. Y. 516) the policy contained a condition that the insurer would not be liable for any loss occasioned by the explosion of a steam boiler. A steam boiler in use in the building exploded, whereby the fire was brought in contact with and consumed the property. This court held that the loss was within the exception created by the condition, and hence there could be no recovery. In the opinion it was said: "When, therefore, this policy proceeds to declare that the defendants will not be liable for any loss 'occasioned by the explosion of a steam boiler,' it refers prima facie to such a loss, as, by the prior provisions of the contract, the defendants would be bound to indemnify against, and not to one which would not be embraced in the general terms of the policy, and as to which there was no occasion to introduce an exception."

In *Miller v. London & L. F. Ins. Co.* 41 Ill. App. 395, a case very much like this one was decided. The exemption clause in the policy contained the same language as this one, and the fire preceded the explosion. The plaintiff's premises adjoined a mill which took fire and shortly after exploded, blowing the plaintiff's house off its foundation, and almost ruining it. It was held that the plaintiff could not recover.

In *German F. Ins. Co. v. Roost*, 55 Ohio St. 581, 36 L. R. A. 236, 45 N. E. 1097, a powder house situated across the street from plaintiff's house was struck by lightning, and an explosion occurred. Plaintiff's house was totally destroyed. The policy contained a provision that "this insurance does not apply to or cover . . . any loss by explosion, unless fire ensues, and then the loss or damage by fire only." The policy had attached thereto a special clause providing against any loss or damage caused by lightning. It was held that plaintiff could not recover, and the court said: "That destruction by explosion of a house 71 feet away from one struck by lightning should be deemed a natural result of the lightning is at least a doubtful proposition. But, be that as it may, when there follows in a policy, after a lightning clause, a provision which distinctly excludes liability for loss by explosion, it appears plain that, within the contemplation of the parties at the time of the making of the contract, a loss by explosion could not have been understood to

be embraced within the protection of the policy. . . . In no case which has come within our observation—and we have examined a great many—has a liability been found to attach where there was a provision excluding liability for loss by explosion, and the loss was caused by fire, or, as here, by lightning, taking effect in a distant building, and the damage being wrought to the insured property by an explosion produced by the fire or the lightning, without either of the latter agencies coming in contact with the insured property."

In *Heuer v. North Western Nat. Ins. Co.* 144 Ill. 393, 19 L. R. A. 504, 33 N. E. 411, an explosion was produced by the lighting of a match in a basement filled with illuminating gas. Goods insured were damaged, but not by burning. The policy contained an explosion clause similar to that of the standard policy, and it was held the plaintiff could not recover; the court saying: "Here the goods insured were not brought in contact with the fire produced by the lighting of the match, but with the explosive power of a fireless concussion, which caused the floor of the store in which they were situated to fall, and thereby occasioned the injury."

In *Stanley v. Western Ins. Co.* L. R. 3 Exch. 71, the plaintiff carried on the insured premises the business of extracting oil from shoddy. An inflammable and explosive vapor evolved in the course of the process escaped and caught fire, setting fire to other things. It afterward exploded, and caused a further fire, besides doing damage by the explosion. The policy contained a clause that the company would not "be responsible for loss or damage by explosion except for such loss or damage as shall arise from explosion by gas." It was held that the company was not liable.

There are authorities that both in reasoning and decision tend otherwise, but attention is not called to them in detail because the position of this court as to that question is settled. Our object in calling attention to a few of the authorities in other jurisdictions has been to show that this court is not alone in the position taken.

Counsel for plaintiffs insists that the wreck of plaintiffs' building by the explosion in the Tarrant building was direct loss or damage by fire, within the meaning of the policy, and that the situation calls for precisely the same disposition as if the question was presented in an action upon a policy covering the Tarrant building, where the fire had been raging for something like thirty minutes before the explosion. He quotes from the opinion of the court in *Hefron v. Kittanning Ins. Co.* 132 Pa. 586, 20 Atl. 700: "Nor are losses by explosions for-

sign to the risks assumed by insurance against fire. They are like the damages by smoke and water, losses by theft, destruction by the falling of buildings, or injury by fire agencies without actual ignition, all of which are to be found among the losses excepted against in clauses in policies of insurance." This he follows with instances and authorities supporting them; as where goods are injured by water thrown to extinguish a fire, where goods are lost or damaged in the course of an effort to remove them in order to save them from fire raging in a building adjoining, where an insured building is blown up under direction of public authorities to prevent the spread of a conflagration (supported by early authorities in this state), and where the insurers were held liable for theft of insured property during a fire. While it is true that in the cases cited as holding these several propositions, cases, which cover a variety of jurisdictions, the insured was held liable as for a loss by fire, the decision usually was placed on the ground that the fire was the proximate cause of the loss. In this way very substantial additions were made by the courts to the liability expressly covered by the contract of insurance, and hence the exemption clauses became features in some contracts of insurance before the standard policy was adopted in this state, and when it was created such a clause was incorporated into it. The fact that the courts, prior to the insertion of the explosion exemption clause, held that under the policy the insurer was liable as for a loss by fire, does not make it a loss by fire direct, if it is in reality a loss by explosion. Where a policy contains a provision that there shall be no liability for explosion of any kind, as well as a provision for liability for direct loss by fire, each provision must be given full force and effect, unrestrained by decisions made before the explosion exemption clause became a feature of the contract. So, while it may be that, but for the explosion clause, we should feel constrained to follow those earlier decisions to which reference was made generally in the *Briggs Case*, and hold defendant liable because a fire in another building was the cause of the explosion, we are not permitted to do that in view of the exemption clause relieving defendant from liability from explosions of any kind; and so we held in the *Briggs Case*, charging the insurance company with the loss by fire which in that case followed the explosion, and compelling plaintiff to bear the loss caused by the explosion. A similar construction was given to the lightning provision of an insurance contract in *Beakes v. Phoenix Ins. Co.* 143 N. Y. 402, 26 L. R. A. 267, 38 N. E. 453. Judge Bartlett writing. In that case a policy of

insurance contained a clause declaring that "this policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term 'lightning,' and in no case to include loss or damage by cyclone, tornado, or wind-storm)." The plaintiff's buildings were struck by lightning, and immediately thereafter a high wind came up, which substantially damaged the buildings. Defendant claimed it should not be charged with damages occasioned by the wind; but the trial court charged that, if the jury found that the buildings were struck by lightning, and this was the proximate cause of the loss, plaintiff was entitled to recover the whole loss, although the wind subsequently increased the damage; and refused to charge, as requested, that "the jury must strictly confine their verdict to the actual damage done by the lightning." The plaintiff had judgment. In this court it was reversed on the ground that, under the policy, the recovery should have been limited to the direct loss or damage done by lightning. The construction placed upon this clause is in harmony with the construction placed upon the explosion clause in the *Briggs Case*.

It seems to me that, approaching an examination of such features of this policy as are applicable to the facts of this case in

the spirit of the opinion in *Peabody v. Satterlee*, 166 N. Y. 179, 52 L. R. A. 956, 59 N. E. 818, in which it is said: "It is important, alike, to the insurer and insured that the standard policy should be fairly construed, in order that an instrument which came from the hands of its creators presenting many questions for construction be rendered clear and easily understood,"—we must reach the conclusion that the language of the policy, so far as it operates upon the facts in this case, is free from doubt. It insures plaintiff against all direct loss or damage by fire, and relieves the insurer from liability for all loss caused directly or indirectly by explosions of any kind and necessarily, therefore, from a loss by concussion caused by an explosion in a neighboring building, whether the explosion be brought about by a lighted match, a fire, or other cause. If this conclusion is correct, it is unnecessary to consider the other questions discussed by counsel.

The judgment should be reversed, and judgment ordered for defendant on submission, with costs to defendant in both courts.

Gray, O'Brien, Haight, and Vann, JJ., concur. Martin, J., concurs in result. Bartlett, J., dissents.

MISSOURI SUPREME COURT.

William NICHOLS et al., Trustees of Commercial National Bank of St. Louis, Apts.,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Resp't.

(.....Mo.....)

1. The right to contract for the adjustment of a claim on an insurance policy forfeited for nonpayment of premiums, according to the laws of the insurer's domicile, although the insurance is upon the life of a person residing in another state where the contract is made, is accorded by a statute of the latter state providing for such adjustment, but making its provisions inapplicable to policies issued by foreign companies authorized to do business in the state where the laws of their domicile provide for continued insurance upon such forfeiture.
2. The judicial power to interpret a statute does not contemplate the power to amend it when it comes before the court for construction.
3. Leaving it optional with insured as

NOTE.—For another case in this series as to construction of statute providing against forfeiture of insurance policy, see *Cravens v. New York L. Ins. Co.* 53 L. R. A. 305.

As to constitutionality of statute against forfeiture, see *McGarron v. Michigan Millers' Mut. F. Ins. Co.* 54 L. R. A. 739.
62 L. R. A.

to the kind of policy he will take in the adjustment of a claim upon a policy forfeited for nonpayment of premium does not prevent the application of a proviso of the local statute making inapplicable its provisions as to such adjustment, where the laws of the state of the insurer's domicile, with respect to which the parties have agreed the contract shall be construed, provide for the methods of adjustment which the local statute requires to make its provisions inapplicable.

4. A proviso in a statute governing the adjustment of claims upon life-insurance policies forfeited for nonpayment of premiums, that "in no instance shall a policy be forfeited . . . after the payment of three annual premiums thereon;" but in all such instances "the holder of such policy shall be entitled to paid-up insurance" the value of which shall be equal to that provided in another section of the statute,—does not give a right to extend temporary insurance, although the section referred to provides for the ascertainment of a premium which may be used to obtain temporary insurance for the full amount of the policy.
5. A provision for paid-up insurance, in a statute governing the adjustment of claims upon policies forfeited for nonpayment of premiums, will not be construed by the court to mean paid-up temporary insurance for the full amount of the policy.

A PPEAL by plaintiffs from a judgment of the St. Louis Circuit Court in favor of plaintiffs for a less amount than was demanded in an action brought to enforce the amount alleged to be due on a life-insurance policy. *Affirmed.*

The facts are stated in the opinion.

Messrs. Stewart, Cunningham, & Elliot, for appellants:

This policy is a Missouri contract.

Cravens v. New York L. Ins. Co. 148 Mo. 583, 53 L. R. A. 305, 50 S. W. 519; *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226-232, 35 L. ed. 497-500, 11 Sup. Ct. Rep. 822; *Price v. Connecticut Mut. L. Ins. Co.* 48 Mo. App. 281.

Sections 5856 and 5858, Rev. Stat. 1889, apply to this case, unless some law or reason to the contrary be shown.

Section 5857 has, and can have, no application. That section gives the insured an option, which he may exercise, if he will, within sixty days after §§ 5856 and 5858 take effect; but it puts no compulsion upon the insured to exercise that option; and it gives the insurer no right or exemption whatever, unless the insured exercises that option within that time. In the present instance the insured did not so elect. He rested upon his right given by §§ 5856 and 5858. That fact makes § 5857 inapplicable.

Cravens v. New York L. Ins. Co. 148 Mo. 583, 53 L. R. A. 305, 50 S. W. 519; *Hanthorne v. Brooklyn L. Ins. Co.* 5 Mo. App. 73; *New York L. Ins. Co. v. Cravens*, 178 U. S. 389-395, 44 L. ed. 1116-1118, 20 Sup. Ct. Rep. 962; *Knapp v. Homeopathic Mut. L. Ins. Co.* 117 U. S. 411, 29 L. ed. 960, 6 Sup. Ct. Rep. 807.

The body of § 5859 does not, but the proviso does, apply to and control this case.

Price v. Connecticut Mut. L. Ins. Co. 48 Mo. App. 281.

The fact that any given policy does not by its terms prevent a forfeiture after payment of two full annual premiums leads logically towards the conclusion that that policy is not such an one as § 5859 intends shall be excepted or excluded from the application to it of § 5856.

Cravens v. New York L. Ins. Co. 148 Mo. 583, 53 L. R. A. 305, 50 S. W. 519; Mo. Laws 1895, p. 197; *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226-233, 35 L. ed. 497-500, 11 Sup. Ct. Rep. 822; *Price v. Connecticut Mut. L. Ins. Co.* 48 Mo. App. 281.

According to the terms and provisions of this policy and of the statute of New York there would in this case be complete and final forfeiture, notwithstanding that not only two, but three full annual premiums had been paid before default. As the facts are, the insurer, according to the terms of the policy and the New York statute, is 62 L. R. A.

bound for nothing. As the facts are, the insurer is by the statute of Missouri (§§ 5856 and 5858) bound to pay \$4,882.87, that sum being the face of the policy, \$5,000, less one unpaid annual premium and interest.

Cravens v. New York L. Ins. Co. 148 Mo. 583, 53 L. R. A. 305, 50 S. W. 519; *Hanthorne v. Brooklyn L. Ins. Co.* 5 Mo. App. 73; *Northwestern Mut. L. Ins. Co. v. Barbour*, 92 Ky. 427, 15 L. R. A. 449, 17 S. W. 796; *Knapp v. Homeopathic Mut. L. Ins. Co.* 117 U. S. 411, 29 L. ed. 960, 6 Sup. Ct. Rep. 807; *Sheerer v. Manhattan L. Ins. Co.* 20 Fed. 886; *Ashbrook v. Phœnia Mut. L. Ins. Co.* 94 Mo. 72, 6 S. W. 462; *Omaha Nat. Bank v. Mutual Ben. L. Ins. Co.* 81 Fed. 935, 28 C. C. A. 300, 55 U. S. App. 73, 84 Fed. 122.

This policy, therefore, has not by its terms accomplished the object of the Missouri statutes in this case.

Price v. Connecticut Mut. L. Ins. Co. 48 Mo. App. 296; *Cravens v. New York L. Ins. Co.* 148 Mo. 605, 53 L. R. A. 305, 50 S. W. 519.

There is nothing in the policy or the facts in this case to bring it under the control or application of the body of § 5859.

Cravens v. New York L. Ins. Co. 148 Mo. 583, 53 L. R. A. 305, 50 S. W. 519; *Hanthorne v. Brooklyn L. Ins. Co.* 5 Mo. App. 73; *Northwestern Mut. L. Ins. Co. v. Barbour*, 92 Ky. 427, 15 L. R. A. 449, 17 S. W. 796; *Knapp v. Homeopathic Mut. L. Ins. Co.* 117 U. S. 411, 29 L. ed. 960, 6 Sup. Ct. Rep. 807; *Sheerer v. Manhattan L. Ins. Co.* 20 Fed. 886; *Ashbrook v. Phœnia Mut. L. Ins. Co.* 94 Mo. 72, 6 S. W. 462; *Omaha Nat. Bank v. Mutual Ben. L. Ins. Co.* 81 Fed. 935, 28 C. C. A. 300, 55 U. S. App. 73, 84 Fed. 122; *Price v. Connecticut Mut. L. Ins. Co.* 48 Mo. App. 281.

The "paid-up insurance" to which the proviso of § 5859 and also § 5856 entitle the plaintiffs is the paid-up, extended, "temporary insurance for the full amount written in the policy" for such term as the net value of the policy, taken as a net single premium, will keep the policy in force, as is prescribed in § 5856.

Mo. Rev. Stat. 1879, § 5986; Mo. Rev. Stat. 1889, §§ 5856-5858; Mo. Laws 1895, p. 197; *Knapp v. Homeopathic Mut. L. Ins. Co.* 117 U. S. 411, 414, 415, 29 L. ed. 960, 961, 6 Sup. Ct. Rep. 807; *Price v. Connecticut Mut. L. Ins. Co.* 48 Mo. App. 281.

Messrs. Seddon & Blair, Nathaniel S. Brown, James L. Blair, and Edward L. Short for respondent.

Fox, J., delivered the opinion of the court:

This is a suit upon a policy of life insurance issued and delivered April 9 1896 in

Missouri, to a citizen of Missouri, by the defendant (respondent), a corporation of the state of New York, then doing a life-insurance business in Missouri. A jury was waived, and the case was tried by the circuit court upon the petition, the amended answer, the application for insurance, the policy of insurance, and a stipulation of facts. The petition sets forth the issue and delivery of the policy in Missouri on the 9th of April, 1896, to one Samuel Harris, subject to the laws of Missouri, the payment by said Harris of three annual premiums, sufficient, under the statutes of Missouri, to keep the policy in force long after the death of said Harris; the assignment and transfer of the policy by Harris, the assured, to the plaintiffs, who were and are his creditors; the death of said Harris on the 28th of November, 1899; the making and delivery to defendant of proofs of death, and demand of payment of \$5,000; and the failure and refusal of defendant to pay the same. The petition prays judgment for \$5,000, the full amount of the policy, with interest and special damages. The answer sets up a default by Harris in the payment of the fourth annual premium on this policy, and contends that by reason of such default the policy became void and of no effect, and that the plaintiffs, as his assignees, had and have no right to recover on the policy, but that defendant is liable to the plaintiffs only for the amount of a new paid-up policy of insurance in the sum of \$305, which sum defendant says it is ready and willing to pay.

This cause was submitted to the court upon the following agreed statement of facts.

"For the purpose of the trial of this cause and at said trial the plaintiffs and defendant stipulate and agree upon the following facts, *viz.* :

"First. Prior to the year 1898, and until January 27, 1899, the Commercial Bank of St. Louis was a banking corporation of the state of Missouri, transacting business at the city of St. Louis. Said corporation was dissolved January 27, 1899, and plaintiffs then were the president and directors and managers of the affairs of said corporation, and then became, and now are, the trustees of the Commercial Bank of St. Louis, and entitled to sue as such upon causes of action accrued or accruing to said bank.

"Second. Prior to April 9, 1896, defendant, the Mutual Life Insurance Company of New York, was, and still is, a corporation of the state of New York, authorized and licensed under the provisions of the laws of Missouri to carry on the business of life insurance in Missouri, and then was, and ever since then has been, and still is, carrying on said business in Missouri under the license and authority of the state of Missouri, sub-

ject to and in conformity with all the requirements and provisions of statutes of Missouri in that behalf provided.

"Third. In the prosecution of its said business under its said license, defendant on or about April 9, 1896, delivered at St. Louis, Missouri, to Samuel Harris, a citizen and resident of Missouri, its certain policy of insurance, numbered 764,369, hereto attached, with the application therefor, also attached and made part hereof, and then and there accepted and received from said Harris \$110.50,—one full annual premium on said policy. Subsequently, on or before April 9, 1897, defendant, at St. Louis, accepted and received from said Harris \$110.50, the second full annual premium on said policy, which payment operated to keep said policy in force till April 9, 1898. Subsequently, on or before April 9, 1898, defendant, at St. Louis, accepted and received from said Harris \$110.50, the third full annual premium on said policy, which payment operated to keep said policy in force till the 9th day of April, 1899, at noon.

"Fourth. Said Harris failed to pay the premium falling due April 9, 1899, and never paid, nor did anyone for him ever pay, any premium on said policy, other than the first three annual premiums above mentioned. Said Samuel Harris died on the 28th day of November, 1899, at St. Louis.

"Fifth. On April 9, 1899, when the fourth annual premium fell due and was not paid, the net value of said policy, computed upon the American experience table of mortality, with 4½ per cent interest per annum, was one hundred and thirty-eight dollars and seventy-five cents (\$138.75), three fourths of which sum was one hundred and four dollars and four cents (\$104.04). There were no notes or other indebtedness to the defendant given or existing on account of past premiums on said policy. One hundred and four dollars and four cents (\$104.04), taken as a net single premium for temporary insurance for \$5,000 written in said policy, would keep said policy in force for the term of two (2) years and eighteen (18) days after April 9, 1899.

"Sixth. During the life of said Samuel Harris and of said policy, said Harris, for value received, while said Commercial Bank was his creditor to the amount of about \$6,000, assigned, transferred, and set over said policy to the Commercial Bank of St. Louis as collateral security to secure the indebtedness of said Harris to said bank. Plaintiffs are still the holders of said policy, and are creditors of said Samuel Harris in manner aforesaid to the amount of about \$6,000, as aforesaid.

"Seventh. Plaintiffs, within due time after the death of said Samuel Harris, gave

defendant notice thereof, and on or about December 15, 1899, submitted and delivered to defendant proofs as required by said policy. Defendant thereupon offered and was ready to issue to plaintiff a paid-up policy for \$305, being the amount of paid-up insurance purchasable by the life reserve of said policy according to the provisions of § 88, chap. 690, p. 1969, of the Laws of the State of New York of 1892, but has refused and still refuses to pay or do more.

"Eighth. Section 88, chap. 690, p. 1969, of the Laws of the State of New York of 1892, in force at the date of said policy as a law of New York, is in the following words and figures, to wit: 'Sec. 88. Surrender value of lapsed or forfeited policies.—Whenever any policy of life insurance issued after January 1st, 1880, by any domestic life insurance corporation after being in force three full years, shall, by its terms, lapse or become forfeited for the nonpayment of any premium or any note given for a premium or loan made in cash on such policy as security, or of any interest on such note or loan, the reserve on such policy computed according to the American experience table of mortality at the rate of 4½ per cent per annum, shall on demand made, with surrender of the policy within six months after such lapse or forfeiture, be taken as a net single premium of life insurance at the published rates of the corporation at the time the policy was issued, and shall be applied, as shall have been agreed in the application or policy, either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance for that amount at the age of the insured at the time of lapse or forfeiture, or to purchase upon the same life at the same age, paid-up insurance payable at the same time and under the same conditions, except as to payments of premiums as the original policy. If no such agreement be expressed in the application or policy, such single premium may be applied in either of the modes above specified at the option of the owner of the policy, notice of such option to be contained in the demand hereinbefore required to be made to prevent the forfeiture of the policy. The reserve hereinbefore specified shall include dividend additions calculated at the date of the failure to make any of the payments above described according to the American experience table of mortality, with interest at the rate of 4½ per cent per annum after deducting any indebtedness of the insured on account of any annual or semi-annual or quarterly premium then due and any loan made in cash on such policy, evidence of which is acknowledged by the insured in writing. The net value of the insurance given for such single premium under this section L. R. A.

tion, computed by the standard of this state, shall in no case be less than two thirds of the entire reserve computed according to the rule prescribed in this section, after deducting the indebtedness as specified; but such insurance shall not participate in the profits of the corporation. If the reserve upon any endowment policy applied according to the provisions of this section as a single premium of temporary insurance be more than sufficient to continue the insurance to the end of the endowment term named in the policy, and if the insured survive that term, the excess shall be paid in cash at the end of such term, on the conditions on which the original policy was issued. This section shall not apply to any case where the provisions of the section are specifically waived in the application, and notice of such waiver is written or printed in red ink on the margin of the face of the policy when issued.' "

The court sitting as a jury, upon the agreed statement of facts as herein quoted, rendered judgment for the plaintiffs in the sum as admitted to be due by the answer,—\$305. After an unsuccessful motion for new trial on the part of the plaintiffs, this cause is brought here by appeal.

The learned trial judge, in disposing of this case, filed a written opinion, expressing his views upon the law, as applicable to the facts agreed upon. That we may fully comprehend and appreciate the position taken by the trial court, we here quote the opinion.

"This is an action upon a policy of insurance, in which plaintiffs claim that they are entitled to recover the sum of \$5,000, and defendant admits a liability of \$305. The question is to be determined by a construction of the statute of this state with reference to temporary insurance. I know of no decision that has ever been rendered in this state or elsewhere upon the particular points of law involved in this case, and the industry of counsel has failed to produce any case exactly like the one which I am now considering. Section 5836 of the Statutes of 1889 provides that no policies of life insurance issued by any life insurance company authorized to do business in this state on and after the 1st day of August, 1879, shall, after payment of two full annual premiums, be forfeited or become void by reason of nonpayment of premium thereon, but it shall be subject to the following rules of commutation, to wit: 'The net value of the policy when the premium becomes due and is not paid, shall be computed upon the American experience table of mortality, with four and one half per cent interest per annum, and after deducting from three fourths of such net value any notes or other indebtedness to the company on account of past premium payments on said policy issued to the in-

sured, which indebtedness shall be canceled, the balance shall be taken as a net single premium for temporary insurance, for the full amount written in the policy, and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium and the assumption of mortality and interest aforesaid.'

"It is conceded by both parties to the case that, were it not for the amendment, passed in the year 1895, of § 5859 of the Statutes of 1889, the plaintiffs would be entitled to recover the full amount of \$5,000 in this case. This is an action against the Mutual Life Insurance Company of New York, a company organized under the laws of another state, doing business in this state. It is therefore one of the insurance companies referred to in § 5856. Three premiums were paid. It will be noticed that this amendment provides that, in case of default in (i. e., after) the payment of two premiums, the policy shall not be forfeited, but, if the value of the policy at the time of the default, computed as stated in § 5856, is sufficient to procure temporary insurance for the time stated therein, if that runs past the date of the death of the deceased, then, as a matter of course, the assured would be entitled to recover the full amount of the policy,—\$5,000. It is conceded that, if said computation is made in this case, it would procure temporary insurance sufficient to carry the policy for the full amount beyond the date of the death of the deceased. But the defendant invokes the amendment of § 5859, which was passed in the year 1895, to be found in Session Acts of 1895 (p. 197). The amendment of that section is as follows: 'Sec. 5859. The foregoing provisions not applicable when. The three preceding sections shall not be applicable in the following cases, to wit: If the policy shall have been issued by any company authorized to do business in this state and organized under the laws of another state of the United States, which prescribe a surrender value or paid-up or temporary insurance in case of default in payment of premiums and shall contain an agreement for such surrender value, temporary or paid-up insurance as prescribed by such other state as a part of said policy: . . . Provided, that in no instance shall a policy be forfeited for nonpayment of premiums after the payment of three annual premiums thereon; but in all instances where three annual premiums shall have been paid on a policy of insurance, the holder of such policy shall be entitled to paid-up insurance, the net value of which shall be equal to that provided for in § 5856 of this article.' It is admitted by the agreed statement of facts that \$305 is the amount of

paid-up insurance which plaintiffs would be entitled to under this clause prior to the passage of this act. Previous to this amendment, the supreme court of this state (*Cravens v. New York L. Ins. Co.* 148 Mo. 583, 53 L. R. A. 305, 50 S. W. 519), and the Supreme Court of the United States, in *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822, held that, notwithstanding policy holders may contract with reference to the laws of the state where the policy is issued, notwithstanding they may agree that the laws of such state may be taken and deemed to be portions of the policy, notwithstanding they may waive any provision,—for instance, such a provision for temporary insurance under § 5856,—yet such agreement as that is null and void, and the policy is construed according to the laws of the state of Missouri, which forbid and prevent forfeiture. It seems to me that this § 5859 is a legislative recognition of the right of parties to contract with reference to the insurance laws of other states, and in that respect it may be regarded as repealing legislatively, we might say, the decisions which I have mentioned. That is, it recognizes and gives parties the right to contract with reference to laws of another state. Therefore the question to be determined in this case is whether or not the policy in question falls within the purview of § 5859, which provides that § 5856, which gives temporary insurance, shall not be applicable if the policy shall have been issued by any company authorized to do business in this state that is organized under the laws of another state, which prescribe a surrender value or paid-up or temporary insurance in case of default in the payment of premiums,—the laws of New York provide for paid-up insurance and for temporary insurance. Then the section goes on further and says, 'and shall contain an agreement for surrender value, temporary or paid-up insurance, as prescribed by such other state as a part of said policy.' The policy in question contains a provision for paid-up insurance in accordance with the laws of New York. It seems to me, therefore, that the policy falls within § 5859, as amended. This section provides, in the latter part, 'provided that in no instance shall a policy be forfeited for nonpayment of premium after the payment of three annual premiums thereon; but in all instances where three annual premiums shall have been paid on a policy of insurance, the holder of such policy shall be entitled to paid-up insurance, the net value of which shall be equal to that provided for in § 5856 of this article.' Under the laws of New York, they could not have obtained temporary insurance in this case, for the reason that the law provides

for demand for such temporary insurance being made within a certain time, which, it appears, was not done. This policy was assigned to William Nichols and others, trustees of the Commercial Bank. If such demand were not made under the laws of New York, they would not have been able to recover anything whatever in this case, were it not for the saving clause in the amendment of § 5859, which provides that, in all cases where three premiums have been paid, the then holder of the policy shall be entitled to paid-up insurance. Under that provision or proviso of this amendment, the defendant in this case has tendered the amount of \$305,—it has tendered a paid-up policy for that amount. Judgment, therefore, will be rendered in favor of the plaintiffs for \$305."

We are of the opinion that the trial court very appropriately and sharply presents the question for determination in this controversy, where it says: "Therefore the question to be determined in this case is whether or not the policy in question falls within the purview of § 5859, which provides that § 5856, which gives temporary insurance, shall not be applicable if the policy shall have been issued by any company authorized to do business in this state that is organized under the laws of another state, which prescribes a surrender value or paid-up or temporary insurance in case of default in the payment of premiums." In 1895 the legislature amended § 5859, Rev. Stat. 1889, by striking out all of that section, and inserting in lieu thereof the following section:

"Sec. 5859. The foregoing provisions not applicable, when. The three preceding sections shall not be applicable in the following cases, to wit: If the policy shall have been issued by any company authorized to do business in this state, and organized under the laws of another state of the United States which prescribes a surrender value or paid-up or temporary insurance in case of default in payment of premiums, and shall contain an agreement for such surrender value, temporary or paid-up insurance, as prescribed by such other state as a part of said policy, or if the policy shall contain a provision for an unconditional cash-surrender value at least equal to the net single premium for the temporary insurance provided hereinbefore, or for the unconditional commutation of the policy for nonforfeitable paid-up insurance, or if the legal holder of the policy shall, within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then, and in any of the foregoing cases, this act shall not be applicable: Provided, that in no in-

62 L. R. A.

stance shall a policy be forfeited for non-payment of premiums after the payment of three annual premiums thereon; but in all instances where three annual premiums shall have been paid on a policy of insurance, the holder of such policy shall be entitled to paid-up insurance, the net value of which shall be equal to that provided for in § 5856 of this article. Approved April 19, 1895."

The preceding sections, upon which § 5859 was to operate, were §§ 5856, 5857, 5858, Rev. Stat. 1889, which were as follows:

"Sec. 5856. No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this state, on and after the 1st day of August, A. D. 1879, shall, after payment upon it of two full annual premiums, be forfeited or become void by reason of the nonpayment of premium thereon, but it shall be subject to the following rules of commutation, to wit: The net value of the policy, when the premium becomes due and is not paid, shall be computed upon the American experience table of mortality, with 4½ per cent interest per annum, and after deducting from three fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium and the assumption of mortality and interest aforesaid; but, if the policy shall be an endowment, payable at a certain time, or at death if it should occur previously, then, if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium for a pure endowment of so much as such premium will purchase, determined by the age of the insured at date of defaulting the payment of premium on the original policy, and the table of mortality and interest as aforesaid, which amount shall be paid at end of the original term of endowment, if the insured shall then be alive.

"Sec. 5857. At any time after the payment of two or more full annual premiums, and not later than sixty days from the beginning of the extended insurance provided in the preceding section, the legal holder of the policy may demand of the company, and the company shall issue, its paid-up policy, which, in case of an ordinary life policy, shall be for such an amount as the net value

of the original policy at the age and date of lapse, computed according to the actuaries' or combined experienced table of mortality, with interest at the rate of 4 per cent per annum, without deduction of indebtedness on account of said policy, will purchase, applied as a single premium upon the table rates of the company; and in case of a limited payment life policy, or of a continued payment endowment policy, payable at a certain time, or at death, it shall be for an amount bearing such proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear to the number of such annual premiums stipulated to be paid: Provided, that from such amount the company shall have the right to deduct the net reversionary value of all indebtedness to the company on account of such policy; and Provided, further, that the policy holder shall, at the time of making demand for such paid-up policy, surrender the original policy, legally discharged, at the parent office of the company.

"Sec. 5858. If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in § 5856, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in the payment of premium, anything in the policy to the contrary notwithstanding: Provided, however, that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy within ninety days after the decease of the insured; and Provided, also, that the company shall have the right to deduct from the amount insured in the policy the amount compounded at 6 per cent interest per annum of all the premiums that had been forborne at the time of the decease, including the whole of the year's premium in which the death occurs; but such premiums shall in no case exceed the ordinary life premium for the age at issue, with interest as last aforesaid."

The questions presented in this controversy are sharply in dispute: First, it is contended by appellants that this policy falls within the provisions of § 5856, *supra*; second, if it does not fall directly within the provisions of that section, three full annual premiums having been paid, the proviso in § 5859, p. 197, Laws 1895, as herein quoted, is applicable, and that "paid-up insurance," as mentioned in the proviso, contemplates temporary insurance, as provided for in § 5856, *supra*. On the part of the respondent, it is contended that this policy falls within

the provision of the body of § 5859, *supra*, and hence § 5856 has no application to it, other than merely furnishing the basis for the calculation of the amount of paid-up insurance the assured was entitled to, as provided for in the proviso of § 5859. These conflicting contentions are very earnestly and ably presented by counsel for appellants and respondent. Will say, however, for this court to undertake to discuss and review every phase of the questions to which our attention is directed, would make a volume. This is a new question, and one of first impression. This court, or the courts of any of the other states, so far as we have been able to discover, have never been called upon to determine the precise question involved in this case.

The policy upon which this suit is predicated was issued and delivered April 9, 1896, in Missouri, to a citizen in Missouri. It was issued by a corporation of the state of New York, then doing a life insurance business in Missouri. It is conceded by both parties that this policy of insurance is a Missouri contract. In the application for insurance in this case, which by the policy is made a part of the contract, it was agreed between the parties that the contract of insurance should be subject to and based upon the laws of the state of New York. Until the enactment of § 5859, *supra*, the law was well settled by this court, as well as the Supreme Court of the United States, that provisions in a policy similar to the provisions contained in the policy before us could be of no avail to the insurer; that, notwithstanding the provisions in the contract, the policy of insurance would be construed under the statutes of Missouri. See cases of *Cravens v. New York L. Ins. Co.* 148 Mo. 583, 53 L. R. A. 305, 50 S. W. 519 (which was affirmed by the Supreme Court of the United States in 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962) and *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822. We are now confronted with a statute, for construction, which extends the contractual powers of the parties in a contract for insurance, and authorizes them, in respect to this particular subject, to insert provisions in an insurance policy that, under the cases cited, were of no effect under the law in force at the time the conclusions were reached in those cases. Hence the remark of the trial judge in his opinion was very appropriate when he said: "It seems to me that this § 5859 is a legislative recognition of the rights of parties to contract with reference to the insurance laws of other states, and in that respect it may be regarded as repealing legislatively, we might say, the decisions which I have mentioned." In the case of *Epperson v. New York L. Ins.*

Co. 90 Mo. App. 436, § 5859 was directly in judgment before that court. Ellison, J., speaking for the court, said: "It will be seen that this act materially changes the old section, for it, in the first part thereof, clearly relieves the policy of a company organized in a foreign state from the effect or application of § 5856, if the laws of that state prescribe a surrender value or paid-up or temporary insurance in case of default in payment of premiums, and the policy, shall contain an agreement for these things as they are prescribed by said laws. And the last part of said act, by proviso, makes a material addition to the old section. It extends the period in which a policy may be forfeited from two years, as provided in § 5856, to three years. The first part of the act . . . has, by its terms, application only to policies issued by foreign companies. The balance of the act, including the proviso, applies to all policies, whether foreign or local. In this case it was shown at the trial that the laws of the state of New York did prescribe a surrender value or paid-up or temporary insurance in case of default in the payment of premiums. It was shown that the policy in suit contained an agreement for such surrender value, temporary, or paid-up insurance as thus prescribed by the laws of said state. And it was also shown that the deceased had not made three payments of premium. It is therefore clear . . . that the policy sued on was forfeited and void at the death of deceased." The conclusion reached by Judge Ellison in that case is in harmony with our views as to the proper construction of that statute. The legislature, by the enactment of § 5859, clearly contemplated the extension or broadening of the powers of the contracting parties in respect to insurance. This policy, from its provisions, clearly falls within the terms of § 5859, and the liability of the respondent must flow from the application of the terms of that section.

It is insisted by appellants that § 5859 should be construed as though the words "after payment of two annual premiums" were written into each prescription of the agreements. In other words, it is contended that this court should so interpret and read that section that those words would be added to it. "Courts do not sit to say what the law ought to be, but it is their duty to declare the law as they find it, leaving its wisdom and policy to the legislature." In the exercise of our judicial power, it is our duty to so interpret the law as to make it harmonize with the intent of the lawmakers; but we are limited, even in the application of this principle, to a judicial interpretation, which by no means contemplates the power to amend the law as handed us for construction. *2 L. R. A.*

This section is not ambiguous. It is simply to be construed as meaning what it says. Parties are not compelled to contract under its provisions, but, if they do, the liabilities are to be determined from giving the terms of the statute their ordinary and familiar signification and import.

It is next insisted that this policy does not fall within the body of § 5859, so as to render inapplicable the three preceding sections referred to, for the reason that the New York statute does not contain the necessary provisions to bring it within the purview of the requirements of § 5859; and it is also urged that the policy does not contain the required agreements in respect to surrender value, temporary or paid-up insurance, upon default being made in the payment of premiums. Will say, in respect to such contention, that we have carefully examined the policy and the law of New York, as admitted in the stipulation, and from such examination we have reached the conclusion that both the law of New York and the policy sued upon contain all the necessary provisions to bring this policy within the body of § 5859, and render inapplicable to it the three preceding sections (5856, 5857, and 5858), except so far as the proviso makes § 5856 applicable. It will be observed that § 5859, in its requirements of what the other states shall prescribe, and as to the agreement in respect thereto to be inserted in the policy, uses the terms disjunctively; that is to say, it provides that the foreign companies doing business in this state shall "prescribe a surrender value or paid-up or temporary insurance, in case of default of payment of premiums." It is apparent, under the requirements of that section, that, if the law of the foreign state and the policy provided for either of the methods of insurance upon default in the payment of premiums, it was a substantial compliance with that section. It will be noted, by reference to the law of New York and to the terms of the policy, that provision was made for paid-up insurance, as well as temporary insurance. The fact that the policy made it optional with the insured, as to the character of insurance he would accept, did not place it outside the bounds of that section.

This brings us to the last contention of appellants; that is, that, even if the policy does fall within § 5859, the proviso entitles plaintiffs to recover the full face of the policy under the provisions of § 5856. We are unable to reach the conclusion that the legislature, by the proviso in § 5859, undertook to destroy the force and effect of the body of the act. If the policy in suit falls within the provisions of the body of the act of § 5859, then § 5856, by the express terms of the statute, is not applicable; but appellants

insist on the proviso, which says: "Provided, that in no instance shall a policy be forfeited for nonpayment of premiums after the payment of three annual premiums thereon; but in all instances where three annual premiums shall have been paid on a policy of insurance, the holder of such policy shall be entitled to paid-up insurance, the net value of which shall be equal to that provided for in § 5856 of this article." It is clear that, if the legislature intended to destroy the force and power of the body of the act of § 5859, it would have used terms which would more clearly indicate such intent than are used in such proviso. If such was the intention, it could have avoided all confusion by simply saying that, in cases where three annual premiums are paid and default is made, then the holder of the policy shall be entitled to such character of insurance as is provided by § 5856. Instead, we have in the proviso, where three annual payments are made, the holder of the policy is entitled to "paid-up insurance, the net value of which shall be equal to that provided for in § 5856." It will be noted that § 5856 provides how the net value of the policy shall be computed when the premium becomes due and is not paid. It says: "The net value of the policy, when the premium becomes due and is not paid, shall be computed upon the American experience table of mortality, with $4\frac{1}{2}$ per cent interest per annum, and after deducting from three fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium and the assumption of mortality and interest aforesaid." Here we have provided for, in express terms, temporary insurance for the full amount written in the policy; and it is insisted and very ably argued that this is the character of insurance intended by the term "paid-up insurance," in the proviso of § 5859. We are unable to agree to this contention. It must be admitted that the science of life insurance is in an advanced state in this country, and in the management of the immense increased business,—in fact, in conducting any business involving the application of thorough business principles—certain terms are used, as applying to certain subdivisions of the business. We find upon the subject now before us that not only individuals, but, as well, legislatures and courts, have recognized the application

of certain terms to special classes of the business transaction. An examination of the laws of Missouri will demonstrate that the legislature keeps clearly the distinction between paid-up insurance and temporary and extended insurance. The very term "paid-up insurance" conveys the meaning that no more payments are required, and we are of the opinion that, when the legislature is dealing with the subject of life insurance, and uses the term "paid-up insurance," it means an insurance for life, fully paid up. Section 5857, Rev. Stat. 1889, recognizes very clearly the distinction between paid-up insurance and extended insurance. Upon that subject it provides: "At any time after the payment of two or more full annual premiums, and not later than sixty days from the beginning of the extended insurance provided in the preceding section, the legal holder of the policy may demand of the company, and the company shall issue, its paid-up policy, which, in case of an ordinary life policy, shall be for such an amount as the net value of the original policy at the age and date of lapse, computed according to the actuaries' or combined experience table of mortality, with interest at the rate of 4 per cent per annum, without deduction of indebtedness on account of said policy, will purchase, applied as a single premium upon the table rates of the company." In the case of *Cravens v. New York L. Ins. Co.* 148 Mo. 583, 53 L. R. A. 305, 50 S. W. 519, the court fully recognizes the distinction heretofore mentioned. Burgess, J., in that case, says: "This section, we think, has reference solely to paid-up policies, and gives the holder of a policy who is entitled to extended insurance under § 5983 the right to compel the company, within a limited time from the beginning of such extended insurance, to convert the extended insurance into a paid-up policy of a prescribed value, if he so desire." The very terms of the section under discussion (§ 5859) make the distinction, in its requirement of the foreign state "to prescribe paid-up or temporary insurance." It becomes more apparent that the term "paid-up insurance," as used in the proviso, was not intended to refer to temporary insurance, as mentioned in § 5856, when we look at the amendment of § 5859, as contained in § 7900, Rev. Stat. 1899, which provides: "Sec. 7900. The three preceding sections shall not be applicable in the following cases, to wit: If the policy shall contain a provision for an unconditional surrender value, at least equal to the net single premium, for the temporary insurance provided for hereinbefore, or for the unconditional commutation of the policy for nonforfeitable paid-up insurance, or if the legal holder of the policy shall, within sixty days after default of premium,

surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then, and in any of the foregoing cases, this article shall not be applicable: Provided, that in no instance shall a policy be forfeited for nonpayment of premiums after the payment of three annual premiums thereon; but in all instances where three annual premiums shall have been paid on a policy of insurance, the holder of such policy shall be entitled to paid-up or extended insurance, the net value of which shall be equal to that provided for in this article." It will be specially noted that the contrast is maintained all through the section between temporary and paid-up insurance, and finally this is emphasized in the proviso, which provides for "paid-up or extended insurance, the net value of which shall be equal to that provided for in this article."

It is urged that "paid-up insurance," as used in the proviso of § 5859, should be construed to mean "paid-up temporary insurance." To give it this construction would simply require judicial legislation by amending the section in that respect, and, in order to make it fully fall within the provisions of § 5856, we would be required to make the additional amendment; that is to say, "paid-up temporary insurance, for the full amount written in the policy." This amendment by judicial construction we are not willing to add to the proviso of § 5859. We take it that the words in the proviso, "the net value of which shall be equal to that provided for in § 5856," have reference solely to the computation of the net value of the policy, so as to ascertain the amount of paid-up insurance which can be bought. In other words, that reference to § 5856 in the proviso means that you shall compute the net value of the policy, in accordance with the provisions of § 5856, but it does not mean that the result of such computation shall purchase temporary insurance for the full amount written in the policy. If it had been so intended, it would have so stated, and would not have used the term "paid-up insurance," which has such a well-understood meaning under the laws of

this state, as well as nearly every other state in the Union.

It is insisted that the terms in the proviso cannot refer to computation of the net value, as provided in § 5856, alone, for the reason, it is urged, that the computation under that section cannot be made applicable to paid-up insurance for life as mentioned in the proviso. If a computation can be made, so as to invest the result in temporary insurance, the same calculation will produce the same result to invest in paid-up insurance. It will not answer the conclusion reached as to this policy to say that this construction is unfavorable to the policy holder. We are not prepared to say as to which construction would be most beneficial to the insured. The terms of the statute, and not the interests of either party, must control in the construction. We will say, however, that, while in this particular case it may operate unfavorably to the insured, had he lived beyond the period to which his temporary insurance, contended for, extended, and then been unable to further pay the premiums, his temporary insurance, even for the full amount of the policy, would be of little benefit to him.

The adjudications upon insurance policies, even as numerous as they are, shed but little light upon the construction and application of this comparatively new statute; hence we have been left to apply to the terms of the statute under discussion the common and approved use of such terms.

We have reached the conclusion that the policy upon which this suit is based falls within the provisions of § 5859, Laws 1895, p. 197, and that § 5856, Rev. Stat. 1889, is inapplicable, except so far as the proviso in said section renders its application necessary in the computation of the amount to be applied to the payment of paid-up insurance.

With these views, we are of the opinion there was no error in the judgment by the trial court, and that the learned trial judge correctly interpreted the law, as applicable to this case, in his written opinion, and *the judgment will be affirmed.*

All concur.

GEORGIA SUPREME COURT.

Frank D. AIKEN, Admr., etc., of M. P. King, Deceased, *Plff. in Err.*,

v.

SOUTHERN RAILWAY COMPANY.

(.....Ga.....)

*1. While a husband may make with a

*Headnotes by COBB, J.

railway company a contract for the safe carriage of his wife, the law will not imply such a contract from the mere purchase of an ordinary ticket by the husband for the wife. In such a case the law raises an implied contract for safe carriage in favor of the wife only.

2. Construing the petition in the present case most strongly against the

NOTE.—As to husband's right to maintain action for loss of wife's baggage, see Jackson—62 L. R. A.

ville, St. A. & H. River R. Co. v. Mitchell, 21 L. R. A. 487.

pleader, it simply alleged that the husband had purchased an ordinary ticket for the wife, and did not set up that there was any other contract than one which would result from the purchase of such a ticket.

(May 30, 1903.)

ERROR to the City Court for Polk County to review a judgment in favor of defendant in an action brought to recover for alleged breach of carriage contract. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bunn & Trawick, for plaintiff in error:

The contract is of a dual character: (a) A contract was made with Mr. King safely to carry and land his wife at Rockmart, on a consideration in money received from him; (b) a contract, implied by law, arose with Mrs. King, safely to so transport and land her.

Either of these parties could sue if the contract was broken with him or her, and had a choice between a suit in tort and a suit in contract.

Pollock, Torts, p. 652; *Patterson v. Augusta & S. R. Co.* 94 Ga. 141, 21 S. E. 283.

The actual contract was made with the husband. The contract with the wife was implied by law, on reasons of public policy. *Webb's Pollock, Torts*, p. 657, note A.

The damages to the husband from the breach of the contract make a chose in action, and go as personalty to his administrator.

Hines v. Johnston, 95 Ga. 629, 23 S. E. 470; *Ga. Code*, pp. 3458, 3070, 3072, 3076.

The service and labor of the wife during coverture are the property of her husband, he being liable for her support; and, on his death, they belong to his estate, and the wife cannot recover therefor.

Prescott v. Brown, 23 Me. 305, 39 Am. Dec. 623; *Scotton v. Mann*, 89 Ind. 404; *Jacksonville, St. A. & H. River R. Co. v. Mitchell*, 32 Fla. 77, 21 L. R. A. 487, 13 So. 673; *Lewis v. Atlanta*, 77 Ga. 756.

Messrs. Shumate & Maddox and Fielder & Ault, for defendant in error:

There could not be a contract for safe carriage between the railway company and two parties, the passenger and the person who paid for the tickets.

The right to recover for an alleged injury to the wife was a personal action, and, the husband having failed to commence this action during the eighteen months he lived after the accident, the right of action died with him, and did not survive to his administrator.

Brauner v. Sterdevant, 9 Ga. 69; *Frazier v. Georgia R. & Bkg. Co.* 101 Ga. 77, 28 S. 62 L. R. A.

E. 662; Thompson v. Central R. Co. 60 Ga. 120.

As tort is the natural foundation of an action, a declaration will be construed to be in tort unless it clearly appears that the suit is on contract.

Whittenton Mfg. Co. v. Memphis & O. River Packet Co. 21 Fed. 896.

Cobb, J., delivered the opinion of the court:

Aiken, as administrator of King, brought suit against the Southern Railway Company on January 20, 1902, alleging that King was the husband of Eugenia King, and that on the 15th of September, 1897, King, "desiring to go with his wife and other members of his family to Cedartown, Georgia, upon a visit, contracted with the said Southern Railway Company, through its ticket agent at Brunswick, Georgia, to be carried, together with his wife, from Brunswick, Georgia, to Rockmart, Georgia, in said county of Polk, and that his wife and himself should be safely transported by said defendant and landed safely at Rockmart, Georgia; and he purchased from the said defendant, through its said agent at Brunswick, a ticket for himself and a ticket for his wife, and a ticket for the other members of his family, paying for said ticket for his wife, as well as for the others, the usual passenger fare from Brunswick, Georgia, to Rockmart, Georgia." It was further alleged that, "in consideration of said price paid for said ticket for Mrs. Eugenia King by her husband the defendant undertook and promised to convey her from Brunswick, Georgia, to Rockmart, Georgia, and to afford her all reasonable and proper opportunities safely to alight from the train." The petition then avers, in substance, that after purchasing the tickets, and making the contract with the defendant, King and his wife and the other members of his family entered the train of the defendant at Brunswick, and surrendered their tickets to the conductor; that they were safely conveyed until they reached the town of Rockmart, when Mrs. King received painful and serious injuries as a result of the negligent jerking of the train while she was attempting to alight therefrom. The petition sets forth in detail the circumstances under which she was injured, and the extent of her injuries. The value of her services are set forth, and also various items of expense which her husband incurred by reason of the accident. A general demurrer to the petition was sustained, and the plaintiff excepted.

Where a person makes a contract with a railway company engaged in the business of a common carrier to be transported from

one point to another along its line of road, and he is injured by the negligence of the carrier, he has two remedies,—one an action for a breach of the contract, and the other an action on the case for the wrong; and he may elect which of the remedies he will pursue. *Patterson v. Augusta & S. R. Co.* 94 Ga. 140, 21 S. E. 283. See also Civ. Code 1895, § 3811. "Tort is the natural and habitual foundation of the action for the breach of the ordinary contract of carriage, and the declaration will be so construed, unless the facts of the case clearly show that the plaintiff has elected to sue on the contract." *Whittenton Mfg. Co. v. Memphis & O. River Packet Co.* 21 Fed. 896. When the petition in the present case is construed as a whole, we think it sufficiently appears that the purpose of the pleader was to bring an action on the alleged contract of carriage. So construing it, it is to be determined whether it sets forth a cause of action. Does it sufficiently appear that the railway company entered into a contract with King for the safe transportation of his wife? It is alleged in terms that King contracted with the railway company, but the manner in which the contract was made is also set forth, and from this it is apparent that King made no other contract than one which would arise from the mere purchase of an ordinary ticket for his wife. The question, therefore, arises whether, when one purchases such a ticket from a railway company for the use of another, and there are no other transactions or negotiations between the purchaser and the company, the contract of carriage is made with the purchaser of the ticket, or with the one who uses the ticket as evidence of a right to passage. While there has been some difference of opinion as to whether a railroad ticket constitutes a contract, by the great weight of authority "the ordinary ticket is not a contract, but is evidence of the right to transportation furnished to the passenger in consequence of a contract to carry, and intended to enable the passenger to secure transportation, under the rules and regulations of the carrier in performance of such contract." 6 Cyc. Law & Proc. 570. See also 25 Am. & Eng. Enc. Law, p. 1074; 1 Fetter, Carr. Pass. § 275; *Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469; *McClain's Cas.* on Carr. 57, 222, 663, 882. In *Boyd v. Spencer*, 103 Ga. 828, 30 S. E. 841, this language was used: "A ticket issued to a passenger by a common carrier does not constitute the contract between the parties unless made so by express agreement. It is in the nature of a receipt for the passage money, and is generally only a token, the purpose of which is to enable the carrier to

recognize the bearer as the person entitled to be carried. Any other system by which the business of the carrier would be equally facilitated would answer the same purpose as the ticket system." See also *Southern R. Co. v. Watson*, 110 Ga. 691, 36 S. E. 209. There is nothing alleged in the petition as to the character of the ticket purchased by King for his wife, and it is to be presumed that it was the ordinary ticket indicating the points between which the passenger was to be transported. When one purchases an ordinary ticket from the ticket agent of a railway company, and there is no other communication between the purchaser and the company than the application to the ticket agent for the ticket, the delivery of the ticket, and the payment of the price, the railway company, by the delivery of the ticket under such circumstances, undertakes to safely transport and carry any person who may enter its cars as a passenger having possession of such ticket. In the absence of some express agreement to the contrary, this is the undertaking of the company. If the purchaser himself becomes the passenger, he has a right to rely upon the implied contract of safe transportation. On the other hand, if he does not become the passenger, but delivers the ticket to someone else, either for a valuable consideration or gratuitously, the implied obligation on the part of the railway company to safely transport arises in favor of him who presents himself as a passenger and tenders the ticket as evidence of his right to passage. In other words, in such a case the contract entered into by the railway company at the time the ticket is delivered is simply a contract safely to transport whoever may present himself as a passenger holding the ticket. We do not mean to hold that a husband might not make an express contract with a railway company for the safe transportation of his wife; but it would seem that, where such a contract was claimed, it would be incumbent upon the person setting it up to show that the agent with whom it was made had authority to do so. What we do mean to hold is that the mere purchase of an ordinary ticket by a husband for his wife, even though he pays for it, does not constitute a contract between the purchaser and the company for the safe transportation of the wife, but the implied contract for safe passage which the law raises from the purchase of the ticket is in favor of the wife, and in her behalf alone can an action be maintained for its breach. Of course, we do not mean to hold that where a railroad company has undertaken to safely carry a wife, or child, or servant, the husband, or father, or master

may not, in an action of tort, recover any damages he sustained on account of injuries received by the wife, child, or servant in consequence of the negligence of the carrier. The recovery in such a case is for the injury to the husband, father, or master on account of the tort, and not for the breach of any implied contract which the law raises in his favor. The only case called to our attention which seems to be at all in conflict with what is above laid down is the case of *Jacksonville, St. A. & H. River R. Co. v. Mitchell*, 32 Fla. 77, 21 L. R. A. 487, 13 So. 673. In that case it was held that a husband traveling with his wife, where he purchased tickets for himself and his wife, and had his own and her bag-

gage checked to the point of destination, might sue the company in his own name for the loss of the wife's trunk containing her wearing apparel and that of her child. It seems, though, that this decision was put upon the special ownership which the husband had in the property of his wife, which was intrusted to his care; that is, not so much upon the ticket which he had bought for his wife, but upon that which he had purchased for himself. If the case cannot be distinguished upon the ground stated, it seems to us to be manifestly unsound. See, in this connection, 2 Fetter, Carr. Pass. § 644.

Judgment affirmed by five Justices.

VIRGINIA SUPREME COURT OF APPEALS.

SOUTHERN EXPRESS COMPANY, Plff.
in Err.,

v.

Max GOLDBERG.

(.....Va.....)

A state cannot fix the rates to be charged by an interstate carrier for the carriage within the state of a shipment which is delivered to the carrier at a point in another state.

(June 25, 1908.)

ERROR to the Corporation Court of Radford to review a judgment in favor of plaintiff in an action brought to recover a statutory penalty for charging excessive transportation rates. *Reversed.*

The facts are stated in the opinion.

Mr. John R. Johnson, for plaintiff in error:

Those subjects of commerce which are national in their character, admitting of only one uniform system or plan of regulation, are exclusively under the control of Congress, whether Congress has legislated or not.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; *Western U. Teleg. Co. v. Tyler*, 90 Va. 299, 4 Inters. Com. Rep. 481, 18 S. E. 280.

Carrying freight and packages by an express company from one state to another is interstate commerce.

Lottery Case, 188 U. S. 321, 47 L. ed. 492,

NOTE.—As to state power to regulate freights and fares, including freight on interstate shipments, see also note to *St. Louis & S. F. R. Co. v. Gill*, 11 L. R. A. 452; also *Mobile & O. R. Co. v. Dismukes*, 17 L. R. A. 113, and *Burlington, C. R. & N. R. Co. v. Dey*, 12 L. R. A. 436, and note.

62 L. R. A.

23 Sup. Ct. Rep. 321; *Pacific Coast S. S. Co. v. Railroad Comrs.* 9 Sawy. 253, 18 Fed. 11.

When the law says that a failure to refund an excessive charge shall subject the carrier to a penalty, it undertakes to prescribe a rule by which the commerce between this state and another shall be conducted, and this power rests alone with Congress.

Hall v. De Cuir, 95 U. S. 485, 24 L. ed. 547; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Western U. Teleg. Co. v. Tyler*, 90 Va. 297, 4 Inters. Com. Rep. 481, 18 S. E. 280; *Western U. Teleg. Co. v. Powell*, 94 Va. 268, 26 S. E. 828; *Western U. Teleg. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; *Western U. Teleg. Co. v. Reynolds*, 100 Va. 459, 41 S. E. 856.

Where the power of Congress is exclusive, its failure to act is not to be interpreted that the states may do so.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 7 Sup. Ct. Rep. 1118; *Leisy v. Hardin*, 135 U. S. 109, 34 L. ed. 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

Messrs. Longley & Jordan, for defendant in error:

The states have authority unless it is expressly taken away from them by the Constitution.

When it becomes necessary for its self-protection, it may interfere with the instrument of commerce and protect the property of its citizens from extortion, although it incidentally touches interstate commerce.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 472, 24 L. ed. 530; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154.

There was an overcharge of 60 cents for the whole distance, or 37½ cents for the part of it in Virginia. It is this overcharge within the state of Virginia, and the failure within the state of Virginia of a Virginia corporation to refund it to a citizen of Virginia at the place of payment in Virginia within ten days after demand, which is the question at issue in the case.

People v. Wabash, St. L. & P. R. Co. 104 Ill. 476; *Stewart v. Comer*, 100 Ga. 754, 28 S. E. 461; *Western U. Teleg. Co. v. Tyler*, 90 Va. 297, 4 Inters. Com. Rep. 481, 18 S. E. 280; *Southern Exp. Co. v. Com.* 92 Va. 59, 41 L. R. A. 436, 22 S. E. 809; *Norfolk & W. R. Co. v. Com.* 93 Va. 749, 34 L. R. A. 105, 24 S. E. 837.

Harrison, J., delivered the opinion of the court:

The Es Camillo Cigar Factory placed in the office of Adams Express Company in the city of Philadelphia, Pennsylvania, a package of cigars, weighing 16 pounds, to be shipped to Max Goldberg, at East Radford, Virginia. Upon this package the charges demanded by the company, amounting to 60 cents, were prepaid by the cigar factory. The Southern Express Company, having traffic arrangements with Adams Express company, received the package at Hagerstown, Maryland, for transportation to its destination. When the shipment reached the office of the plaintiff in error at East Radford, that company demanded 80 cents as the terms upon which it would be delivered to the consignee. This latter charge was paid under protest by the defendant in error.

It appears that the correct charge, according to the rates of the express company, for transporting the package from Philadelphia to East Radford, was 80 cents, and that the error of charging only 60 cents, and failing to mark the package "Prepaid," occurred in the office of the company at Philadelphia; the waybill calling for the collection of 80 cents at East Radford. The plaintiff in error failing to refund the excessive charge within ten days after demand was made therefor, this action was brought, in the name of the commonwealth, at the relation of the defendant in error, to recover of the plaintiff in error the penalty prescribed by statute in such cases.

62 L. R. A.

Section 1215 of the Code of 1887 provides that express companies may charge \$1.50 for every dollar charged by the railroad company whose lines it may be using, for transporting like articles by the regular freight trains of such railroad companies, except that for carrying packages weighing less than 5 pounds the rate of compensation shall not exceed 25 cents for any distance within the state, and for packages weighing more than 5 and less than 50 pounds the rate of compensation shall not exceed 50 cents for all distances within the state.

Section 1219 provides that whenever an express company shall receive any article at a place without the state to be transported to a place within the state, or shall receive such article at a place within the state to be carried beyond its limits, the amount of compensation demanded by such company shall be regarded as a uniform rate of charge per pound, and per package per mile for and throughout the whole distance within and without the limits of the state, for which such article was so transported, unless it should otherwise appear by sufficient evidence.

Section 1220, as amended by an act of the general assembly approved December 20, 1897 (Acts 1897-98, p. 12, chap. 14), provides that for any violation of these sections such company shall forfeit not less than \$100,—one half for the use of the informer, and the other half for the use of the commonwealth,—provided, however, that if the company shall within ten days after demand, at the place where paid, return the excess over the proper charge to the party paying the same, then the penalty or forfeiture provided for shall not be enforced.

The contention on behalf of the Southern Express Company is that § 1215 is in conflict with article I, cl. 3, of § 8 of the Constitution of the United States, which provides that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

It has long been established by the Supreme Court of the United States, to whose decisions we must look in determining questions of this character, that, as to all subjects of commerce which are national in their character, admitting of only one uniform system or plan of regulation, the power of Congress to regulate commerce among the states is not only supreme, but exclusive, and that its failure to act is not to be interpreted as licensing the states to act. The silence of Congress is held to be an emphatic assertion that the subject shall be left free from any restrictions, exactions, or burdens. *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *State Freight Tax Case*, 15 Wall.

232, 21 L. ed. 146; *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 7 Sup. Ct. Rep. 1118; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

The state has the power to protect her own citizens from extortionate rates charged by one of her own corporations, so long as the commerce is carried on entirely within her own territorial limits. It is also an established principle that commerce between the states can be legitimately affected by state laws in that large class of cases involving the police power of the state, such as laws for the security of the lives, limbs, health, and comfort of persons, and the protection of property, or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, pilotage, and other commercial facilities. For authorities on this branch of the subject, it is only necessary to refer to those already cited.

It cannot be successfully questioned that the transportation of goods over the railroads by an express company from Philadelphia, in the state of Pennsylvania, to East Radford, in the state of Virginia, is interstate commerce.

In *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347, it is said: "It will not be denied that that portion of commerce with foreign countries and between the states which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating state legislation."

And in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826, it is said that "it needs no argument to show that commerce between the states, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation."

In the case of *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4, the 62 L. R. A.

Supreme Court had under review an act of the Illinois legislature which provided that, if any railroad corporation shall charge, collect, or receive for the transportation of any passenger or freight of any description upon its railroad, for any distance within the state, the same or a greater amount of toll or compensation than is at the same time charged, collected, or received for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same road, all such discriminating charges, collections, or receipts, whether made directly or by means of rebate, or other shift or evasion, shall be deemed and taken against any such railroad corporation as prima facie evidence of unjust discrimination, prohibited by the provisions of the act. The statute further provided a penalty of not less than \$5,000 for the offense, and also that the party aggrieved shall have a right to recover three times the amount of damages sustained, with costs and attorneys' fees. The allegation was that the railroad company had, in violation of this statute, been guilty of an unjust discrimination in its rates of charges of compensation for the transportation of certain freight from Peoria, in the state of Illinois, to New York city. Mr. Justice Miller delivered an able opinion in the case, reviewing the authorities, and holding that the act was in violation of the commerce clause of the Constitution and invalid. In discussing the subject, the learned justice said that, "whatever may be the instrumentalities by which this transportation from the one point to another is effected, it is but one voyage,—as much so as that of the steamboat on the Mississippi river. It is not the railroads themselves that are regulated by this act of the Illinois legislature, so much as the charge for transportation; and, in language just cited [*Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547], if each one of the states through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all the other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to. 'It was' . . . 'to meet just such a case that the commerce clause of the Constitution was adopted.'" It is further said that "it cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential, in modern times, to that freedom of commerce from the restraints which the states might choose to impose upon it, that the

commerce clause was intended to secure. This clause giving to Congress the power to regulate commerce among the states and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. *Cook v. Pennsylvania*, 97 U. S. 566, 574, 24 L. ed. 1015, 1018; *Brown v. Maryland*, 12 Wheat. 419, 446, 6 L. ed. 678, 688. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation or any other restrictive regulation interfering with and seriously embarrassing this commerce. . . . We must therefore hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a state which attempts to regulate the fares and charges by railroad companies within its limits for a transportation which constitutes a part of commerce among the states is a valid law."

Counsel for the defendant in error make a calculation to show that the overcharge for that portion of the distance within the state of Virginia was 37½ cents, and that it is only this overcharge within the state of Virginia, and the failure to refund that part of the overcharge, that is the issue in this case. In support of this proposition, *People v. Wabash, St. L. & P. R. Co.* 104 Ill. 476, is cited. This is the case which was reversed by the Supreme Court (118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4), and from which we have already quoted so fully. The supreme court of Illinois, conceding that the contract of shipment in that case was in itself a unit, and that the pay received by the railroad company was the compensation for the entire transportation from the point of departure in the state of Illinois to the city of New York, held that, while the statute of Illinois is inoperative upon that part of the contract which has reference to the transportation outside of the state, it is binding and effectual as to so much of the transportation as was within the limits of 62 L. R. A.

the state of Illinois. Mr. Justice Miller, in dealing with that question, says: "It becomes, therefore, necessary to inquire whether the charge exacted from the shippers in this case was a charge for interstate transportation, or was susceptible of a division which would allow so much of it to attach to commerce strictly within the state, and so much more to commerce in other states." It is then held, as already seen, that it was interstate commerce, and that the chargemade for the whole distance could not, therefore, be apportioned in the manner suggested.

The case of *Stewart v. Comer*, 100 Ga. 754, 28 S. E. 461, relied on by defendant in error, could not be regarded as authority, even if it maintained a contrary view to that taken by the Supreme Court of the United States. It is, however, easily distinguished from the case at bar. In the Georgia case the statute imposed a penalty upon any common carrier who should demand and receive for goods shipped from within or without the state a charge over and beyond the proper or contract rate of freight, whereas the Virginia statute under consideration undertakes to prescribe and determine the rates that the common carrier shall charge, and to impose a penalty for its violation.

Every statute is presumed to be constitutional, and the courts will not declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained. In the light of the authorities we have cited, it seems clear, and we are constrained to hold, that § 1215 of the Code of 1887, in so far as it undertakes to fix and prescribe the rate of charges to be received by common carriers engaged in interstate commerce, is in conflict with the commerce clause of the United States Constitution (article 1, § 8, cl. 3), and therefore void; that the plaintiff in error, being a common carrier engaged, as we have held, in commerce between the states, is not bound by the rates prescribed by § 1215 of the Code of 1887, and therefore not liable to the penalty imposed by § 1220 as amended.

For these reasons the judgment must be reversed and the verdict set aside, and this court will enter such judgment as the lower court ought to have entered, sustaining the demurrer to the declaration, and dismissing the same, with costs.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

PASSAIC PRINT WORKS, *Piff. in Err.*,
v.ELY & WALKER DRY-GOODS COMPANY
et al

(44 C. C. A. 426, 105 Fed. 163.)

1. A merchant does not subject himself to liability to an action for damages in favor of a manufacturer by sending circulars to the retail trade offering a small quantity of such manufacturer's product, which he owns, at a cut price for the purpose of injuring and destroying such manufacturer's trade and depressing the price of his goods on the market.
2. Merchants cannot be held liable for conspiracy by offering goods of a certain manufacturer, which they own, at a cut price for the purpose of injuring his trade and depressing the market value of his product.

(Sanborn, Circuit Judge, dissents.)

(November 14, 1900.)

NOTE.—Effect of bad motive to make actionable what would otherwise not be.

- I. Scope of note, 673.
- II. General principles involved.
 - a. In general, 674.
 - b. Acts in exercise of rights without interference with legal rights of others, 675.
 - c. Acts in exercise of rights accompanied by interference with legal rights of others, 677.
 - d. Acts not in exercise of rights and infringing rights of others, 678.
- III. Injury to property.
 - a. Causing breach of contract, 678.
 - b. Obstructions to light and air, 683.
 - c. Waters.
 1. Natural water courses, 687.
 2. Percolating waters, 688.
 - d. Miscellaneous, 693.
- IV. Injury to business or occupation.
 - a. Causing injury to trade, 694.
 - b. Causing loss of employment or service, 714.
 - c. Causing loss of employee or servant, 719.
- V. Injury to person or feelings, 719.
- VI. Judge acting without, or in excess of, jurisdiction, 721.
- VII. Abuse of process, 721.
- VIII. General and unclassified cases, 724.
- IX. Conclusion, 727.

I. Scope of note.

The question whether an act which injures another, otherwise lawful, and for the doing or commission of which no action will lie, will become, or be rendered, actionable if done, or committed, or accompanied with bad motive, or—as it has been termed by courts and law writers—malice in fact,—actual malice, and un-mixed malice, is one in regard to which a variety of opinion has been furnished by such courts and writers. Not only has there been a

ERROR to the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri to review a judgment in favor of defendants in an action brought to recover damages for the issuance of a circular offering to sell goods manufactured by plaintiff at cut rates. *Affirmed.*

Statement by Thayer, Circuit Judge:

This case was determined below on a demurrer to the plaintiff's petition, which was sustained, and a final judgment was entered against the Passaic Print Works, the plaintiff below, it having declined to plead further. The plaintiff's petition contained the following allegations: That the plaintiff was a corporation organized under the laws of the state of New Jersey, and engaged in the manufacture of prints or calicoes at Passaic, in that state. That prior to February 25, 1899, it had been engaged for more than fifteen years in the manufacture of

difference of opinion and judgment upon the subject between tribunals of different jurisdictions, but not infrequently courts of the same jurisdiction and judges of the same court. In the same case, have disagreed and disputed as to what is the correct doctrine on the subject.

As is well known, there are certain actions for wrongs which have been designated by courts and law writers as the excepted actions. The rules laid down in such actions will not be considered in this note, as they are of a character which necessitates the presence of bad motive, either as an essential ingredient of the cause of action itself, or, as in one kind of actions, to overcome what would otherwise be a complete defense. In this general class may be enumerated malicious prosecution, slander and libel where the defense of privilege is interposed, the action improperly named slander of title, and possibly some others. *Allen v. Flood* [1898] A. C. 1, 87 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258 (Ld. Watson, pp. 92, 93; Ld. Herschell, p. 125; Ld. Davey, pp. 172, 173).

There is another class of cases which, like the foregoing, would be excluded from consideration herein but for the fact that there are certain special cases arising under their titles which, as the courts have stated, are not of the character which the general title to the action would indicate. Among these are, to some extent, cases styled abuse of process, and a very few under what is known as false imprisonment.

Most, if not all, of the cases designated slander or libel, where the statement or publication refers to and causes an injury to the property or business, or business reputation, of the plaintiff, are really special actions on the case for damages for representations affecting property or business. *Trenton Mut. L. & F. Ins. Co. v. Ferrine*, 23 N. J. L. 402, 57 Am. Dec. 400, which has an excellent explanation of why such an action is not slander; *Western Counties Manure Co. v. Lawes Chemical Manure Co. (L.*

prints or calicoes, and by careful management of its business had earned a reputation of manufacturing a high class of such goods. That it sold its goods, through its selling agents, to jobbers or wholesale dealers throughout the United States, who in turn sold the same to the retail trade. That the city of St. Louis, Missouri, was one of the markets in which its prints or calicoes were sold at wholesale, and that it had a large and prosperous trade in that city; that among the goods by it manufactured and sold were four brands of calicoes known as "Trouville mourning prints," "Central Park shirtings," "Elmora fancy prints," and "Ramona fancy prints," all of which were of a kind largely purchased by jobbers in the St. Louis market, being well suited to the

retail trade tributary thereto. That its selling agents had fixed the price for said brands of calicoes for the season of 1899 as follows: For the Trouville mourning prints, $3\frac{1}{2}$ cents a yard, less a discount of 5 per cent and 2 per cent; for the Central Park shirtings, $3\frac{1}{2}$ cents a yard, less a discount of 5 per cent and 2 per cent; for the Elmora fancy prints, $4\frac{1}{2}$ cents per yard, less a discount of 10 per cent and 2 per cent; and for the Ramona fancy prints, 4 cents per yard, less a discount of 5 per cent. That at the date aforesaid the blank cloth from which such calicoes were made was selling at $2\frac{1}{2}$ cents per yard, and that the price above specified for the finished product was its price at Passaic, New Jersey, without the addition of any freight. It was fur-

R. 9 Exch. 218, 48 L. J. Exch. N. S. 171, 23 Week. Rep. 5; *Riding v. Smith*, L. R. 1 Exch. Div. 91, 45 L. J. Exch. N. S. 281, 24 Week. Rep. 487; *Ratcliffe v. Evans* [1892] 2 Q. B. 524, 61 L. J. Q. B. N. S. 535, 66 L. T. N. S. 794, 40 Week. Rep. 578, 56 J. P. 837; *Van Horn v. Van Horn*, 53 N. J. L. 514, 21 Atl. 1069; *Morasse v. Brochu*, 151 Mass. 587, 8 L. R. A. 524, 25 N. E. 74; *Hubbuck v. Wilkinson* [1899] L. R. 1 Q. B. 86, 68 L. J. Q. B. N. S. 34, 79 L. T. N. S. 429.

Ogders in his work on *Libel & Slander*, chap. 5, p. 138, after instancing cases where an attack on a thing is a direct attack upon an individual, and therefore defamatory, says: "But, wholly apart from these cases, there is a branch of the law (generally known by the inappropriate, but convenient, name,—slander of title), which permits an action to be brought against anyone who maliciously decries the plaintiff's goods or some other thing belonging to him, and thereby produces special damage to the plaintiff."

The supreme court of Michigan has held that, where there were several classes of causes of action set forth in the declaration; namely, breach of contract; trespass; and acts which were slanderous (in the sense that they were statements causing injury to business reputation),—the same constituted a series of wrongful acts all aimed at a single result contributing to the injury complained of; to wit, a malicious destruction of one's business, credit, and reputation; and that they were properly counted upon, not severally, but collectively, as producing that result, and need not be segregated and made the basis of separate actions. *Oliver v. Perkins*, 92 Mich. 304, 52 N. W. 609.

There is another class of actions which it has not been deemed well to consider in this note on account of their close relationship to the action of malicious prosecution, it being held, whenever the question was up, almost invariably, that the essential ingredients of the latter action, malice and want of probable cause, were necessary to their maintenance. These actions are generally known as actions for wrongful issuing of attachment. Another reason for not including these actions in the note is, that in many of the states the action may be based, not only upon the common-law right to proceed for the injury done maliciously and without probable cause, but may be upon the bond given upon the granting of the attach-

ment; and in one state (Texas) the right to damages for the malicious and causeless injury may be, and generally is, asserted by what is known there as reconvention in the action in which the attachment is issued.

Still another class of actions has been excluded from the fact that the cause of action almost always, if not always, depends upon the presence of bad motive, although not necessarily malice,—*i. e.* fraud.

And finally, some cases have been included herein which are particular in their nature but usually assigned to the title, abuse of process, and which are similar in their character,—and may be said to be a go-between, between malicious prosecution and false imprisonment; cases wherein everything on the face is apparently legal, but the acts committed by virtue of the process, thus seemingly proper in every respect, are done maliciously and with the wilful and sole intent to injure.

II. General principles involved.

a. In general.

In those cases in which the courts have discussed the general principles underlying their decisions they have distinguished between the cases in which the defendant, although moved by malicious motives, was engaged in the exercise of rights, which exercise did not interfere with the legal rights of the plaintiff, and those cases where a legal right of the plaintiff was infringed. In the latter class of cases the courts have also made a distinction between the acts of the defendant which were performed without being even colorably in the exercise of rights, and those performed in the execution of either correlative or superior rights.

For the purpose of presenting the authorities bearing on these general principles, this classification will be maintained. The cases are here presented merely for the purpose of showing their bearing upon these general principles, and are more specifically referred to in the later subdivisions relating to their specific subjects.

It will be noted that, in addition to the questions suggested by these distinctions, there arise the questions as to what were the respective rights of the parties; was the defendant exercising a right; was he interfering with a right of the plaintiff; if he interfered with the rights of the plaintiff, did he have a justifiable cause.

ther alleged that prior to February 25, 1899, the plaintiff had received orders for a large amount of the several kinds of prints aforesaid at the prices above specified from several large wholesale dealers doing business in the city of St. Louis, and "that on or about the 25th day of February, 1899, the said defendants (to wit, the Ely & Walker Dry-Goods Company *et al.*), combining and conspiring among themselves and with others to the plaintiff unknown, and maliciously intending to injure the business of the said plaintiff, and to cause it great loss in money, and to break up and ruin the plaintiff's trade among the jobbers in St. Louis, maliciously caused a circular in the name of the said defendant corporation to be issued and sent out to the retail trade tributary to St.

Louis, which said circular was in words and figures following; that is to say: 'Ely & Walker Dry-Goods Co. We beg to call your attention to the following items at prices that cannot be replaced, and request you to order promptly if interested, to secure first selection of styles. Prices for all items subject to change without notice, and orders accepted only for stock on hand.' Then followed a long list of various brands of cloth, with a specification of the prices at which the various brands would be sold, and among them the following: "Trouville mourning prints, as long as they last, 3¼; Central Park and boat club shirting print as long as they last, 2½; Elmora and Ramona fancy prints, as long as they last, 3¼." It was next averred that the plain-

The solution of these questions depends upon the facts of each case, and will be presented in the later subdivisions where the cases are arranged and classified according to the specific character of the alleged injurious acts.

b. Acts in exercise of rights without interference with legal rights of others.

As will be seen, the cases, with a few exceptions, hold that one's motive in exercising a right is immaterial, where no legal right of another is infringed; and the fact that he is moved to exercise the right from a malicious desire to injure such person does not render the act actionable.

In *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, *infra*, IV. b, the court, in holding that an official of a boiler makers' union was not liable to two members of a shipwrights' organization for having informed their common employer that, unless such members of the shipwrights' organization were discharged, the members of the boiler makers' society would be called out, or would leave the service of the company, although he was actuated by malice in so doing, said that the defendant was simply doing what he had a right to do, and the motive which prompted him was immaterial.

And in *National Protective Assn. v. Cumming*, 170 N. Y. 315, 58 L. R. A. 135, 63 N. E. 369, *infra*, IV. a, the court refused to restrain the officers and members of a labor organization, who had notified their employer that the members of the association would leave his employment unless he dismissed the plaintiff and other members of the plaintiff association from his employment, on the ground that the defendants were in the exercise of a legitimate trade purpose.

And in *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, *sub nom.* *Bohn Mfg. Co. v. Northwestern Lumbermen's Assn.* 21 L. R. A. 337, 55 N. W. 1119, *infra*, IV. a, the court, in refusing to enjoin the secretary of a retail lumber dealers' association from sending notice to the members of the association that a wholesale dealer had sold direct to a consumer, where the members of the association had mutually agreed that they would not deal with a wholesaler so doing, said that, where a party has a legal right to do an act, the fact that he is actuated by an improper motive does not render it unlawful; and that the plaintiff's right to maintain the

action depends upon whether the defendants have committed, or are about to commit, some unlawful act which will interfere with some of the plaintiff's legal rights.

And in *Orr v. Home Mut. Ins. Co.* 12 La. Ann. 255, 68 Am. Dec. 770, *infra*, IV. b, where it was held that the act of defendants in entering into a combination not to insure any boats which employed the plaintiff, and thereby preventing him from securing employment, was not actionable, although malicious and with the sole desire of injuring the plaintiff, the court placed its decision on the ground that the defendants were under no legal contract or obligation to insure the boats.

In *Brothers v. Morris*, 49 Vt. 460, and in *Kiff v. Youmans*, 86 N. Y. 324, 40 Am. Rep. 543, *infra*, V., it was held that, if one only did that which he had a right to do in removing a trespasser, he is not liable in an action for assault and battery, even though he may have been influenced by malice.

The principle that one cannot complain of malicious conduct where no rights of his are infringed was sustained in *Foster v. McKibben*, 14 Pa. 168, *infra*, VIII., where the court, in holding that the postmaster is not liable for maliciously refusing to publish his official advertisements in the plaintiff's newspaper instead of another paper, said the plaintiff did not have a legal right to the printing, and a malicious refusal of it would not entitle him to an action: as a man may withhold his benefits for his own reasons, and the most deserving claimants of them may be passed over for the worst of motives.

Again, in *McCune v. Norwich City Gas Co.* 30 Conn. 521, 79 Am. Dec. 278, *infra*, VIII., it was held that a gas company was not liable for maliciously refusing to supply plaintiff with gas, which it had previously done, on the ground that, where a person has a legal right to do a particular act at pleasure, the motive which induces his action cannot affect his legal liability.

It was held in *Auburn & C. Pl. Road Co. v. Douglass*, 9 N. Y. 444, *infra*, VIII., that the owner of land adjoining a toll road has a legal right to construct a parallel road upon his own land, and the fact that he does it maliciously, so that travelers can leave the toll road, pass over his land, and thereby avoid the tollgate, will not render it actionable; as an individual who uses his property in a manner which would otherwise

tiff had not sold to the defendant corporation or to either of the individual defendants any of the aforesaid prints or calicoes of its manufacture for a period of about one year prior to February 25, 1899; that it had never sold to said defendants any El-moras or Ramonas; that, if said defendant had any of said last-mentioned prints, it had purchased them at second-hand; that, as it was informed and believed, the defendants had but a small quantity of such goods to sell, and for that reason qualified its offer to sell by inserting in its circular the words "as long as they last;" and that the price named in said circular for the aforesaid four brands of prints of its manufacture was less than the price charged by the plaintiff for said prints, it having universal-

ly charged for said prints for delivery in the spring of 1899 the several prices therefor heretofore specified. It was next averred that the effect of the aforesaid circular was to advertise to the retail trade tributary to the city of St. Louis that the four brands of calicoes aforesaid of the plaintiff's manufacture could be purchased at a less price from the defendant corporation than they could be from other jobbers in the city of St. Louis to whom the plaintiff had sold large quantities thereof, and to cause said other jobbers to either cancel their orders, or to compel the plaintiff to make a rebate on the price of its goods in order that other jobbers might meet the prices so specified in the defendant's circular, and to break up, injure, and destroy the sale and trade in

be lawful does not subject himself to liability by the fact that his motive is malicious.

In *Letts v. Kessler*, 54 Ohio St. 73, 40 L. R. A. 177, 42 N. E. 765, *infra*, III. b, the court held that a landowner has a legal right to erect and maintain a fence on his land, although it shuts off the light and air from the windows of an adjoining house; and, for that reason, the fact that it was erected from purely malicious motives, and served no useful nor ornamental purpose of the builder, did not make it actionable.

In *Pickard v. Collins*, 23 Barb. 444, *infra*, III. b, the court, in holding that the malicious construction of such a fence is not actionable, said that bad motives in doing an act which violates no legal right of another cannot make that act a ground of action.

But in *Flaherty v. Moran*, 81 Mich. 52, 8 L. R. A. 183, 45 N. W. 381, *infra*, III. b, it was held that the maintenance of a high fence would be enjoined where it served no useful or needful purpose, and was built and maintained out of pure malice. This case was followed by *Kuzniak v. Kozminski*, 107 Mich. 444, 65 N. W. 275, in which it was held that, if the building involved was erected by the defendant for a useful purpose, the mere fact that it was accompanied by malice did not make it actionable.

In *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373, *infra*, III. c, 1, which was an action to restrain defendant, a lower riparian proprietor, from opening plaintiff's dam which wrongfully obstructed the flow of the water past the defendant's land, the court said that the fact that the defendant insisted upon his right to the natural flow of the water, from a bad motive, and for the purpose of annoying the plaintiff, was not a sufficient ground for preventing him from exercising his right; and that a court has no power "to deny to a party a legal right, because it disapproves his motives for insisting upon it."

In *Humphrey v. Douglass*, 11 Vt. 22, 34 Am. Dec. 608, *infra*, III. d, it was held that an owner of a meadow is not liable for driving stray horses off the meadow, whereby they were lost, although he acted maliciously; that he was doing what he had a legal right to do, and that cannot be rendered actionable, although accompanied by malice.

In *Falloon v. Schilling*, 29 Kan. 202, 44 Am. Rep. 642, *infra*, VIII., the court, in holding that the act of a landowner in erecting a poor class of dwellings and placing people of an inferior

grade of society in occupation of them is not actionable, although done maliciously for the purpose of annoying a neighbor who had refused to sell his property to him, based its decision upon the ground that the defendant was in the exercise of a right, and his motive in so doing could not be questioned.

In *Raycroft v. Tayntor*, 68 Vt. 219, 33 L. R. A. 225, 35 Atl. 53, *infra*, IV. b, the court, in holding that the superintendent of a quarry, who secured the discharge of an employee of one working in the quarry under a contract terminable at will by a threat to terminate such contract if the employee was not discharged, distinguished the case from those where a third person secures the discharge of an employee, by saying that in this case the superintendent had a right to terminate the contract with the servant's employer, which would thereby indirectly have removed the employee, while third persons who secure the discharge of an employee are not exercising a right.

In *Baker v. Metropolitan L. Ins. Co.* 23 Ky. L. Rep. 1174, 55 L. R. A. 271, 64 S. W. 913, *infra*, IV. b, where it was held that an insurance company was not liable for maliciously discharging an employee at the instance and demand of another insurance company that had entered into a malicious combination to prevent his securing employment, the court said that the employee had a right to quit whenever he saw proper; that the defendant had the same right to terminate his employment; and that, when it discharged him, it was merely executing a legal right.

In *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505, *infra*, IV. a, the decision that a banking corporation is not liable for having maliciously, and with intention to injure a rival bank, bought up its bills which were in circulation, and refused again to exchange them for other money, and thereby kept them out of circulation till they had accumulated, at which time the rival bank was compelled to redeem a large amount in specie, was based on the ground that the defendant did what it had a right to do, and its motive was immaterial.

In *Kobison v. Texas Pine Land Asso.* (Tex. Civ. App.) 40 S. W. 843, *infra*, IV. a, it was held that an employer who issued store checks redeemable in merchandise was not liable to an action by another storekeeper for threatening to discharge its employees if they traded with him, and refusing to take up any checks which had

such prints in the St. Louis market and in the country tributary thereto, except at greatly reduced prices. It was also alleged, but on information and belief, that the quotations aforesaid in the defendant's circular were made for the purpose of injuring and destroying the plaintiff's trade in the manner last stated, and that in consequence of the issuance of said circular the plaintiff had lost profits on sales which it otherwise might have made to the amount of \$10,000, and had been further damaged by having to change the name of its goods and by having their identity lost to the amount of \$20,000, and had also been further damaged by the malicious acts complained of to the amount of \$20,000; making its total loss \$50,000, for which sum it prayed judgment.

passed through the hands of plaintiff. The decision was on the ground that the plaintiff had no superior right to trade with defendant's employees; that the defendant had a right to appropriate to itself all the customers it could command, provided it did not violate a definite legal right of the plaintiff.

In *Payne v. Western & A. R. Co.* 13 Lea, 507, 49 Am. Rep. 666, *infra*, IV. a, it was held that an employer is not liable to an action by a third person for having deprived him of the trade of his employees by threatening to discharge such employees if they continued to trade with him, as the employer had a right to discharge his employees, and his motive in so doing cannot be considered.

But in *Graham v. St. Charles Street R. Co.* 47 La. Ann. 214, 27 L. R. A. 416, 16 So. 806, *infra*, IV. a, the foreman of a railway company, who maliciously deprived a storekeeper of the trade of the railroad employees by threatening to discharge the men, was held liable, upon the ground that the intentional causing of loss to another, without justifiable cause, and with malicious purpose, is of itself a wrong; that, while a person has an absolute right to refuse to have business relations with any person whomsoever, it is not equally true that he can always, with malicious motives, influence another to do the same thing without incurring legal liability.

Again, in *International & G. N. R. Co. v. Greenwood*, 2 Tex. Civ. App. 76, 21 S. W. 559, *infra*, IV. a, it was held that a railway company was liable to the proprietor of a boarding house for having deprived him of the patronage of his men by threatening to discharge them if they patronized him. The court based its decision upon the ground that the company had no right to discharge its servants arbitrarily or capriciously, but for reasonable causes only. The court said that, if the company had a right to discharge its employees for doing the forbidden thing, it was not liable.

It is evident that the above cases, in which the employer was held liable, do not militate against the principle that one is not liable for damages resulting from the exercise of a legal right, even though accompanied by malice. The conflict in the cases arises out of differences as to whether the defendant was in the exercise of a legal right.

In the *Payne* Case the defendant was relieved from liability on the theory that his right to discharge his employees was the right involved, 62 L. R. A.

Argued before *Caldwell, Sanborn, and Thayer*, Circuit Judges.

Messrs. Underwood, Van Vorst, Rosen, & Hoyt, with *Messrs. Lubke & Muench*, for plaintiff in error:

A lawful act resulting in damage, even if done with intent to injure another, may not be actionable; but the object must be competition in trade, or to further business interests. It is then justifiable. When the act, although otherwise lawful, is actuated by no legitimate trade purpose, and solely with the malicious intent to injure the business of another, it becomes unlawful and loses its justification.

Mogul S. S. Co. v. McGregor [1892] A. C. 25; *Ray*, Contractual Limitations, pp. 306, 307; *Moores v. Bricklayers' Union No.*

while the court, in the other cases, penetrated this disguise, and fastened upon the real purpose of the defendant, which was to deprive plaintiff of a portion of his trade, which he had no legal right to do, unless he did it, as in the *Robison* Case, for the legitimate purpose of increasing his own trade.

In *Bradford v. Pickles* [1895] A. C. 587, 64 L. J. Ch. N. S. 759, 73 L. T. N. S. 353, 11 Reports, 286, 44 Week. Rep. 190, 60 J. P. 3, *infra*, III. c, 2, the court, in holding that the fact that a landowner exercised his right to divert percolating water with a malicious purpose to injure his neighbor did not make his conduct actionable, said that the principle that defendant might be restrained from the purely malicious exercise of his legal rights, although he did not infringe any rights of the plaintiff, had not found a place in English law. See *Barclay v. Abraham* (Iowa) 96 N. W. 1080, *infra*, III. c, 2, discussed in the next subdivision, where it was held that rights in percolating waters are correlative.

c. *Acts in exercise of rights accompanied by interference with legal rights of others.*

The decision in the *Bradford* Case [1895] A. C. 587, 64 L. J. Ch. N. S. 759, 73 L. T. N. S. 353, 11 Reports, 286, 44 Week. Rep. 190, 60 J. P. 3, *supra*, II. b, and in the case of *Barclay v. Abraham* (Iowa) 96 N. W. 1080, *infra*, III. c, 2, illustrates the value of the distinction followed in the classification used in this discussion of the general principles. While different results are reached in these cases, it is due to differences as to the nature of the primary right of a landowner in the use of percolating water. The decision in the *Bradford* Case rested on the ground that the rights of a landowner to do what he pleases with the water percolating through his land are absolute, and not correlative with the rights of his neighbor. In regard to this, the court, in the *Barclay* Case, said: "The right being conceded, possibly the intent with which [it was] exercised would be immaterial;" but it called attention to a tendency on the part of the courts to depart from the strict rules of the common law with respect to percolating waters, and to hold that the rights of the landowner are correlative, and not absolute; and it based its decision, restraining the landowner from maliciously wasting percolating water to the detriment of his neighbor, without

1, 23 Ohio L. J. 48; *Walker v. Cronin*, 107 Mass. 555; *Doremus v. Hennessy*, 62 Ill. App. 391, 176 Ill. 608, 43 L. R. A. 797, 52 N. E. 924, 54 N. E. 524; *Van Horn v. Van Horn*, 52 N. J. L. 284, 10 L. R. A. 184, 20 Atl. 485; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730. See also *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307; *Vegelahn v. Guntner*, 167 Mass. 92, 35 L. R. A. 722, 44 N. E. 1077; *Continental Ins. Co. v. Fire Underwriters*, 67 Fed. 310; *Hopkins v. Ozley Stave Co.* 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; *Booker v. Puyear*, 27 Neb. 346, 43 N. W. 133; *Gregory v. Brunswick*, 6 Mann. &

G. 205; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287.

The crime of conspiracy consists of a conspiracy or confederation of two or more persons to do an unlawful act, or to do a lawful act with unlawful means. Criminal conspiracy cannot be predicated of one person alone. In the action of civil conspiracy, however, it is not the concerted action, or the confederation, which forms the gravamen of the action, but the damage which results from the tort committed (*Parker v. Huntington*, 2 Gray, 124). If, therefore, no confederation or agreement were shown, the tort and the damage would be sufficient to sustain a judgment against one or more (*Savile v. Roberts*, 1 Ld. Raym. 378).

any benefit accruing to himself, upon this ground. These two decisions show that the real question to be determined in each case is the nature of the right involved.—Is it absolute? or is it correlative, to be exercised with due regard to the exercise of the corresponding rights by others?

In *Hoy v. Sterrett*, 2 Watts, 327, 27 Am. Dec. 313, *infra*, III. c, 1, which was an action of a lower riparian proprietor against an upper proprietor for the improper detention of the water, their rights being correlative the court said that, if the defendant's action in detaining was malicious, his conduct was actionable.

In *Moores v. Bricklayers' Union No. 1*, 23 Ohio L. J. 48, *infra*, IV. a, the court, in holding that the act of defendants in maintaining a boycott against plaintiffs was actionable because malicious, said that, in the exercise of common rights, acts, which would otherwise be lawful, become actionable when they are actuated from simple motives of malice; and that the exercise of such rights is distinguishable from the right which one exercises in the use of his land, which is a positive right.

In *Post v. Munn*, 4 N. J. L. 61, 7 Am. Dec. 570, *infra*, III. d, it was held that, if one, in the exercise of his superior right of navigation, should turn out of his course for the malicious purpose of running upon a net, or should lie in wait until the net is spread, and then crowd sail to reach it, he is liable for thus maliciously interfering with the inferior right of fishery.

d. Acts not in exercise of rights and infringing rights of others.

In *Quinn v. Leatham* [1901] A. C. 495, 70 L. J. P. C. N. S. 78, 85 L. T. N. S. 289, 50 Week. Rep. 139, 65 J. P. 708, *infra*, IV. a, where it was held that the defendants, who were officers of a trade union, were liable to a third person from whom the employer of members of their union ceased to purchase goods, pursuant to a threat of the defendants to call out the members of the union who worked for him if he continued to deal with the plaintiff, the decision was on the ground that the defendants were not engaged in the exercise of a right, but were actuated solely by a malicious purpose to injure the plaintiff; while in the case of *Allen v. Flood*, the defendants were in the pursuit of a legitimate trade object, although actuated by malice. Lord Lindley stated that, in the present case, the coercion of the plaintiff's cus-

tomers and servants, and of the plaintiff through them, was an infringement of their liberty as well as his; and the case was, therefore, distinguishable from those in which, although damage was intentionally inflicted, no right was infringed.

In *Ertz v. Produce Exchange*, 79 Minn. 140, 48 L. R. A. 90, 81 N. W. 737, *infra*, IV. a, it was held that a conspiracy to refuse to deal with a dealer in farm produce, and to induce others to do likewise, was actionable, where it was done with a malicious intent to injure such dealer, and not for the purpose of serving any legitimate interest of the conspirators. And the court, in so holding, distinguished the decision from its earlier one in *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, *sub nom.* *Bohn Mfg. Co. v. Northwestern Lumbermen's Assn.* 21 L. R. A. 337, 55 N. W. 1119, *infra*, IV. a, on the ground that in that case the defendants were engaged in protecting legitimate interests of their own.

In *Dannerberg v. Ashley*, 10 Ohio C. C. 553, *infra*, IV. b, the court held that a general manager of a railway company, who procured another railway company to discharge one of its employees, from a malicious motive, was liable to such employee. The court placed its decision upon the ground that the plaintiff's act was without justifiable cause.

In *Dickson v. Dickson*, 33 La. Ann. 1261, *infra*, III. a, it was held that, if defendant acts maliciously in inducing laborers to refuse to contract, or to abandon their contracts, with another, it is actionable, as the acts are not in the exercise of a legal right, but are in violation of the rights of the plaintiff.

In *Walker v. Cronin*, 107 Mass. 555, *infra*, III. a, which was an action brought by the plaintiff against the defendant for wilfully persuading and inducing a large number of persons to leave plaintiff's employment, the court distinguished the case from those relating to acts done by the owner of land in the exercise of his rights of ownership, on the ground that in those cases the act is not actionable because no legal right of the adjoining owner is violated; while, where the defendant's acts are purely malicious, without justification or the exercise of any interest or lawful purpose, they are actionable if they injure another in the conduct of his business.

III. Injury to property.

a. Causing breach of contract.

In *Lumley v. Gye*, 2 El. & Bl. 216, 22 L. J. Q.

Bigelow, Torts, 6th ed. p. 104; *Gregory v. Brunswick*, 6 Mann. & G. 205.

The authorities are recognizing certain cases, other than those of slander, libel, and malicious prosecution, where the element of malice is considered in the question of the lawful or unlawful nature of the act, and that malice will, in certain cases, overturn an otherwise rightful act.

Keeble v. Hickeringill, 11 East, 574, note; *Carrington v. Taylor*, 11 East, 571; *Gregory v. Brunswick*, 6 Mann. & G. 205; *Lumley v. Gye*, 2 El. & Bl. 216; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; *Jaggard, Torts*, p. 645; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 387, 5 Inters. Com.

B. N. S. 463, 17 Jur. 827, 1 Week. Rep. 432, it was held that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or of harboring or keeping him as servant, after he has quitted it, during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law; and the right of action in the master arises from the wrongful act of the defendant in procuring the person hired, to break his contract by putting an end to the relation of employer and employee. That the right of an employer to maintain an action on the case for procuring or inducing persons in his service to abandon their employment is not limited to the cases of apprentices and menial servants and others to whom the provisions of the statute of laborers, 23 Edw. III., would be applicable; but that it extends to the cases of persons who have contracted for personal service for a time, and during the period have been wrongfully procured and incited to abandon such service to the loss of the person whom they had contracted to serve. The court distinguished and indicated doubt as to the authority of *Tarleton v. McGawley*, Peake N. P. Cas. pt. 1, p. 207, 3 Revised Rep. 689, *infra*, IV. a; *Ashley v. Harrison*, Peake N. P. Cas. pt. 1, p. 194, 1 Esp. 48, 3 Revised Rep. 686; and *Taylor v. Nerl*, 1 Esp. 386, — *infra*, IV. c.

The case, so far as the subject here being considered is concerned, arose upon a demurrer to a declaration, the three counts of which alleged that the defendant maliciously enticed and procured a dramatic artist of the plaintiff, who had been employed by him, to depart from such employment. Coleridge, J., delivered an elaborate opinion dissenting from the propositions of the majority of the court, stating, in substance, that in order to make an act the subject of a cause of action, there must be a loss directly and approximately connected with the act, and that the mere intention, or even endeavor, to produce it will not found the action. That the existence of the intention,—that is, the malice,—will in some cases be an essential ingredient in order to constitute the wrongfulness or injurious nature of the act; but it will neither supply the want of the act itself, nor its hurtful consequences, however complete the injury.

This case has been frequently cited in both 62 L. R. A.

Rep. 522, 54 Fed. 730; Bigelow, Torts, 6th ed. pp. 1-12.

The object of the defendants was to force a change in the existing contracts of the plaintiff with other jobbers, and thus to interfere with the contractual obligations between them, and to deprive the plaintiff of the full contract prices to which it was entitled.

The combination was unlawful if its object was to induce persons to break their contracts with the plaintiff.

Thomas v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 788, 62 Fed. 817; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; *Temperton v. Russell* [1893] 1 Q. B. 715; *Mogul S. S. Co. v. McGregor* [1892] A. C.

English and American cases as an authority for two propositions: First, that the intentional enticement and procurement of a servant or employee to the breach of an existing unperformed contract is, in and of itself, an actionable wrong; second, that an act which, if done innocently and in good faith would not be actionable, becomes so if done with malice.

One who, by a written agreement with another, engages the latter to perform services for five years, during which such other person is, by the agreement, not to engage himself to anyone else, where the person so engaged is possessed of a secret known only to him and a few others in the process of manufacturing certain articles, which process he is to use exclusively during the period mentioned in the business of his employer, may maintain an action against such person and a rival manufacturer of the same articles, and his manager, who, with knowledge of such contract, have wrongfully induced the person so engaged to him to depart from his exclusive service contrary to said agreement, and to manufacture, on account of such rival manufacturer, the articles such as he had contracted to manufacture in said agreement, for damages against the rival manufacturer and his manager, and for an injunction to restrain them from employing the other defendant to do work for them in the manufacture of such articles, and to restrain such other defendant (the person with whom he had made such agreement) from engaging himself to the other defendants until the expiration of his said contract of service with the plaintiff. *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, 50 L. J. Q. B. N. S. 305, 44 L. T. N. S. 75, 29 Week. Rep. 367, 45 J. P. 373. It was in this case that Brett, L. J. (afterwards Lord Esher, M. R.), first stated that it was decided in *Lumley v. Gye*, 2 El. & Bl. 216, 22 L. J. Q. B. N. S. 463, 17 Jur. 827, 1 Week. Rep. 432, *supra*, that, if the defendants there merely had persuaded a person to break his contract, it might not be wrongful in law or in fact; but that, if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is, in law and fact, a wrong act, and, therefore, a wrongful act, and, therefore, an actionable act if injury ensues from it. And that a malicious act, such as above described, is a wrongful act in law and in fact. He proceeded further to state that the act complained of in the case of *Lumley v. Gye*, and

37; *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333; *Walker v. Cronin*, 107 Mass. 567.

This rule is not confined to cases of master and servant, or to those of personal service.

Temperton v. Russell [1893] 1 Q. B. 715; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333; *Thomas v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 788, 62 Fed. 817; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 10, 38 L. ed. 59, 14 Sup. Ct. Rep. 240; *Walker v. Cronin*, 107 Mass. 567; *Doremus v. Hennessy*, 62 Ill. App. 391; *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111.

The object and effect of the circular were, also, to deprive the plaintiff of custom and other possible contracts, for which an action will lie.

which was complained of in the present case, was, therefore, because malicious, wrongful. He also stated that the lord chancellor agreed with him in the judgment, and that it was to be taken, therefore, as the judgment of the lord chancellor as well as of himself. Lord Coleridge, Ch. J., in dissenting, admitted that the question to be decided was whether the opinion of the majority of the judges, or the opinion of the dissenting judge, in the case of *Lumley v. Gye*, should prevail in a court which was not bound by the decision in that case. He was of the opinion that the court of appeal was not bound by it, and ought to overrule it.

By the concession that merely persuading one to break his contract might not be wrongful in law or in fact, the line seems to be distinctly drawn, that it is the malice that makes actionable an act, otherwise lawful and within defendant's right.

Officers of three trades unions having a common interest, who combine to induce or compel a firm to transact their business in a manner provided by the rules of the unions, and for that purpose and with that object, in an endeavor to coerce another not to deal with such firm, threaten that, if any person connected with the trade common to all shall deal with such other for materials the members of the unions would refuse to work for anyone upon the goods supplied by such other, whereby persons are induced to break contracts entered into with him for the supply of materials, and not to enter into further contracts with him,—are liable to him in an action for the damages sustained by him on account thereof. *Temperton v. Russell* [1893] 1 Q. B. 715, 62 L. J. Q. B. N. S. 412, 4 Reports, 376, 69 L. T. N. S. 78, 41 Week. Rep. 565, 57 J. P. 676. In this case Lord Esher reiterated the statement made in his opinion (as Brett, L. J.), in *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, 50 L. J. Q. B. N. S. 305, 44 L. T. N. S. 75, 29 Week. Rep. 367, 45 J. P. 373, *supra*, for both himself and Lord Selborne, to the effect that persuading a person to break a contract for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it; and further said that the distinction that was asserted between the claim for inducing persons to break contracts already en-

May v. Wood, 172 Mass. 14, 51 N. E. 191; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730; *Temperton v. Russell* [1893] 1 Q. B. 715.

Mcasra. William B. Thompson and Ford W. Thompson, for defendants in error:

An act which does not amount to a legal injury cannot be actionable because it is done with a bad motive; or, a man's motive will not make wrongful an act which in itself is not wrongful; or, an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.

Allen v. Flood [1898] A. C. 1; *Heald v. Carey*, 11 C. B. 977; *Brinsmead v. Harrison*, L. R. 7 C. P. 547; *Stevenson v. Neun-*

tered into and that for inducing persons not to enter into contracts could not prevail, and was not maintainable; that there was the same wrongful intent in both cases, wrongful because malicious; and that there was the same kind of injury to the plaintiff. Lopes, L. J., took the same view. The propositions here laid down by the master of the rolls, and concurred in by Lopes, L. J., have been frequently alluded to by those courts and judges who were of the same mind, as though they were the decision in the case, while others, as, for instance, the majority of the law lords in *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, *infra*, IV. b, two of whom reiterated their views in *Quinn v. Leatham* [1901] A. C. 495, 70 L. J. P. C. N. S. 76, 85 L. T. N. S. 289, 50 Week. Rep. 139, 65 J. P. 708, *infra*, IV. a, and others who agree with the latter judges, have distinctly stated that they were not essential to be considered in arriving at the result, and called attention to the fact that A. L. Smith, L. J., declined to express an opinion thereon.

Walker v. Cronin, 107 Mass. 555, was not a case itself involving the subject under consideration. It was an action brought by the plaintiff against the defendant for wilfully persuading and inducing large numbers of persons in plaintiff's employ to leave and abandon the employment of the plaintiff, and for inducing certain persons who had agreed with plaintiff to make certain stock into boots and shoes and return the same to the plaintiff's factory, to neglect to make and finish said stock, and return the same in an unmanufactured condition. The superior court had sustained a demurrer to the declaration. In reversing the judgment and overruling the demurrer, the supreme court adverted to those cases in which it is generally held that no action will lie against one for acts done upon his own land in the exercise of his rights of ownership, whatever the motive, if they merely deprive another of advantages, or cause a loss to him without violating any legal right,—that is, the motive in such cases is immaterial; saying, however, that in *Greenleaf v. Francis*, 18 Pick. 117, *infra*, III. c. 2, it was intimated that such acts might be actionable if done maliciously, and that, while the general rule just mentioned was assented to in *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721, *infra*, III. c. 2, the suggestion in *Greenleaf v. Francis* was approved

ham, 13 C. B. 285; *Bradford v. Pickles* [1895] A. C. 597; *Hunt v. Simonds*, 19 Mo. 583; *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373; *Alexander v. Relfe*, 9 Mo. App. 133; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, sub nom. *Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.* 21 L. R. A. 337, 55 N. W. 1119; *Norcross v. Otis*, 152 Pa. 481, 25 Atl. 575; *Spalding v. Vilas*, 161 U. S. 483, 40 L. ed. 780, 16 Sup. Ct. Rep. 631; *Glencoe Land & Gravel Co. v. Hudson Bros. Commission Co.* 138 Mo. 439, 36 L. R. A. 804, 40 S. W. 93; *Cooley, Torts*, 2d ed. 81, 688; *Chatfield v. Wilson*, 28 Vt. 49; *Payne v. Western & A. R. Co.* 13 Lea, 507, 49 Am. Rep. 606; *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81, 19 N. E. 390; *Rich v. New York C. & H. R. R. Co.* 87 N. Y. 382; *Boyson v. Thorn*, 98 Cal. 598, 21 L.

R. A. 233, 33 Pac. 492; *Kelly v. Chicago, M. & St. P. R. Co.* 93 Iowa, 436, 61 N. W. 957; *Wood, Nuisances*, 2d ed. §§ 6, 642; *Sir Frederick Pollock* in 14 Law Quarterly Rev. 129; *Lumley v. Gye*, 2 El. & Bl. 216; *May v. Wood*, 172 Mass. 14, 51 N. E. 191; *Van Horn v. Van Horn*, 52 N. J. L. 284, 10 L. R. A. 184, 20 Atl. 485, 53 N. J. L. 514, 21 Atl. 1069.

The right of the Ely & Walker Dry-Goods Company to issue the circular and sell its goods at the prices named in the circular, including the goods which it purchased from the plaintiff, as well as those which it purchased from other dealers, and which the petition admits it had lawfully purchased, was a right of as high a dignity and status in the law as the right asserted on behalf of plaintiff. It cannot be destroyed or qual-

so far as this, namely, that malicious acts without the justification of any right—that is, acts of a stranger resulting in like loss or damage—might be actionable. The court then proceeded to state in its own terms a rule in regard to cases of this character, and the language which follows, used by it in doing so, has been quoted by nearly every court which has held that a conspiracy to do a wrongful act may be the gist of an action for damages ensuing from its commission: "Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss comes as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it comes from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to."

(The authorities last mentioned were such as *Keeble v. Hickeringill*, 11 East, 574, note, 11 Mod. 74, 11 Revised Rep. 273, note; *Carrington v. Taylor*, 11 East, 571-574, 2 Campb. 258, 11 Revised Rep. 270, *infra*, III. d; and *Tarleton v. McGawley*, Peake N. P. Cas. pt. 1, p. 205, 3 Revised Rep. 689, *infra*, IV. a).

If one contracts upon a consideration to render personal services for another, any third person who maliciously—that is, without lawful justification—induces the party who contracted to render the services to refuse to do so, is liable to the injured party in an action for damages. *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780.

When the relation of master and servant exists by virtue of a valid contract, the master may maintain an action on the case against any person who knowingly and wilfully induces the servant to break the contract and abandon the service. *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475.

Where a widow held plantations formerly belonging to her husband as legal usufructuary, and the plaintiff, her daughter, had leased from her the same for a term of years, and the other heirs of deceased, for the purpose of compelling 62 L. R. A.

the daughter to abandon her lease with the idea of having the widow renounce her legal usufruct so that there might be a partition of the estate between all the heirs, upon the refusal of the daughter so to do, deprived her and her plantations of labor by threats, persuasions, and other inducements addressed to the laborers, thereby inducing them to refuse to contract, or to abandon their contracts with the daughter, whereby she suffered great damage, an action will lie in her favor against the persons causing the injury. *Dickson v. Dickson*, 33 La. Ann. 1261. As a ground for the maintenance of the action, the court said: "It is manifest that these acts, thus wantonly and maliciously done by defendants, were, in the sense of the law, faults,—that is, acts done in the exercise of no legal rights of their own, and in violation of the rights and feelings of the plaintiff, who was entitled to pursue her lawful business without interference or hindrance from defendants. For the damages resulting from such acts, the defendants are responsible."

In distinguishing this case, the court, in *Kline v. Eubanks*, 109 La. 241, 33 So. 211, said: "It appears in *Dickson v. Dickson*, 33 La. Ann. 1263, that the acts complained of had been committed solely for the purpose of injuring the plaintiff, and of preventing her from deriving any benefit from her lease."

A declaration states a cause of action which avers that the defendant, knowing that plaintiff was the rightful possessor by his tenants of the premises in question, and wrongfully and maliciously intending to injure him, so disturbed his tenants that they abandoned the possession, whereby he lost his rent, which he would have received if they had continued in possession, and the premises sustained injury and dilapidation by reason of being vacant and unoccupied for the remainder of the year. The court said that here was damage to the plaintiff caused by the wrongful and malicious act of the defendant, committed with a full knowledge that he was violating the plaintiff's rights, and with the intent to injure him; and it did not follow that, because the tenants had violated their contract with the plaintiff, and were liable to him for rent, the defendant was to be excused from liability. *Aldridge v. Stuyvesant*, 1 Hall, 210.

On the other hand, it has been held by the Kentucky court of appeals that inducing another to break his contract will not render one liable

ified because the exercise of it was impelled by a bad motive; nor was its exercise limited to instances of commercial competition.

Allen v. Flood [1898] A. C. 1; Sir Frederick Pollock in 14 Law Quarterly Rev. 131; Prof. Wigmore in 21 Am. Law Rev. 519, 520; Pollock, Torts, 4th ed. 295-500; *Arthur v. Oakes*, 25 L. R. A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310; *Hopkins v. Ozley Stave Co.* 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; *People v. Barondess*, 133 N. Y. 649, 31 N. E. 240.

The American rule is, that there must be illegal means, and the means themselves must be of a nature unlawful and wrongful.

Old Dominion S. S. Co. v. McKenna, 30 Fed. 48; *Arthur v. Oakes*, 25 L. R. A. 414,

4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. 811; *Hopkins v. Ozley Stave Co.* 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Vegetahn v. Guntner*, 167 Mass. 92, 35 L. R. A. 722, 44 N. E. 1077.

If any of the contracts were broken by the parties contracting with the plaintiff, there could not be tort committed by these defendants, but the right of action would exist only against the parties breaking their contracts.

Cooley, Torts, 497; *Chambers v. Baldwin*,

to the other party to the contract, although it is done maliciously and for the sake of profit, if without force or fraud. And that an act which does not of itself amount to a legal wrong cannot be made so by a wrong motive. *Chambers v. Baldwin*, 91 Ky. 121, 11 L. R. A. 545, 15 S. W. 57.

And in *Bourlier Bros. v. Macauley*, 91 Ky. 135, 11 L. R. A. 550, 15 S. W. 60, it was stated that there were two principal questions of law in the case: First, whether one party to a contract can maintain an action for damages against a person who maliciously advised and procured the other party to break it; second, whether an act lawful in itself can become actionable solely because it was done maliciously. The court also stated that these two questions were considered and determined in the case of *Chambers v. Baldwin*, 91 Ky. 121, 11 L. R. A. 545, 15 S. W. 57, decided at the same term, and that a rediscussion of them was, therefore, unnecessary. The court further said that it was held in *Chambers v. Baldwin* that, to maintain an action upon the case at common law, the act upon which it is founded must not only amount to a legal wrong, but must be the proximate cause of the loss or damage sustained; and that, upon principle, and according to decided weight of authority in the United States, whether a legal wrong has been done or not depends upon the nature and quality of the act, not upon the motive of the person doing it; the forcible statement of the proposition in *Jenkins v. Fowler*, 24 Pa. 308, *infra*, VIII., being quoted and approved: "Malicious motives make a bad case worse, but they cannot make that wrong which in its own essence is lawful."

Both the above cases are in direct opposition to *Lumley v. Gye*, 2 El. & Bl. 216, 22 L. J. Q. B. N. S. 463, 17 Jur. 827, 1 Week. Rep. 432, and *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, 50 L. J. Q. B. N. S. 305, 44 L. T. N. S. 75, 29 Week. Rep. 367, 45 J. P. 373, *supra*, and the latter cases, by inference at least, are disapproved in *Bourlier Bros. v. Macauley*, 91 Ky. 135, 11 L. R. A. 550, 15 S. W. 60, *supra*, where the facts were substantially identical with those in *Lumley v. Gye*.

A complaint which states that the plaintiff entered into an agreement with the proprietor of a hotel whereby he hired of such proprietor certain rooms in the hotel at a monthly rent for himself and wife, and that they were to have their meals in their room or at the restaurant connected with the hotel; that the defendant,

who was, during the times mentioned, agent of the proprietor, maliciously and with intent to oppress, annoy, and disturb the plaintiff in the occupancy of his lodgings, and to force him to abandon the same, and to deprive him of the comforts and conveniences which he was then and there enjoying, and to injure him in his profession, and to degrade and belittle him in the eyes of the guests of the hotel, and of his friends and the public in general, and in fraud of said agreement caused and procured the proprietor of the hotel to demand that the plaintiff and his wife forthwith vacate said rooms and lodgings; and also that the defendant maliciously caused and procured said proprietor to refuse to furnish meals etc., and to instruct the servants to refuse their orders; and also maliciously caused and procured said proprietor to threaten and attempt to forcibly eject plaintiff and his wife from said rooms to the plaintiff's damage.—falls to state a cause of action, and a demurrer thereto is sustained. *Boyson v. Thorn*, 98 Cal. 578, 21 L. R. A. 233, 33 Pac. 492. The court considered and disapproved *Lumley v. Gye*, 2 El. & Bl. 216, 22 L. J. Q. B. N. S. 463, 17 Jur. 827, 1 Week. Rep. 432, and *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, 44 L. T. N. S. 75, 29 Week. Rep. 367, 45 J. P. 373, *supra*, and approved the doctrine stated in the dissenting opinion of Coleridge, J., in the former, and in the dissenting opinion of Mr. Justice Coleridge (afterward lord chief justice of England) in the latter (making the mistake of supposing them the same person); stating that the reasoning in the dissenting opinions in those cases seemed conclusive and satisfactory. In this connection the court further said: "It is a truism of the law that an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent. What one has a right to do another cannot complain of. It is conceded that one may lawfully persuade or procure another to break his contract with a third person 'if it be done from good motives.' We think the qualification has no place in the proposition. If it is right, and the means used to procure the breach are right, the motive cannot make it a wrong any more than a good motive would justify fraud, deceit, slander, or violence to effect the same purpose."

The court also quoted and approved the rule on this subject laid down by Cooley in his work on Torts, 2d ed. pp. 832, 836, as follows: "Bad motive by itself, then, is no tort. Ma-

91 Ky. 121, 11 L. R. A. 545, 15 S. W. 57; *Glencoe Land & Gravel Co. v. Hudson Bros. Commission Co.* 138 Mo. 439, 36 L. R. A. 804, 40 S. W. 93; *Bourlier Bros. v. Macaulley*, 91 Ky. 135, 11 L. R. A. 550, 15 S. W. 60; *Boyson v. Thorn*, 98 Cal. 578, 21 L. R. A. 233, 33 Pac. 492.

The acts done, and intended to be done, as contained in the circular, could not of themselves constitute conspiracy, nor could they be made an actionable wrong, by reason of a charge that the acts done, or intended to be done, were done maliciously, or in pursuance of any conspiracy.

United States v. Kane, 23 Fed. 750; *O'Callaghan v. Cronan*, 121 Mass. 114; *Hunt v. Simonds*, 19 Mo. 583; *Payne v. Western & A. R. Co.* 13 Lea, 507, 49 Am.

licious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful. When in legal pleadings the defendant is charged with having wrongfully . . . done the act complained of, the words are only words of vituperation, and amount to nothing unless a cause of action is otherwise alleged. . . . Motive generally becomes important only when the damages for a wrong are to be estimated. It then comes in as an element of mitigation or aggravation, and is of the highest importance."

The court also approved *Payne v. Western & A. R. Co.* 13 Lea, 507, 49 Am. Rep. 686, *infra*, IV. a. and *Bourlier Bros. v. Macaulley*, 91 Ky. 135, 11 L. R. A. 550, 15 S. W. 60, and *Chambers v. Baldwin*, 91 Ky. 121, 11 L. R. A. 548, 15 S. W. 57, *supra*.

The court seemed to intimate in the above case that, if the case was one of a contract between master and servant, the rule would be different; taking precisely the ground expressed in the dissenting opinions in *Lumley v. Gye*. 2 El. & Bl. 216, 22 L. J. Q. B. N. S. 463, 17 Jur. 327, 1 Week. Rep. 432, and *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, 50 L. J. Q. B. N. S. 305, 44 L. T. N. S. 75, 29 Week. Rep. 367, 45 J. P. 373, *supra*.

In each of the last three cases the court took issue with the proposition asserted in *Bowen v. Hall*, and there stated to have been decided in *Lumley v. Gye*, *viz.*: that persuading a person to break his contract, which in and of itself was not wrongful in law or in fact, became an actionable act if done with malice, and injury ensued from it.

A demurrer to a petition which states that the defendant, by some means unknown to plaintiffs, induced and persuaded a third party to refuse to go on with a sale under an agreement to purchase real estate of him, by reason of which the sale of the property to a third party was broken off and commissions earned on such sale by the plaintiffs as brokers were wholly and entirely lost, is properly sustained; such a petition charges neither malice nor fraud on defendant's part, and, in the absence of both, an action of this kind is not maintainable. *McCann v. Wolff*, 28 Mo. App. 447. The court said: "There must be a wrongful intent to do harm to the plaintiff before the right of action for procuring a breach of contract can be established. Mere knowledge that there is a subsisting contract will not do. Only with these limitations can we safely say that a contract can, or does, impose a 62 L. R. A.

Rep. 686; *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598 [1892] A. C. 25; *Coolsey, Torts*, 635; *Stevenson v. Neunham*, 13 C. B. 285; *Heald v. Carey*, 11 C. B. 977; *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373; 18 Cent. L. J. pp. 424, 427.

Maliciously to conspire to do an injury to another is not more actionable than maliciously to intend to injure another; and, unless some overt act, of itself unlawful, is done towards the completion of the design, in a matter which, if done without conspiracy, would cause it to be actionable, the mere addition of the fact of conspiracy will not make that act the more illegal and actionable.

Bigelow, Torts, p. 207; *Hutchins v. Hutchins*, 7 Hill, 104; *Kann v. Diamond*

duty upon persons extraneous to the obligation, not to interfere with its due performance."

b. Obstructions to light and air.

The owner of property may place windows in the walls of his house, though they overlook his neighbor's land. The neighbor, if he chooses to do so, may build to the extreme end of his land, and in that way shut off the offending windows. He may build for the express purpose of shutting them off, and, whether the erections consist of poles with sheet-iron plates, or of solid brick, is all the same, and the motive is of no consequence whatever, for, where an act is legal, the motive with which it is done is wholly immaterial. *Levy v. Brothers*, 4 Misc. 48, 23 N. Y. Supp. 825; *Knabe v. Levelle*, 23 N. Y. Supp. 818.

The erection of a high-board fence near to the lot line of a defendant, though entirely on his premises near the windows of a neighboring house to shut out the view therefrom, not from necessity, but from malice alone, is a nuisance; it is an unjustifiable use of one's premises, and will be enjoined. *Peck v. Bowman*, 22 Ohio L. J. 111. This case is in line with *Kessler v. Letts*, 7 Ohio C. C. 108, reversed by the supreme court of Ohio (54 Ohio St. 73, 40 L. R. A. 177, 42 N. E. 765, *infra*), in which the principle laid down in that case, and also the present case, was completely disaffirmed, overruled, and obliterated.

Where the defendant nalled a frame work of boards upon a wall, completely covering up the aperture in which the windows in plaintiff's house were, and thereby shut out the light and air from the plaintiff's house, it was held that no action could be maintained therefor, even assuming the plaintiff's charge that the defendant's motives were malicious and his act intended to annoy his neighbor and to injure him and his property without any benefit to the defendant. *Dawson v. Kemper*, 32 Ohio L. J. 15. The court declined to agree with the decision of its sister circuit in *Kessler v. Letts*, 7 Ohio C. C. 108, and was evidently correct in so doing, as that case was afterwards reversed by the supreme court of Ohio.

Plaintiff and defendant owned adjoining lots, and defendant erected on his lot a board fence reaching to the roof of plaintiff's house which stood on the line of the two lots, which fence shut off light and air from the windows of the

Steel Co. 32 C. C. A. 324, 61 U. S. App. 22, 89 Fed. 706; *Stevenson v. Newnham*, 13 C. B. 285; *Jenkins v. Fowler*, 24 Pa. 308; *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373; *Bradford v. Pickles* [1895] A. C. 597.

The petition shows clearly upon its face that the contracts which plaintiff made with the jobbers for the sale of the goods in question were, in fact, invalid and void because in restraint of trade, and, consequently, unenforceable at law. Those which it claimed it might have made but for defendant's action are in violation of the so-called "anti-trust law" of Congress of July 2, 1890, being in restraint of trade and commerce in the states mentioned by name in the petition, and such contracts are both *mala prohibita* and *mala in se* under the laws of Missouri.

plaintiff's house to its injury, and was so erected by defendant for no useful or ornamental purpose, but from motives of unmixed malice towards the plaintiff. In an action by the plaintiff against the defendant to compel the removal of the fence, it was held, that defendant had a legal right to erect and maintain it, and that neither law nor equity could compel its removal. *Letts v. Kessler*, 54 Ohio St. 73, 40 L. R. A. 177, 42 N. E. 765, Reversing 7 Ohio C. C. 108.

In an action to restrain the defendant from erecting a high-board fence on and near the line dividing the lots of the contending parties, and to procure the abatement of the fence already built, claiming that the same was a nuisance, a judgment for a perpetual injunction was reversed, the court holding that, if the improvement is legitimate and lawful, it is not *per se* a nuisance. The law will not inquire into the motives with which the owner acts in its erection. A person may use his premises for any lawful purpose, and may build thereon any structure which is not *per se* a nuisance, unless especially prohibited from so doing. The owner of a lot may not place a building upon one side thereof, and then call upon the owner of the adjacent lot to furnish the same light, air, and view which he would have had if he had placed the building near the center of his lot, or was the owner of the adjacent lot himself. The law aims to protect each person in the enjoyment of his own property. *Triplett v. Jackson*, 5 Kan. App. 777, 48 Pac. 931.

The owner of a house in which there is a window overlooking the adjacent premises of another does not thereby acquire a right to the light and air coming laterally over such adjacent premises. No action will lie for the obstruction or darkening of such window by a wall built by the defendant on his own land, though his only motive in building it was to obstruct. *Ransom v. McCallister*, 9 Ky. L. Rep. 495.

In an action brought by the plaintiff to abate a nuisance claimed in the complaint to exist by means of the defendant having wrongfully, maliciously, and unnecessarily built a board fence 40 feet high within 2 or 3 feet of the plaintiff's building,—so close to his building as to cut off light, air and view therefrom,—the court, in sustaining a demurrer to the complaint, held that it could make no difference whether defendant's motive in building the fence was one of

Mo. Rev. Stat. 1890, chap. 143; *National Lead Co. v. S. E. Grotz Paint Store Co.* 80 Mo. App. 247; *People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221, 34 N. E. 785, *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790; *Leonard v. Poole*, 114 N. Y. 371, 4 L. R. A. 728, 21 N. E. 707; *DeWitt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.* 16 Daly, 529, 14 N. Y. Supp. 277; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Nester v. Continental Brewing Co.* 161 Pa. 473, 24 L. R. A. 247, 29 Atl. 102; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Emery v. Ohio Candle Co.* 47 Ohio St. 320, 24 N. E. 660; *Hoffman v. Brooks*, 11 Ohio L. J. 258; *Anderson v. Jett*, 89 Ky. 375, 6 L. R. A. 390, 12 S. W. 670; *Chapin v. Brown Bros.* 83 Iowa, 156, 12 L. R. A. 428, 48 N. W. 1074; *Craft v. McConoughy*,

malice towards her neighbor, or a desire to improve or ornament her property. She could, with a purely malicious motive, shut out her neighbor's light and air by a magnificent building; and why not, though prompted by a like motive, by a fence 40 feet high? *Bordeaux v. Greene*, 22 Mont. 254, 56 Pac. 218.

No action lies against a person who, under the pretense of preventing his yard being overlooked by the windows in his neighbor's house, but in fact from mere malice and with intent to exclude the light and air from the windows in question, erects on his own lot a fence 40 feet high opposite the windows in the house of the plaintiff, in consequence whereof the light and air are excluded from the windows, and the plaintiff has sustained damage on account thereof, where there is no claim on the part of the plaintiff that the windows were ancient lights, or that a right had been acquired by the plaintiff by grant, or occupation and acquiescence. *Mahan v. Brown*, 13 Wend. 261, 28 Am. Dec. 461.

Darkening another's windows or depriving him of his prospect by building on one's own land, where no right to the light unobstructed has been acquired by grant or prescription, is not a legal injury, and the motive with which it is done makes no difference. If it did, the question of liability would turn upon the motive. Although the owner might, for the protection of his land, and for his own comfort and profit, or any worthy motive, erect a fence or building which would have the effect to shut out the light from his neighbor's dwelling, he could not do so for the purpose of injury. If an action would lie because of his bad motive in doing so, such a principle would be highly dangerous to the security of the enjoyment of real property. As to the various modes of enjoyment, the lawfulness or unlawfulness of them would depend upon the views of others as to the intentions of the owner. The fallacy of the doctrine that the owner of land is liable for such acts if done with a bad motive consists in its overlooking a fatal defect in the right of action in such a case, the absence of any legal injury. Bad motives in doing an act which violates no legal right of another cannot make that act a ground of action. *Pickard v. Collins*, 23 Barb. 444.

A declaration which alleges that the defendant planted, and permitted to grow to the height of about 16 feet, a hedge on his own land, and

79 Ill. 346, 22 Am. Rep. 171; *Moore v. Bennett*, 140 Ill. 69, 15 L. R. A. 361, 29 N. E. 888; *Ford v. Chicago Milk Shippers' Asso.* 155 Ill. 106, 27 L. R. A. 298, 39 N. E. 651; *Bishop v. American Preservers' Co.* 157 Ill. 284, 41 N. E. 765; *Milwaukee Masons' & Builders' Asso. v. Niezeroiski*, 95 Wis. 129, 37 L. R. A. 127, 70 N. W. 166; *Vulcan Powder Co. v. Hercules Powder Co.* 96 Cal. 510, 31 Pac. 581; *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 15 L. R. A. 598, 19 S. W. 274; *India Bagging Asso. v. Kock*, 14 La. Ann. 164; *Hilton v. Eckersley*, 6 El. & Bl. 47; *Urmston v. Whitelegg Bros.* 63 L. T. N. S. 455; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96, 48 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271.

within a few feet of plaintiff's dwelling house, whereby the currents of air which otherwise would have come to his house were intercepted, and by reason thereof the same became damp and unwholesome and endangered the health of plaintiff and his family, and, after repeated requests, defendant refused to trim the same to the proper height, but wilfully and with intent to injure plaintiff permitted the same to grow in manner aforesaid,—falls to state a cause of action. *Honsel v. Conant*, 12 Ill. App. 259.

A declaration which alleges that the defendant, intending to injure and prejudice plaintiff and to deprive him of the use, benefit, and enjoyment of the windows of his dwelling house, wrongfully, maliciously, wilfully, and injuriously greatly darkened said windows, and hindered and prevented the light and air from coming and entering into and through said windows into said dwelling house and premises, falls to state a cause of action. *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570. The court said that, although the defendant was influenced by malice and desire to inconvenience the plaintiff in the erection of the fence, still her right to erect it existed, and was not lost by reason of her malice.

A petition was held bad on demurrer which alleged that the defendant maliciously and spitefully erected, or caused to be erected, on the line between adjoining lots owned by the parties, the full length thereof from east to west, a board or plank fence 6 feet and 8 inches in height, and made so close and tight it was impossible for the air to circulate through it; that it projected westwardly beyond plaintiff's residence 20 feet, shutting off and preventing the free circulation of air to his residence from the south and southwest; and that it shut off his entire view south and southwest; and shaded and rendered valueless some 2 to 6 feet of his light from front to rear, and thereby greatly injured its value by shading and retaining the moisture in the ground. *Saddler v. Alexander*, 21 Ky. L. Rep. 1835, 56 S. W. 518.

A complaint alleging, in substance, that plaintiff is possessed of an attractive house surrounded by lawns; that defendant, owning the adjoining lot, built a fence 4 feet from the plaintiff's house, but entirely on defendant's land, consisting of rough tamarack posts, from 8 to 16 feet high, and old, unsightly, and partially decayed lumber of varying lengths, which fence extended back 90 feet from the street, and was 62 L. R. A.

Thayer, Circuit Judge, delivered the opinion of the court:

The complaint filed in the lower court, the substance of which has been stated, shows by necessary intendment that, when the circular of the defendant company was issued, it had in stock a limited quantity of the four brands of calico of the plaintiff's manufacture which are therein described. The circular stated, in substance, that the defendant had such calicoes in stock, and the complaint did not deny that fact, but admitted it by averring that "the defendant corporation had but a small quantity of such goods to sell, and for that reason qualified its offer to sell by inserting in the circular after the name of the goods the words, 'as long as they last.'" Moreover,

supported by wires strung from the tops of the posts to defendant's house; that the fence shut off the view from the house to the street, injured the value of the property for rent or sale, and was wilfully and maliciously erected,—falls to state a cause of action. The court held that, while it was true that there were decisions in the state of Michigan, and some *dicta* of courts elsewhere, to the effect that, if one maliciously uses one's own property to the annoyance of his neighbors, regardless of any physical discomfort to them, he is guilty of actionable nuisance, the element of malice rendering that an actionable wrong which would otherwise be rightful; that doctrine, however, has very little support; none, in fact, where the rules of the common law have not been changed by legislation, and the courts have kept strictly within their legitimate sphere as administrators of the law. The general rule is that, whatever a man may lawfully do on his own property under any circumstances, he may do regardless of the motive for his conduct. That doctrine is as well defined in the common law as any that has to do with the rights and remedies cognizable by the courts, and courts that have departed from it have, as it seems, trespassed upon the domain of the legislative department of the government. *Metzger v. Hochrein*, 107 Wis. 267, 50 L. R. A. 305, 83 N. W. 308.

In *Burke v. Smith*, 69 Mich. 380, 8 L. R. A. 184, 37 N. W. 838, which was a bill filed to abate an illegal nuisance, the decree below granted the relief prayed for, and this was affirmed by an equal division of the supreme court, two of the judges holding that, while the defendant would have a right to erect the structures complained of, if it was done with good intentions and for the purpose of his own benefit or pleasure, that, if they were erected, as they were in the present case, for the sole purpose of maliciously shutting out the view of the defendant's premises from the complainant's windows, the action would lie, and the structure would be enjoined. The other two judges took the ground that any act that the defendant might do on his own land for any purpose could not be changed into an illegal act, such as would support an equity action and an injunction therein, because he did it from bad or malicious motive.

Equity will enjoin the maintenance of a fence 10 feet high along the line of lots between two owners, but upon the premises of the person erecting it, where it is evidenced that the fence

the owner of property, real or personal, has an undoubted right to sell it and to offer it for sale at whatever price he deems proper. although the effect of such offer may be to depreciate the market value of the commodity which he thus offers, and incidentally to occasion loss to third parties who have the same kind or species of property for sale. The right to offer property for sale, and to fix the price at which it may be bought, is incident to the ownership of property, and the loss which a third party sustains in consequence of the exercise of that right is *damnum absque injuria*. We are thus confronted with the inquiry whether the motive which influenced the defendant company to offer for sale such calicoes of the plaintiff's manufacture as they had in stock at the

price named in its circular, conceding such motive to have been as alleged in the complaint, changed the complexion of the act, and rendered the same unlawful, when, but for the motive of the actor, it would have been clearly lawful. It is common learning that a bad motive—such as an intent to hinder, delay, and defraud creditors, by virtue of stat. 13 Eliz. chap. 5, and possibly by the rules of the common law—will render a conveyance or transfer of property void which, but for the bad motive, would have been valid. So, also, one who sets the machinery of the law in motion without probable cause, and for the sole purpose of injuring the reputation of another, or subjecting him to loss and expense, is guilty of an unlawful act which would have been lawful

served no useful or needful purpose, and was built and is maintained out of pure malice and spite. *Flaherty v. Moran*, 81 Mich. 52, 8 L. R. A. 183, 45 N. W. 881. In this case the court said that the case came so squarely within the opinion of Mr. Justice Morse in *Burke v. Smith*, 69 Mich. 380, 8 L. R. A. 184, 37 N. W. 838, that the court must decline to discuss the question of law involved; that it was there held by an equal division of the court as then constituted that a fence erected maliciously, and with no other purpose than to shut off the light and air from a neighbor's window, is a nuisance.

The rule in *Flaherty v. Moran*, 81 Mich. 52, 8 L. R. A. 183, 45 N. W. 381, *supra*, was approved and adopted in *Kirkwood v. Finegan*, 95 Mich. 543, 55 N. W. 457, a case identical in its facts.

In *Kuzniak v. Kozminski*, 107 Mich. 444, 65 N. W. 275, it was decided that the defendants might, for a useful purpose, erect a building upon their own land; and, while there may have been some malice displayed in putting it so near the plaintiff's house as to shut off some of the light, that would not be a sufficient reason upon which to found a right in complainant to have the building removed, as defendants had a right to erect a building upon their own premises, and motives of a party in doing a lawful act cannot form the basis upon which to found a remedy. The court said that this case did not fall within the rule of *Flaherty v. Moran*, 81 Mich. 52, 8 L. R. A. 183, 45 N. W. 381, *supra*.

The last four cases indicate with a good deal of exactness the effect of malice to create a cause of action in Michigan. If in the commission, by a person upon his own premises, of an act lawful if done for his benefit or pleasure or any good reason, as where he erects a building upon his premises for his own benefit, even though he cause an injury to his adjoining neighbor, the act is not unlawful or the subject of an action whatever his motive; but, if he does the same act without any benefit or pleasure to himself, but solely with the malicious motive of injuring the adjoining owner by shutting out his light, air, or view, there he violates the rights of such adjoining owner, and the fact that he does it purely from malice renders what would otherwise be legal, illegal and actionable.

But the theory of the cases immediately preceding the Michigan cases is that the adjoining owner has, in no event, any right to violate; and that the malice of the other party in erecting

the obstruction will not, alone, create such right.

In several of the states it has been, by statute, declared unlawful to erect a fence or other obstruction solely with the malicious purpose of annoying the owner or occupant of the adjoining premises by obstructing his view, light, and air. It is believed that, where such statutes have been construed, it will be found that the courts of the several states which have passed upon them have been unanimous in holding that, in order to bring the obnoxious structure within the provisions of such a statute, there must be a predominance of the malicious motive, and the malicious intent must be so predominant as a motive as to give character to the structure, and it must be manifest and positive that the real usefulness of the structure will be manifestly subordinate and incidental; but, where it certainly appears that malice prompted the erection of the structure in question, and that the alleged usefulness must be regarded as simply an incident, the structure will be held unlawful. *Harblson v. White*, 46 Conn. 106; *Gallagher v. Dodge*, 48 Conn. 387, 40 Am. Rep. 182; *Lord v. Langdon*, 91 Me. 221, 39 Atl. 552; *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81, 19 N. E. 390; *Hunt v. Coggin*, 66 N. H. 140, 20 Atl. 250; *Smith v. Morse*, 148 Mass. 407, 19 N. E. 393.

And in the last case it was held that the statute must be construed as above stated, or it would be unconstitutional.

And in *Karasek v. Peter*, 22 Wash. 419, 50 L. R. A. 345, 61 Pac. 33, it was said, in reference to a similar statute, that it was not the intention to prohibit the erection of such structures as really enhance the value, usefulness, or enjoyment of the land, but such, only, as are primarily or solely intended to injure or annoy an adjoining owner, and which serve no useful or reasonable purpose.

The fact that such statutes were deemed necessary would seem to indicate that the legislatures of the several jurisdictions which have enacted them considered them essential in order to create a cause of action for maliciously erecting obstructions to light and air; and that without the existence of such a statute no cause of action therefor existed.

In *Whitlock v. Uhle*, 75 Conn. 423, 53 Atl. 891, the court said that the fact that a statute of this character is in derogation of the common law, disturbs previously existing rights of property, and creates a new right difficult of

but for the improper motive. And one who, by virtue of his situation, has a qualified privilege to make defamatory statements concerning another, may be deprived of the benefit of that privilege by proof that it was not exercised in good faith, but in pursuance of a malicious intent to injure the person concerning whom the defamatory statement or statements were made. Pollock, Torts, Webb's ed. pp. 331-335, and cases there cited. There is also some authority for saying that one who maliciously (that is, with intent to obtain some personal benefit at another's loss or expense) induces another to break his contract with a third party thereby commits an actionable wrong if special damage is disclosed, although the act done would have been lawful if the

wrongful motive had been absent. *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, *Walker v. Cronin*, 107 Mass. 555. And see Pollock, Torts, Webb's ed. pp. 668-673. Aside from cases of the latter kind, it is a general rule that the bad motive which inspires an act will not change its complexion, and render it unlawful, if otherwise the act was done in the exercise of an undoubted right. Or, as has sometimes been said, "when an act done is, apart from the feelings which prompted it, legal, the civil law ought to take no cognizance of its motive." The question as to how far and under what circumstances a bad purpose will render an act actionable which, considered by itself, and without reference to the purpose which

reasonable enforcement, except in a clear case, demands that its effect should not be extended beyond the evil it was intended to remedy. That the evil was not injury of adjacent land by the use of one's own land without taking the necessary and reasonable precautions to avert such injury as may happen in building close to a neighbor's line. Such evil is provided for by the common law. That it is not the use of one's own land for maintaining a nuisance by which a neighbor suffers damage. That that evil is provided for by the common law. That still less is it the bickerings, spite, and hatred arising from neighborhood quarrels. That, plainly, the real evil consists in the occasional subjection of a landowner to the impairment of his land by the erection of a structure which substantially serves, and is intended to serve, no purpose but to injure him in the enjoyment of his land.

It is difficult to perceive how the subjection of the landowner to the impairment of the value of his land by the erection of a structure which only serves, and is only intended to serve, the purpose of injuring him in the enjoyment of his land is anything other than the result of bickerings, spite, and hatred arising from neighborhood quarrels.

c. Waters.

1. Natural water courses.

In an action against defendant for interfering with plaintiff's dam by opening the gate and letting the water therefrom, the action being to restrain the defendant from opening such gate and letting off the accumulated water, the court, in reversing a judgment in favor of the plaintiff on the ground that the defendant was simply exercising his legal right to the unobstructed flow of the water past his premises, said: "Again, it is said, and the fact is found by the special term, that the defendant insists upon his right to the natural flow of the water in the stream from a bad motive, and for the purpose of annoying the plaintiff. This is immaterial. Courts have no power to deny to a party his legal right because it disapproves his motives for insisting upon it." *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373. The defendant had the right to have the water flow through his premises. The plaintiff had interfered with that right, and the defendant had removed the cause of the interference, as he had a right to

do; and it made no difference that in doing so he was actuated by malice.

Plaintiff erected a milldam upon a stream of water, and used it continuously for thirty years. Defendant, who owned land above, built a larger mill, by means of which the water was detained to the detriment of plaintiff's mill. A charge that, if the injury to plaintiff's mill was occasioned by the detention of the water in the defendant's dam for an ordinary and proper use for mill purposes, it was *damnum absque injuria*; but, if there was a vexatious detaining of the water, or if there was any degree of malevolence as to the time or the quantity of water discharged by the defendant, it was an injury for which the plaintiff was entitled to relief in damages,—was sustained. *Hoy v. Sterrett*, 2 Watts, 327, 27 Am. Dec. 313.

Where it appears that the parties are respectively riparian owners upon a fresh-water, un-navigable stream, the defendants owning a mill below, with a privilege, and a dam which flows the water back upon plaintiff's land, thereby creating a pond which is useful and profitable for cutting ice in the winter season; and it further appears that the defendants had not used their mill for several years, but that they had flowed the water in the summer and early winter, but that, when the ice was forming and being cut and harvested, they wantonly and maliciously let the water out of the dam by opening the gate and sluiceway, thus causing the ice to fall into the mud and become spoiled,—the defendants are liable to the plaintiff therefor. *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 312, 3 Atl. 868.

The foregoing was held by the court upon what was practically a demurrer to the allegations in the writ, and the case was remanded for trial. The case was afterwards tried, and the jury found that the defendants were guilty of no malicious intent, since they only vented such water as had been done for the long series of years during which the mills existed, and, under instructions, found a verdict for the defendants, and a motion for a new trial was denied by the supreme court. The effect of the two decisions would seem to be that, as the allegations of the writ charged the act to have been done maliciously, it stated a cause of action, but that, the jury, on the trial, having found that the defendants were guilty of no malicious intent, but had simply done what they were obliged to do not to render themselves liable to

prompted it, is lawful, has been so much discussed since the decision in *Allen v. Flood* [1898] A. C. 1, that it would be profitless to indulge in further comment. It has been well observed that it would be dangerous to the peace of society to admit the doctrine that any lawful act can be transformed *prima facie* into an actionable wrong by a simple allegation that the act was inspired by malice or ill-will, or by an improper motive. It is wiser, therefore, to exclude any inquiry into the motives of men when their actions are lawful, except in those cases where it is well established that malice is an essential ingredient of the cause of action, or in those cases where, the act done being wrongful, proof of a bad motive will serve to exaggerate the damages.

lower mill owners for obstructing the water, they were not liable. See same case, 13 Atl. 45.

The owner of a mill, who has the right to maintain a pond or flow back the water of a stream upon the land of another and to use such water to operate his mill, possesses, as to the water, the dominant right, and, while not the absolute owner of ice which may form on the pond, is entitled to have it remain there while it will be, or is, useful and necessary to the exercise of his right to use the water as motive power for the mill or to operate the mill; but the owner of the land, if upon a non-navigable stream, may make any use he desires of ice which forms over and above so much of the bed of the stream to which his ownership extends as does not interfere with, or injure, the rights of the mill owner. If the owner of such a mill and the dam subservient thereto wantonly and unnecessarily draws the water from, or lowers the water in, the pond, and by so doing injures or destroys the ice privileges of the owner of land bordering upon the pond, he thereby renders himself liable in damages to such owner. *Eldemiller Ice Co. v. Guthrie*, 42 Neb. 238, 28 L. R. A. 581, 60 N. W. 717. In this case the court said: "We have no doubt that, where the owner of a milldam, either maliciously or unnecessarily draws the water from the pond, or materially lowers it, and by so doing destroys the ice privilege, he becomes liable to an action for so doing."

The action was for an injunction to restrain the drawing off of the water and thereby injuring the ice privilege, and a judgment in favor of the plaintiff, awarding an injunction, was reversed, and a decree entered vacating the injunction and dismissing the plaintiff's petition, upon the ground that the damages were not irreparable, but that the plaintiff had an abundant relief in an action at law for damages. The latter being all that the court was called upon to decide, it is left optional with one to judge whether what was said on the question of malice as a support to a cause of action is authority or dictum.

Persons who intentionally, unnecessarily, and without benefit to themselves or others divert the water of a natural channel flowing from a living spring through and benefiting the lands of another, by using artificial and unnecessary means to accomplish that purpose, when they might accomplish the same purpose better for themselves by deepening the channel through

The case at bar falls within neither of the exceptions to the general rule above stated.—that, if an act is done in the exercise of an undoubted right, and is lawful, the motive of the actor is immaterial. No one can dispute the right of the defendant company to offer for sale goods that it owned and were in its possession, whether the quantity was great or small, for such a price as it deemed proper. This was the outward visible act of which complaint is made, and, being lawful, the law will not hold it to be otherwise because of a secret purpose entertained by the defendant company to inflict loss on the plaintiff by compelling it to reduce the cost of a certain kind of its prints or calicoes.

Nor is the complaint aided in any re-

which the stream naturally runs, must be said to have diverted the water to the injury of such other person, and this the law characterizes as a malicious injury; and, conceding that they are entitled to drain the land in which such stream originated and through which it runs before entering the land of the other person, yet if, without inconvenience or extra expense, they can adopt the means of drainage through the natural channel, they have no right to adopt a mode which is not only injurious to such other person, but intentionally so. *Bartlett v. O'Connor* (Cal.) 36 Pac. 513.

If the stream were a natural water course they would not have the right to divert it, even with the best intentions. The case is not much of an authority, but the latter part of the proposition may be said to apply to the subject under consideration. Of course, in any of these cases the result would have been the same if the actionable ingredient charged had been negligence; but, as it was malice, they are inserted here. They illustrate the general principle laid down in II. b, *supra*.

2. Percolating waters.

Chesley v. King, 74 Me. 164, 43 Am. Rep. 569, has been cited as an authority opposed to the rule that malicious motives cannot make that a wrong which in its own essence is lawful. What was said on this subject would seem to be *obiter*, as the court, in conclusion, said that there was no testimony which, fairly weighed, could lead to the conclusion that defendant dug the well for any purpose except to supply the deficiency that he experienced; and the judgment for the plaintiff was reversed.

In *Wheelock v. Jacobs*, 70 Vt. 162, 43 L. R. A. 105, 40 Atl. 41, in holding the doctrine that there are no correlative rights between owners of adjoining land in respect to percolating water, the court, in its statement of the case, took pains to state that the defendant did the act complained of, whereby water was diverted from the plaintiff's spring, without malice; but at the conclusion of the opinion the statement is made that what was said in *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569, *supra*, that, if the defendant dug the well for the sole and malicious purpose of cutting off the sources of the spring and injuring the plaintiff, he would be liable, is not the rule in Vermont; that by the law in that state it is immaterial with what motive a man does an act lawful in itself.

spect by reference to the law of conspiracy, since the only object that the defendants had in view which the law will consider was the disposition or sale of certain goods which the defendant corporation had the right to sell; and the means employed to accomplish that end, namely, placing them on the market at a reduced cost, were also lawful.

In the brief filed in behalf of the plaintiff in error it is suggested finally, that the complaint may be sustained on the ground that it states a good cause of action for maliciously causing certain persons to break or cancel their contracts with the plaintiff, but we think it quite obvious that the complaint was not framed with a view of stating a cause of action of that nature, and

that it is insufficient for that purpose. It does not give the name of any person or corporation with whom the plaintiff had a contract for the sale of its prints which was subsequently broken in consequence of the wrongful acts of the defendant. Neither does it show that it had accepted any orders for goods which the jobber was not privileged to cancel at his pleasure. Nor does it allege any special damage incident to the breach of any particular contract. In view of all the allegations which the complaint contains, it is manifest, we think, that it was framed with a view of recovering on the broad ground that the issuance of the circular was unlawful and actionable, provided the motive of the defendant company in is-

The owner of land containing underground water, which percolates by undefined channels and flows to the land of a neighbor, has the right to divert or appropriate the percolating water within his own land so as to deprive his neighbor of it; and his right in this respect is the same whatever his motive may be, whether bona fide to improve his own land, or maliciously to injure his neighbor, or to induce his neighbor to purchase his land. *Bradford v. Pickles* [1895] A. C. 587, 64 L. J. Ch. N. S. 750, 11 Reports, 286, 73 L. T. N. S. 353, 44 Week. Rep. 190, 60 J. P. 3, Affirming [1895] 1 Ch. 145. Upon the decision of the case by the court of appeal Lord Herschell (then L. C.) said there was high authority for saying that the principle that, even if the defendant was not otherwise infringing any rights of the plaintiff, he might be restrained from a malicious exercise of his legal rights, his design being to injure the plaintiff, and not to benefit himself, had not found a place in English law; that no case had been cited where relief had been given by the courts on any such ground; and that it could hardly be asserted that this was because no person had ever thus exercised his legal rights to the prejudice of his neighbor. Lord Lindley said that he entirely concurred in the view taken by the trial justice of the conduct of the defendant, who did not want the water himself, nor did he want to get rid of it the better to work his own land, but simply wanted to force the plaintiff to buy his land or the water coming from it, at his own price, regardless of the interests of other people, who would be seriously inconvenienced if the defendant cut off the supply; but that these circumstances were not enough to justify the court in interfering with the defendant. That the only question to be considered was whether the defendant had a right to do what he threatened and intended to do; that if he has he cannot be interfered with, however selfish, vexatious, or even malicious, his conduct might be. And A. L. Smith, L. J., said that, although what the defendant was doing was not in order that he might be enabled to work his stone, as he put forward in evidence, but in order that the plaintiff might be driven to buy him out at the price he himself might value his interest at, the motive of the defendant was immaterial, and it must be taken as if the defendant was sinking a well upon his own land for his own legitimate purposes. In the House of Lords, Lord Halsbury, L. C., said that this was not a case in 62 L. R. A.

which the state of mind of the person doing the act could affect the right to do it; that, if it was a lawful act, however ill the motive might be, he had a right to do it, that, if it was an unlawful act, however good his motive might be, he would have no right to do it; that motives and intentions in such a question seemed to him to be absolutely irrelevant. Lord Watson said no use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive that is improper, or even malicious. Lord Ashbourne said the defendant had acted within his legal rights throughout; and he was not to forfeit them and be punished for their legal exercise because certain motives were imputed to him; that, if his motives were the most generous and philanthropic in the world, they would not avail him when his actions were illegal; and that, if his motives were selfish and mercenary, that is no reason why his rights should be confiscated when his actions are legal. Lord Macnaghten said it is the act, not the motive for the act, that must be regarded. If the act, apart from motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element.

This case was cited by nearly all of the majority in the House of Lords in *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, *infra*, IV. b, as supporting a decision to the effect that malice alone will not support a cause of action.

Plaintiff, with the license and consent of the defendant, had dug a hole in a flat piece of ground on the defendant's land, and in this hole placed a tub which filled with water, and laid an aqueduct of lead pipe from the tub to his buildings for which he paid the defendant annually \$1.50. Some difficulty afterwards arose between the parties, and the defendant notified the plaintiff to remove his tub and pipe, and plaintiff, accordingly, took up his tub and placed it in a hole on a flat piece of ground on his own side of the line but near it, and continued to be supplied with water by the filtration of the water from the brook, which ran from the spring and also through the soil and under the soil on the defendant's side of the line. The defendant dug away and lowered the channel of the brook on his own land so that the water of the brook was thereby made to run in the new channel, further north and about a foot lower than before. Defendant also dug a chan-

suing it was to occasion loss or inconvenience to the plaintiff.

We are of opinion that the complainant did not state a cause of action, as the trial court held, and the judgment below is therefore affirmed.

Sanborn, Circuit Judge, dissenting:

I cannot concur in the opinion of the majority in this case because the petition alleges that the defendants, by their advertisement of the goods manufactured by plaintiff, without any legitimate trade purpose, prevented jobbers from purchasing goods of the plaintiff, and caused those who had agreed to purchase from it to cancel their orders unless the plaintiff would make them a rebate, so that the plaintiff sustained

damage in the sum of \$19,000. In my opinion, the gravamen of this cause of action is not the malicious intent or purpose of the defendants, but it is their wrongful act of interfering with the plaintiff's business, of preventing sales that it would have made, and of causing the cancellation of orders to, or contracts of purchase from, the plaintiff, already made. This act, without any allegation or averment of intent or purpose, was itself wrongful, unless it was done for a justifiable purpose. The act of interfering with and injuring the trade or business of the plaintiff without justifiable cause entitled the plaintiff to damages. It is conceded that, if the defendants had advertised these prints for any legitimate trade purpose, for the purpose of selling

nel from the hole where the plaintiff's tub had formerly stood in his land out into the channel of the brook, so as to carry all the water which collected there into the new channel he had made for the brook. He also filled up the side of this channel from the hole or spring to the brook on the side next to the plaintiff's tub with dry, hard earth, so as to prevent any filtration of the water through or under the soil on his land to the plaintiff's tub, which prevented the water from accumulating in the plaintiff's tub, and he was thereby wholly deprived of water by his said aqueduct. These acts of the defendant were not necessary, and were not done by him in order to supply himself with water for any purpose, but solely with a design of thereby depriving the plaintiff of water by his aqueduct. It was held that the water in question in this case while in the earth of the defendant, though percolating through it, was not distinct from it, and the act of the defendant in obstructing the underground water upon his own premises cannot be made actionable, simply upon the ground that the motive was bad which induced it. It may be laid down as a position not to be controverted that an act legal in itself, violating no right, cannot be made actionable on the ground of the motive which induced it. *Chatfield v. Wilson*, 28 Vt. 49.

The owner of land has a clear right at common law to sink a well thereon, and use the water therefrom as he chooses, or allow it to flow away, regardless of the effect of such use upon his neighbor's wells, and such right is not affected by malicious intent. Whether this right results from an absolute ownership of the water itself, as stated in some of the authorities, or from a mere right to use and divert the water while percolating through the soil, it is, in either event, a property right arising out of his ownership of the land, and is protected by the common law as such. *Huber v. Merkel* (Wis.) 94 N. W. 354.

In *Frazier v. Brown*, 12 Ohio St. 294, the court stated that the question in that case was, whether, in the absence of all rights derived either from contract or legislation, a landowner can have no legal claims in respect to subsurface waters which, without any distinct and definite channel, ooze, filter, and percolate from adjoining lands into his own, when such waters are diverted, retained, or obstructed by the owner of such adjoining lands in the use of his 62 L. R. A.

property, for any object of either taste or profit, even though the use may be accompanied by a malicious intent to injure his neighbor by means of such use. The case arose upon a demurrer to the petition, which stated, in substance, that the plaintiff was the owner of a spring from which issued a rivulet of water running through his land, from which he derived great benefit, and that the defendant, contriving and wickedly intending to injure the plaintiff, maliciously dug, for the purpose of destroying said spring and diverting the rivulet, a certain well, whereby the defendant wickedly, wilfully, and maliciously sunk and destroyed said spring of water to his damage. In sustaining the demurrer and holding that the petition did not state a cause of action, the court said that it did not appear therein that the defendant did not dig the well for some purpose of his own, as it might have been a well for domestic use, or for watering stock, or for several other useful things mentioned, for aught that appeared in the petition; that it was certainly possible that it might have been dug by the defendant from motives of unmixt malice, without any object, and, when done, incapable of answering any end, either of ornament, convenience, or profit, connected with the enjoyment and use of his property; but that this was not averred and would not be presumed, and reserved such a case, if it should ever arise, for future consideration. After discussing several English and American cases upon the effect of malice and the right to percolating waters, the court said, in conclusion: "And, as an act unlawful in itself resulting in injury to another, whatever may have been the motive with which it was done, is none the less the subject of legal redress, so the act done,—to wit, the using of one's own property,—being lawful in itself, the motive with which it is done—whatever it may be as a matter of conscience—is, in law, a matter of indifference."

The last statement would seem to be a *non sequitur*. The same idea, however, is found in *Boyson v. Thorn*, 98 Cal. 578, 21 L. R. A. 233, 33 Pac. 492, *supra*, III. a.

In *PHELPS v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93, it appeared that upon defendant's land was a mineral spring around which an embankment had been formed, partly by the action of the water, and partly artificially, which raised the water in the spring. Plaintiff dug a well upon his land which struck a vein of mineral water,

them for gain for themselves, for the purpose of converting them into money because they preferred their advertised price to the goods, or for the purpose of competing in trade with the plaintiff, they would have had a justifiable cause for inflicting upon it the damages of which it complains, and these damages would then have been *damnum absque injuria*. But, if they had advertised them for any of these purposes, this case would have constituted an exception to the general rule of law. The general rule is that, whenever one injures a man's business, profession, or occupation he is liable for the damages he inflicts. The exception is that, where the injury is caused by competition in trade or the lawful exercise of a right which the inflictor has, then the

injury is justifiable, and no damages can be recovered. But, where such an injury is inflicted, the presumption always is that the rule, and not the exception, applies, and, if the inflictor would justify, he must show that he falls within the exception. The question in this case, therefore, is not whether or not the motive or intent of the defendants will make acts unlawful which were otherwise lawful, but whether or not the intent and purpose of the defendants will justify an otherwise unlawful act, and excuse them from the payment of damages for which, under the general rule of law, they are liable to the plaintiff. It is whether or not the petition shows that they advertised the goods for legitimate trade purposes, so that their acts fell with-

and was using the same when defendant, aware of the operations of plaintiff, dug a ditch through the embankment around his spring thereby lowering the water therein, in consequence of which the water in the plaintiff's well was lowered and the supply cut off, and he suffered damage to a large amount. In doing what he did, the defendant supposed that the water in the plaintiff's well communicated in some hidden and undefined way with the water in his spring; he expected the lowering of the spring would be followed by a diversion of sub-surface water from the well, and a consequent depression of the surface of the water in the well; he intended to produce that result; he dug the ditch for that purpose and no other, and, in so far as such intent and purpose, under the circumstances, constitute malice, his motive was malicious. The court held that the act of the defendant in digging a ditch through the mound which had been formed around the spring on his land, and which had raised the surface of the water therein, was *prima facie* lawful, and a proper exercise of his right, as the owner of the land, to the enjoyment of the subterranean waters which flowed under the same. That the effect of the embankment was to raise the water in the well, which had been constructed upon the land of the plaintiff, higher than it naturally would have been, and the plaintiff had no right, by prescription or otherwise, to have it maintained by the defendant at that elevation. That the use of the water, as thus increased, was only enjoyed by the plaintiff by the mere permission or license of the defendant, which the latter could revoke at his pleasure. That the defendant was authorized to restore the water to its natural course for any legitimate or proper purpose, and to this extent, at least, was justified in opening the mound and removing any obstacle to the natural and ordinary flow of the water. That the plaintiff was enjoying the use of water which had been provided by the embankment on defendant's land, and the act of defendant merely restored the water thus temporarily retained to its previous natural course. That it is not by any means clear that the assertion of a lawful right on one's own land, even although it is not designed to benefit the party who seeks to maintain it, and may injure an adjoining owner, constitutes legal malice for which a remedy by action exists. The court said, in conclusion, that the result of an examination of the subject was that, neither

upon principle nor authority, was the defendant liable for doing a lawful act upon his own premises; and that in this aspect of the case it was not necessary to determine whether, under a different state of facts, the motive or intent, or the malice of the owner of the land, should be taken into consideration.

When water filters or percolates through the soil or interstices of the rock, the owner of the land through which it passes may divert or appropriate it for the improvement or benefit of his estate, without giving an adjoining proprietor ground for complaint; but the right of appropriation is not absolute or unlimited; and, although no action will lie against him for any use of the water in question in favor of the adjoining owner where such use was for his benefit or pleasure, yet, where he has overflowed and diverted the water merely for the purpose of reducing the adjoining owner's water in its spring, he is liable for so doing. *Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 74. In this case it appeared that the defendant diverted the water on a pretense of desiring to repair leaks in his dam, but the fact was found that he did so, not for any benefit or use to himself, but solely for the purpose of lessening the plaintiff's supply of water, and in order to compel the plaintiff to buy his property.

After deciding that waters filtering or percolating in the soil belong to the owner of the freehold, like the rocks and minerals found therein, and he may use them as he chooses, free from any usufructuary rights of others, the courts, in the following cases, stated, in substance, that this was so in case a person who acted upon such right to use did so in good faith and without malice or bad motive. They are, consequently, only of value as to the inference, deducible from such statements,—that, notwithstanding such right to use, the presence of such malice or bad motive would create a cause of action. *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Halldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511; *Lybe's Appeal*, 106 Pa. 626, 51 Am. Rep. 542; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Bliss v. Greeley*, 43 N. Y. 671, 6 Am. Rep. 157; *Redman v. Forman*, 83 Ky. 214; *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 410.

In *Miller v. Black Rock Springs Improv. Co.* 99 Va. 747, 40 S. E. 27, in which case it was held that the defendant was not liable for diverting percolating waters, the judge who de-

in the exception, which justifies the infliction of damages, and not under the general rule, which requires them to compensate the plaintiff for the injury they have caused. The opinion of the majority assumes that the defendants advertised the prints for a legitimate trade purpose, so that their acts fell within the exception to the general rule. It overlooks the legal presumption that injury to one's business entitles him to compensatory damages, and the plain averment of the petition that the acts of the defendants were not done for any justifiable cause, but were committed for the sole purpose of inflicting upon the plaintiff the injury they caused. The tenth paragraph of the petition reads in this way: "Tenth. That the effect of issuing the aforesaid cir-

cular of the defendant corporation was to advertise to the retail trade throughout the states of Missouri, Arkansas, Kansas, Texas, Illinois, Indiana, Kentucky, Tennessee, Indian Territory, Colorado, and New Mexico that the goods named and quoted, manufactured by the plaintiff, could be purchased at a less price from the defendant corporation than they could be from the other jobbers in St. Louis, to whom the plaintiff had sold large quantities of said goods, and to thereby cause the said other jobbers in St. Louis to either cancel their orders, or portions thereof, so as aforesaid given to the said plaintiff for such goods, or, as an alternative, to compel the plaintiff to relabel the goods, and to give a rebate on the price, in order that said jobbers might meet the

livered the opinion of the court said: "A large number of cases are to be found, and some of them are cited for the appellee, in which it was held that an owner of an adjoining tract of land cannot, by digging thereon, divert the water from his neighbor's spring or well, if the digging is done with malice or with the intent to deprive his neighbor of the water."

In *Greenleaf v. Francis*, 18 Pick. 117, it was decided that one may dig upon his own land for water, or for any other purpose, although he thereby cuts off the supply of water from his neighbor's well. But it was intimated that such acts might be actionable if done maliciously and without benefit to the person doing them. This suggestion was approved in *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721, *supra*, to this extent: That malicious acts without the justification of any right,—that is, the acts of a stranger,—resulting in like loss or damage, might be actionable.

In *Delhi v. Youmans*, 50 Barb. 316, it was held that the defendant was not liable for digging on his own land and thereby diverting the water from certain springs on the lands of plaintiff on the ground that the rule in regard to percolating waters applies. One of the judges held that an exception exists in case of an injury done by cutting off such waters with malice; and that no person can wantonly and maliciously cut off on his own land the underground supply of a neighbor's spring or well without any purpose of usefulness to himself. Another said: "I am aware of the opinion (and it is supported by authority) that a person is liable to an action for maliciously digging in his own land for the sole purpose of destroying a spring of water issuing out of the land of his neighbor. But that is not this case; for it is clear the defendant's object in digging in his land, notwithstanding his random declarations, was to obtain a proper supply of water at his house and barn on the same land." In this case the court said that, if the defendant had the legal right to perform the acts complained of (diverting the water for no apparent use except to run it into a sewer), the authorities are abundant and seemingly unanimous to the effect that his motive and purpose are immaterial; but that they had arrived at a conclusion that, irrespective and independent of his motive, he had no absolute legal right to collect the sub-surface waters solely that they might be wantonly wasted, and that he might be restrained from 62 L. R. A.

so doing. That it was true that the action must be disposed of upon principles involving natural rights of property, and, while they were first to look to the extent of the defendant's ownership in the land in which he had dug the trench, they were not altogether to lose sight of the fact that he had collected the water for no worthy purpose, and that he was squandering it to the injury of the public.

If the proprietor of lands, by digging a well, or making any other excavation, on his own lands, withdraws water from the spring on the neighboring proprietor's land, which has either percolated into it through the former's land, or flowed into it by well-defined and well-known subterranean streams or currents,—currents or streams coursing through and under the former's land; and if he does that, not for the purpose of accommodating or benefiting himself or others, but for the purpose of injuring the neighboring proprietor; or, in other words, if in doing it he is actuated by pure and unalloyed malice towards the latter,—he is answerable for the damages sustained by his neighbor. *Wyandot Club Co. v. Sells*, 3 Ohio N. P. 210.

This rule was laid down in a decision by a single judge at nisi prius in overruling a demurrer to a complaint which alleged that the defendant, by digging a hole within a few feet of the plaintiff's line, diverted the water from a definite and well-known channel under the plaintiff's land, which flowed into a spring on its land, and abstracted, prevented, and intercepted the flow of said water, which ought to have flowed into the plaintiff's said spring; and that in doing so the defendant was actuated by un-mixed malice; and that his purpose was for neither the ornament nor the use of his own lands, which adjoined the plaintiff's lands.

The motive of a riparian owner in cutting trees along the bank of a stream whereby evaporation is accelerated, in felling them into the stream to the injury of the water, and in building dams, does not affect his legal liability for such acts. *Fisher v. Feige*, 137 Cal. 39, 59 L. R. A. 333, 69 Pac. 618.

In *Barclay v. Abraham* (Iowa) 96 N. W. 1080, plaintiff and defendant were adjoining owners, and the plaintiff had a well into and from which subterranean waters flowed and supplied his house and barn. Defendant, with the intention to cut off the water supply of a well owner other than the plaintiff, put down a well with a 3-inch pipe near his line adjoining the plaintiff, the

prices so offered by the circular of said defendant corporation, and to thereby break up, injure, and destroy the sales and trade of the said plaintiff in the market of St. Louis and the country tributary thereto, and to make the said other jobbers in St. Louis afraid to deal in the said goods of this plaintiff except at greatly reduced prices, and then in comparatively small quantities; and upon information and belief the plaintiff alleges that the quotations of this plaintiff's said goods in the said circular were made by the said defendants with the end and object in this paragraph stated, and not for any legitimate trade purpose."

Now, no one will dispute the rules of law that the plaintiff in this action had the right to conduct its business of manufacturing

and selling prints without the injurious interference of strangers, and that the defendants were subject to the universal rule that they must so use their own property and rights as to inflict no unnecessary injury upon their neighbors. The averments of this petition are that they were not using any of their property or exercising any of their rights for any legitimate trade purpose, but that they were using them for the express purpose of inflicting injury upon the plaintiff, and that they succeeded in imposing the infliction. These allegations seem to me to bring this case under the general rule of law, and to clearly negative the claim that it falls within the exception. They seem to state a good cause of action. The principle upon which this conclusion

water from which he ran into a ditch which ran into a creek, and was not used by him for any other purpose than watering a few cows, but nearly all of it was wasted. The effect of this was to destroy the plaintiff's well. An injunction reducing the flow of the defendant's well to $\frac{1}{4}$ of an inch, the effect of which was to restore the water flowing from plaintiff's well, was sustained. The court said that, in the light of the facts that the defendant's object was to maliciously cut off the water supply of the well owner other than plaintiff, and that nearly all of the water thus taken was not used by the defendant but wasted, rendered it unimportant to determine whether the water was supplied by percolation through the soil or a well-defined subterranean stream; but, for the purposes of the decision, held that the subterranean district which supplied the various wells was percolating water. The court then said that, while there was no doubt but that defendant had the right to make such beneficial use of the water in the improvement of the land as he might choose, it did not follow that he had the right to draw from this reservoir within the earth, wherein nature had stored water in large quantities for beneficial purposes, merely to waste or carry out a distinct design to injure those having equal access to the supply. After alluding to the decisions to the effect that percolating waters are to be treated the same in law as the land in which found, and may be diverted, consumed, cut off with impunity, without liability for interfering or destroying the supply, the court said, further, that a tendency to depart from the strict rules of the common law with respect to percolating waters in the adjustment of modern decisions is manifest in recent decisions, and proceeded to state and approve what was decided in *Stillwater Water Co. v. Farmer* (Minn.) 80 L. R. A. 875, 93 N. W. 907; and, in reference thereto, further said: "The doctrine there announced is in harmony with good morals. It interferes with no valuable right of the defendants. It shields from destruction property rights of great value belonging to . . . others. It goes no farther than to say that a landowner may not collect, drain, or divert waters percolating through the earth merely to carry from his own land for no useful purpose, when such action on his part will have the effect of materially injuring or destroying the well or spring of another, the waters of which are devoted to some beneficial use connected with the 62 L. R. A.

land where found. It applies in principle the doctrine of correlative rights to the control of subsurface waters whenever the appropriation proposed is unconnected with the use, enjoyment, or improvement of the land from which taken."

D. Miscellaneous.

Plaintiff had prepared a decoy pond for the purpose of taking wild fowl; the defendant, knowing which and intending to damnify the plaintiff and to frighten and drive away the wild fowl accustomed to resort to the decoy pond, discharged guns on his own lands for that purpose, and the wild fowl were thus driven away. It was held that an action on the case would lie for the damage occasioned. *Holt, Ch. J.*, said that, if the defendant had set up another decoy on his own ground near the plaintiff's and that had spoiled the custom of the plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff; but where, without benefit to himself, real or intended, he successfully committed the act intending to accomplish the injury to the plaintiff, it was actionable. *Keeble v. Hickeringill*, 11 East, 574, note, 11 Revised Rep. 273, note.

In the report in 11 Mod. 74, *Holt, Ch. J.*, is stated to have said: "But suppose the defendant had shot on his own ground if he had occasion to shoot, it would have been one thing; but to shoot on purpose to damage the plaintiff is another thing, and a wrong."

In *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, reversing *Flood v. Jackson* [1895] 2 Q. B. 21, 64 L. J. Q. B. N. S. 865, 14 Reports, 397, 43 Week. Rep. 453, 59 J. P. 388, *supra*, IV. b, this case was alluded to by some of the judges as a case of great importance in connection with the question there considered; while others treated what was said by *Holt, Ch. J.*, as unworthy of special consideration.

Defendant, being out in his boat shooting wild fowl in a part of an open creek, first fired his fowling piece within a quarter of a mile of plaintiff's decoy, when 200 or 300 wild fowl came out; and afterwards approached nearer, and fired again at wild fowl on the wing at the distance of about 200 yards and upwards from the decoy pond, killing several, whereupon 400 or 500 wild fowl took flight from the pond; but it did not appear that he fired into the decoy. The King's bench refused to set aside a ver-

rests is nowhere better stated than by Chief Justice Holt in the old case of *Keeble v. Hickeringill*, 11 East, 574, note, where the plaintiff recovered damages from the defendant for firing guns on his own land which frightened wild ducks away from the decoy pond of the plaintiff, where the latter was taking them to sell for gain. He said: "Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases. But if a man doth him damage by using the same employment, as, if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's and that had spoiled the custom of the plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the

plaintiff. This is like the case of 11 Hen. IV. 47. One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new. (The action there was held not to lie.) But, suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither, sure that schoolmaster might have an action for the loss of his scholars. 29 Edw. III. 18. A man hath a market, to which he hath toll for horses sold. A man is bringing his horse to market to sell. A stranger hinders and obstructs him from going thither to the market. An action lies because it imports damage. Action upon the case lies against one that

dict for the plaintiff, *Le Blanc, J.*, referring to *Keeble v. Hickeringill*. *Carrington v. Taylor*, 11 East, 571, 2 Campb. 258, 11 Revised Rep. 270.

But there is a distinction between *Keeble v. Hickeringill* and the above case, as in this case the defendant fired his fowling piece for the purpose of frightening the wild fowl out of the plaintiff's decoy in order that he might shoot them for his own benefit, whereas in *Keeble v. Hickeringill* the party fired in order, simply, to frighten the ducks away from the plaintiff's decoy, and without any benefit to himself; and it was expressly said that, if the defendant had set up another decoy on his own ground near the plaintiffs, and that had spoiled the custom of the plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff. See *supra*, II.

Where the fence through which horses escaped into a meadow of another is a partition fence, which it is as much the duty of the owner of the horses as of the other party to repair, they escaped through the owner's fault, and the son of the owner of the meadow will not be liable to the owner of the horses for driving them out of the meadow and off in a direction away from their owner's home, whereby the horses were lost, as he did no more than he had a lawful right to do, and, that being so, the fact that he did it with improper motives could never alter the character of the lawful act; as, whatever a man has a legal right to do, he can do with impunity regardless of his motives. *Humphrey v. Douglass*, 11 Vt. 22, 34 Am. Dec. 668.

The right of navigation in navigable waters is superior to all other rights, and particularly to the right of fishery. The master of a vessel is not obliged to slacken his sail, or change his course, or yield the channel, to a fishing net. Yet if, under the pretense of exercising this right, he should turn out of his course to run upon a net; or if he should lie in wait until the net was spread and then crowd sail to reach it,—he would be answerable in damages. *Post v. Munn*, 4 N. J. L. 61, 7 Am. Dec. 570.

The right of navigation is superior to that of fishery, and when they interfere, the right of fishery must give way to that of navigation. But the right of fishery is an acknowledged one, though it is entirely subordinate to those of navigation, and no principles should be laid down which would burden commerce or restrict the navigator's rights, beyond those which it 62 L. R. A.

is his evident duty to others justly to require. A fisherman had his nets laid out, with a boat with a light in it, and a vessel was seen approaching, and, when about 400 or 500 yards below the nets, the son of the fisherman rowed towards the vessel, in which there was a light, and hailed it to go to the westward, and the fisherman himself rowed down to the vessel and told the captain of the vessel that, if he would go about, he would clear the nets; but he did not go about, but continued his course until he struck the nets and damaged them; and, when the captain of the boat was requested to keep to the westward of the light, which was pointed out to him, he refused in offensive language, and kept his course inside the light. It was held that there was evidence of malice sufficient to take the case to the jury, to whom it belonged, and not to the court, to say whether the language used—"To hell with your net"—was a mere superfluity of maritime civility, or was indicative of malice; and a judgment in favor of the plaintiff, the fisherman, against the master and agent for the owners of the boat was sustained. *Cobb v. Bennett*, 75 Pa. 326, 15 Am. Rep. 752.

IV. Injury to business or occupation.

a. Causing injury to trade.

In an action on the case the plaintiff alleged that he was a free mason, and used to sell stones, and make stone buildings, and was possessed of a lease, for divers years to come, of a stone pit, and dug divers stones there, as well to sell as to build withal; that the defendant, to discredit and to deprive him of the commodity of the said mines, imposed so many and so great threats upon his workmen, and so disturbed all comers, threatening to mayhem and vex them with suits if they should buy any stones, that the comers all desisted from buying, and the workmen from working, etc. It was held that, the threats of mayhem and suits, whereby they durst not work or buy, were a great damage to the plaintiff, and his losing the benefit of his quarries was a good cause of action. *Garret v. Taylor* (18 James I.) Cro. Jac. 567.

In *Green v. Button*, 2 Crompt. M. & R. 707, 1 Gale, 349, 1 Tyrw. & G. 118, 5 L. J. Exch. N. S. 81, the plaintiff, a carpenter, purchased a quantity of battins, and borrowed the money of the defendant to pay for them. (There was no

shall by threats fright away his tenants at will. 9 Hen. VII. 8; 21 Hen. VI. 31; 9 Hen. VII. 7; 14 Edw. IV. 7." 11 East, 576, note.

In the case of *Mogul S. S. Co. v. McGregor*, L. R. 21 Q. B. Div. 544-553, Chief Justice Coleridge said: "But it is said that the motive of these acts was to ruin the plaintiffs, and that such a motive, it has been held, will render the combination itself wrongful and malicious, and that, if damage has resulted to the plaintiffs, an action will lie. I concede that, if the premises are established, the conclusion follows. It is too late to dispute, if I desired it, as I do not, that a wrongful and malicious combination to ruin a man in his trade may be ground for such an action as this."

In the same case upon appeal (L. R. 23

agreement between the parties that the defendant should have any lien on the battins for the amount loaned, but the defendant thereafter went to the seller and informed him that he had such lien, and directed him not to deliver the battins to the plaintiff, and thereupon the seller refused to do so, by which the plaintiff suffered damage by reason of not being able to use the battins, and it was held that the defendant was liable to him therefor. The court said that the questions were, first, whether it sufficiently appeared that the defendant made the claim falsely or maliciously, and, secondly, whether the special damage appeared to result from that wrongful act. That, as the defendant knew that there had been no agreement for a lien, he falsely and wrongfully pretended that he was entitled to one, and so made the representation from improper and malicious motives.

Lyons v. Wilkins [1896] 1 Ch. 811, 74 L. T. N. S. 358, 45 Week. Rep. 19, 60 J. P. 325, 65 L. J. Ch. N. S. 601, is a decision of the court of appeal affirming an order granting an injunction as modified. While its effect may be said to be local in that a construction of the trade union act of 1871 and the conspiracy and protection of property act of 1875 was involved, yet, in making the decision, the judges who participated therein went into the question of the effect of malice in a cause of action of the character alleged in the affidavits and statement of claim. The defendants, officers of a trade union, ordered a strike against the plaintiff manufacturers, and also against a third person who made goods for the plaintiffs only; and their pickets, by their direction, watched and beset the works of the plaintiffs and of such other person for the purpose of persuading work people to abstain from working for the plaintiffs. The injunction order was somewhat modified, and, by the court of appeal, was made to restrain the defendants and their agents from watching or besetting the plaintiffs' works for the purpose of persuading or otherwise preventing persons from working for them, or for any purpose except merely to obtain or communicate information; and also to restrain the defendants from preventing the third person before mentioned, or other persons, from working for the plaintiffs by withdrawing the plaintiffs' workmen or the workmen of such other person from their employment respectively. While the question of malice was not particularly referred to by the court of appeal, yet, as it substantially affirmed

Q. B. Div. 508), all of the judges were of the opinion that, if the acts done in pursuance thereof were shown to have been for the purpose of ruining and destroying the plaintiff's trade, then an action for the damage occasioned could be maintained. Bowen, J., at page 614, says: "No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden. So is the intentional procurement of a violation of individual rights, contractual or otherwise, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence (*Tarleton v. M'Gawley*, Peake N. P. Cas. pt. 1, p. 207), the obstruction of ac-

the decision of the judge who granted the injunction, and as reference was made by one of the members of the court of appeal to *Flood v. Jackson* [1895] 2 Q. B. 21, 64 L. J. Q. B. N. S. 663, 14 Reports, 397, 43 Week. Rep. 453, 59 J. P. 388 (see *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, *supra*, IV. b), where the opinion of Lord Esher, from which the judge who granted the injunction had largely quoted with approval in regard to this question of malice, may be said to predominate,—it might seem that it approved his views on the subject.

The case was afterwards held by the judge having charge of it until after the House of Lords should have given judgment in the case of *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, *infra*, IV. b, which was then proceeding before them, and, after the decision in that case, he delivered his judgment, in which, among other things, he said: "The plaintiffs further ask for an injunction to restrain the defendants from maliciously inducing, or conspiring to induce, persons not to enter into contracts with the plaintiffs, and I postponed judgment at the request of the parties until after the decision of the House of Lords in *Allen v. Flood* should be given. The effect of that decision, which has now been given, is, in my opinion, to show that the plaintiffs are not entitled to this injunction. It was conceded by the plaintiffs that they could not succeed in this respect unless they could show malice; and it is the law, as finally determined by the House of Lords, that the existence of a malicious motive cannot, in such a case as this, render unlawful an act or acts otherwise lawful." The injunction, however, as directed by the court of appeal was continued.

On appeal to the court of appeal from a judgment which, among other things, sustained that injunction, the court said: "The point decided in *Allen v. Flood* is that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action. No such general question of motive arises in the present case." [1899] 1 Ch. 255, 68 L. J. Ch. N. S. 146.

Officers of a trade union who conspire to injure a person by combining to induce, and actually inducing, his servant to break a contract with him, and other servants to quit his employment, and to cause a customer of such person to cease and refrain from dealing with him

tors on the stage by a preconcerted hissing (*Ciifford v. Brandon*, 2 Campb. 358; *Gregory v. Brunswick*, 6 Mann. & G. 205), the disturbance of wild fowls in decoys by firing of guns (*Carrington v. Taylor*, 11 East, 571, and *Keeble v. Hickeringill*, 11 East, 574, note), the impeding or threatening servants or workmen (*Garret v. Taylor*, Cro. Jac. 567), the inducing persons under personal contracts to break their contracts (*Bowen v. Hall*, L. R. 6 Q. B. Div. 333; *Lumley v. Gye*, 2 El. & Bl. 216), all are instances of such forbidden acts."

In *Waiker v. Cronin*, 107 Mass. 555, 562, an action for molesting, obstructing, and hindering the plaintiffs from carrying on their business of the manufacture and sale of boots and shoes by persuading employees

or receiving his goods by threatening such customer that his men, who are members of their union, and who are satisfied with their employment, will be called out of his employ in case he does not cease and refrain from dealing with and receiving the goods of the person first mentioned, are liable, in an action in favor of such person, for the damages caused by the breaking of his contract by the one servant, and the quitting employment by the others, and by the refusal of the customer to further receive his goods in consequence of such threats and in the fear of the calling out of his men in case he does not. *Quinn v. Leatham* [1901] A. C. 495, 70 L. J. P. C. N. S. 76, 85 L. T. N. S. 289, 50 Week. Rep. 139, 65 J. P. 708.

It was claimed for the defense in the above case that the judgment of the House of Lords in *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, *infra*, IV. b, justified the defendants in their action, but the court was unanimous in the opinion that this was not so. Lord Shand, who wrote and voted with the majority in *Allen v. Flood*, also delivered an opinion in this case, and therein stated that the vital distinction between that case and this might be stated in a single sentence: That in *Allen v. Flood* the purpose of the defendant was, by the acts complained of, to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors, whereas in the present case, while it was clear there was combination, the purpose of the defendants was to injure the plaintiff in his trade, as distinguished from the intention of legitimately advancing their own interests.

This distinction between *Allen v. Flood* and *Quinn v. Leatham* may be elaborated by stating that, if the iron workers for whom the defendant in *Allen v. Flood* spoke had combined or resolved not to continue work with the plaintiffs because the latter, being shipwrights, had invaded their domain as iron workers, no cause of action would have resulted in favor of the plaintiffs on account of their discharge and the consequent injury; since the injury was caused by legitimate competition in labor while in pursuit of a trade object, and that, being so, none resulted in their favor against the defendant. But in *Quinn v. Leatham* the combination was for no such object, but in pursuit, merely, of a malicious purpose to injure another,—the plain-

to abandon the employment of the plaintiffs, and persons who were about to enter their employment not to do so, the supreme court of Massachusetts sustained the action, and said: "The general principle is announced in Comyns' Digest, *Action on the Case*, A: 'In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages.' The intentional causing of such loss to another without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong. This proposition seems to be fully sustained by the references in the case of *Carew v. Ruthenford*, 108 Mass. 1, 10, 11, 8 Am. Rep. 287." The court then cites the cases to which reference has already been

tiff; and, as it was the cause of injury and damage to the latter, actionable.

And the suggestion comes, that the foundation reason for the last proposition may lie in the fact that, while the employees of the customer of the plaintiff in *Quinn v. Leatham* might lawfully quit their employment without reason therefor, yet, if they combined and threatened to do so unless their employer would cease dealing with the plaintiff, and he was thereby induced or compelled to do so to the plaintiff's injury and damage, the cause of action therefor would arise in favor of the plaintiff against them. And if against them, against all who combined to procure them to do so. See *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 387, 5 Intern. Com. Rep. 522, 54 Fed. 730, *infra*, IV. a.

And this would seem to be the idea conveyed in what is given from the opinion of Field, Ch. J., in the case immediately following.

In *Vegehlahn v. Gunter*, 167 Mass. 92, 35 L. R. A. 722, 44 N. W. 1077, which was an action to enjoin a combination of strikers from preventing persons other than union men from working for the plaintiffs by any means whatever, Holmes, J., who had modified the preliminary injunction by permitting the defendants to use persuasion for the purpose mentioned (but whose judgment was overruled and the original injunction order restored) said: "But there is a notion, which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But, in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and on principle." In this connection, he alluded to the fact that in *Mogul S. S. Co. v. McGregor* [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101, *infra*, there was combination of the most flagrant and dominant kind, and that combination was essential to the success there achieved. He admitted, however, that it was settled, and rightly settled, that the doing of damage by combined persuasion is actionable, as well as doing it by falsehood or by force; and that, when a plaintiff proves that several persons have combined and conspired to injure

made, and that class of cases which holds that a man may dig on his own land for water, although he thereby cuts off the supply of water from his neighbor's well, and then says, at page 564: "Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But, if it come from the merely wanton or malicious acts of others, without the justification of competition or

the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to."

The proposition is sustained by respectable authority; it is just and I believe it is sound, that an action will lie for depriving a man of custom (that is, of possible contracts), when the result is effected by persuasion as well as when it is accomplished by fraud or force, if the harm is inflicted without justifiable cause, such as competition in trade. *Walker v. Cronin*, 107 Mass. 555, 565; *Morasse v. Brochu*, 151 Mass. 567, 8 L. R. A. 524, 25 N. E. 74; *Hartnett v. Plumbers' Supply Asso.* 169 Mass. 229, 235, 38 L. R. A. 194, 47 N. E. 1002; *Delav. Winfree*, 80 Tex. 400, 405, 16 S.

his business, and have done acts producing that effect, he shows temporal damage and a cause of action, unless the facts disclose, or the defendants prove, some ground of excuse or justification. In the same case *Field*, Ch. J., who concurred with *Holmes, J.*, as to the form and character of the injunction order, said: "Whether to persuade a person who is free to choose his employment not to enter into the employment of another person gives a cause of action to such other person, by some courts has been said to depend upon the question of actual malice, and, in considering this question of malice, it is said that it is important to determine whether the defendant has any lawful interest of his own in preventing the employment, such as that of competition in business." The same judge also said that "what constitutes justifiable cause remains in some respects undetermined." And this would seem to be the solution of, or reason for, the apparent different decisions in the note.

And it would also appear to be the view taken by the majority of the New York court of appeals in *National Protective Asso. v. Cumming*, 170 N. Y. 315, 58 L. R. A. 135, 63 N. E. 369, in holding that an action could not be maintained against an association and its representative, whose duty, under the rules of the association, is to see, among other things, that "no member works with nonunion men," by an officer of another association to enjoin and restrain the defendants from interfering with the work, business, or employment of the plaintiff association, or any of its members, or from coercing, or obtaining by commands, threats, strikes, or otherwise, the dismissal or discharge by an employer of the plaintiff or any of the members of the plaintiff association, where, from the facts in the case, it appeared that the members of the defendant association and the defendant, its representative, notified the employer of members of both associations that all members belonging to union labor organizations in his employ would strike and leave his employment unless he dismissed and discharged the plaintiff and other members of the plaintiff association from employment, whereby the said employer was induced to, and actually did, dismiss and discharge members of the plaintiff association to their damage.

This was held in affirming a judgment of the appellate division of the supreme court in the same case, reversing a decision of the special term. In the supreme court (53 App. Div. 227, 62 L. R. A.

65 N. Y. Supp. 946) the judge delivering the opinion stated that the case was brought directly within the principle laid down in *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, *infra*, IV. b. The judge who delivered the prevailing opinion in the court of appeals, while declining to discuss authorities, because, as he said, it seemed unnecessary, used the following language: "But it seems not out of place to suggest that the decisions of the English courts upon questions affecting the rights of workmen ought, at least, to be received with caution, in view of the fact that the later ones are largely supported by early precedents which were entirely consistent with the policy of the statute law of England, but are hostile, not only to the statute law of this country, but to the spirit of our institutions." Three of the seven judges dissented, and were for a reversal.

There seems to have been no question as to the facts in the case, and the judges who wrote the prevailing and dissenting opinions agreed, substantially, as to the general rules of law applicable therein; the difference between the majority and the dissenting judges seeming to lie in their several and different conclusions as to whether the defendants had justifiable cause for their action, thereby illustrating the truth of what was said by Chief Justice Field in *Vegeahn v. Guntner*, 167 Mass. 92, 35 L. R. A. 722, 44 N. E. 1077, *supra*, that "what constitutes justifiable cause remains in some respects undetermined." The judge who wrote the dissenting opinion laid down the following general rules, which the judge who wrote the prevailing opinion quoted and approved: "It is not the duty of one man to work for another unless he has agreed to, and, if he has so agreed, but for no fixed period, either may end the contract whenever he chooses. The one may work, or refuse to work, at will, and the other may hire or discharge at will. The terms of employment are subject to mutual agreement, without let or hindrance from anyone. If the terms do not suit, or the employer does not please, the right to quit is absolute, and no one may demand a reason therefor. Whatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act. Workmen have the right to organize for the purpose of se-

W. 111; *Doremus v. Hennessy*, 62 Ill. App. 391, 403; *Van Horn v. Van Horn*, 52 N. J. L. 284, 10 L. R. A. 184, 20 Atl. 485; *Temperon v. Russell*, 62 L. J. Q. B. N. S. 412, 419.

Under the legal principles to which reference has been made, and under the authorities which have been cited, the petition in this case states a good cause of action for interference with and injury to the business of the plaintiff by preventing it from obtaining custom it would otherwise have obtained, without any justifiable cause or excuse; and, for this reason the demurrer should have been overruled, and the case sent to trial.

There is another reason why the judgment below should be reversed. It is that

curing higher wages, shorter hours of labor, or improving their relations with their employers. They have the right to strike,—that is, to cease working in a body by prearrangement until a grievance is redressed,—provided the object is, not to gratify malice or inflict injury upon others,—but to secure better terms of employment for themselves. A peaceable and orderly strike, not to harm others, but to improve their own condition, is not a violation of law." In the application of these rules to the conceded facts in the case, the judge writing the prevailing opinion said: "There is no pretense that the defendant associations, or their walking delegates, had any other motive than one which the law justifies, of attempting to benefit their members by securing their employment. Nowhere throughout that finding will be found even a hint that a strike was ordered, or a notification given of the intention to order a strike, for the purpose of accomplishing any other result than that of securing the discharge of the members of the plaintiff association and the substitution of members of the defendant association in their place. . . . It is only where the sole purpose is to do injury to another, or the act is prompted by malice, that it is insisted that the act becomes illegal. No such motive is alleged in that finding. It is not hinted at. On the contrary, the motive which always underlies competition is asserted to have been the animating one." On the other hand, the judge who delivered the dissenting opinion said: "A combination of workmen to secure a lawful benefit to themselves should be distinguished from one to injure other workmen in their trade. Here we have a conspiracy to injure the plaintiffs in their business, as distinguished from a legitimate advancement of the defendants' own interests. . . . By threatening to call a general strike of the related trades, the defendants forced the contractor to discharge competent workmen who wanted to work for him, and whom he wished to keep in his employment. They conspired to do harm to the contractor in order to compel him to do harm to the plaintiffs, and their acts in execution of the conspiracy caused substantial damage to the members of the plaintiff corporation. While no physical force was used, the practical effect was that members of one labor organization drove the members of another labor organization out of business, and deprived them of the right to labor at their chosen vocation." As sustaining his po-

sition, he cited and quoted from *Quinn v. Leatham* [1901] A. C. 495, 70 L. J. P. C. N. S. 76, 83 L. T. N. S. 289, 50 Week. Rep. 139, 65 J. P. 708, *supra*, and claimed that the cases were substantially identical, and stated that in that case *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, *infra*, IV. b, upon which the appellate division relied in rendering its judgment, was carefully limited and explained, if not virtually overruled.

This last statement would seem to infer that there might be a question whether the decision in *Quinn v. Leatham* did not virtually overrule *Allen v. Flood*. But when it is considered, as has been heretofore stated, that the principal proposition laid down in *Allen v. Flood*; *viz.*, that the exercise of an absolutely legal right cannot be treated as wrongful and actionable merely because a malicious intention prompted such exercise,—was acquiesced in by each and all of the law lords who wrote in *Quinn v. Leatham*,—with the possible exception of the lord chancellor,—one of whom, who took no part in *Allen v. Flood*, stating that that proposition was established as clear law by the House of Lords in *Bradford v. Pickles* [1895] A. C. 587, 64 L. J. Ch. N. S. 759, 73 L. T. N. S. 353, *supra*, III. c, 2,—such inference would appear not to be warranted.

A further comparison of the two cases (*Allen v. Flood* and *Quinn v. Leatham*) appears in connection with *Allen v. Flood*, *infra*, IV. b.

In *Plant v. Woods*, 176 Mass. 492, 51 L. R. A. 339, 57 N. E. 1011, the judge who wrote the prevailing opinion, in commenting upon the then recent case of *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, *infra*, IV. b, said that, if the meaning of the headnote in that case, and of similar expressions, is, that, where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. That if, however, the meaning is that, where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition did not commend itself to the court here as either logically or legally accurate. That, in so far as a right is lawful, it is lawful, and in many cases the right is so far abso-

of the said plaintiff in the market of St. Louis and the country tributary thereto." Here is a plain allegation that contracts had been made for the sale of these goods to the other jobbers in St. Louis, and that the acts of the defendant corporation induced them to break their contracts, or to compel the plaintiff to lose a portion of the price agreed upon therein as a condition of their performance. Whenever one maliciously interferes in a contract between two parties, and induces one of them to break the contract to the injury of the other, the injured party may maintain an action against the wrongdoer for his damages. *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 13, 38 L. ed. 55, 62, 14 Sup. Ct. Rep. 240; *Lumley v. Gye*,

2 El. & Bl. 216; *Boicen v. Hall*, L. R. 6 Q. B. Div. 333, 337; *Green v. Button*, 2 Crompt. M. & R. 707; *Walker v. Cronin*, 107 Mass. 555; *Benton v. Pratt*, 2 Wend. 385, 20 Am. Dec. 623; *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30; *Jones v. Stanly*, 76 N. C. 355, 356; *Tasker v. Stanley*, 153 Mass. 148, 10 L. R. A. 468, 26 N. E. 417; *Russell*, 62 L. J. Q. B. N. S. 412, 419. For the reasons which have now been briefly stated, the judgment below should, in my opinion, be reversed, and the defendants should be required to answer the petition.

Petition for certiorari to remove case to the Supreme Court of the United States denied April 15, 1901.

lute as to be lawful whatever may be the motive of the actor, as where one digs upon his own land for water, or makes a written lease of his land for the purpose of terminating a tenancy at will; but in many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause, and this justification may be found sometimes in the circumstances under which it is done, irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and motive combined. Holmes, J., said that his personal opinion (as stated in *Vege-lahn v. Guntner*, 167 Mass. 92, 35 L. R. A. 722, 44 N. E. 1077, *supra*) had not been weakened by the substantial agreement with the views to be found in the judgments of the majority of the House of Lords in *Allen v. Flood*, *infra*, IV. b.

Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. 19 L. R. A. 387, 5 Intern. Com. Rep. 522, 54 Fed. 730, was a motion for a temporary injunction to compel the defendant railroads to receive the freight of the plaintiff, and to compel the defendant, who was chief of the Brotherhood of Locomotive Engineers, to rescind his action putting in motion a contingent order of the brotherhood, the effect of which was to interdict the handling of plaintiff's freight. In granting the injunction as to both, the court said, among other things: "But it is said that it cannot be unlawful for an employee either to threaten to quit, or actually to quit, the service when not in violation of his contract, because a man has the inalienable right to bestow his labor where he will, and to withhold his labor as he will. Generally speaking, this is true, but not absolutely. If he uses the benefit which his labor is or will be to another by threatening to withhold it, or agreeing to bestow it, or by actually withholding it or bestowing it, for the purpose of inducing, procuring, or compelling that other to commit an unlawful or criminal act, the withholding or bestowing of his labor for such a purpose is itself an unlawful and criminal act." In this case it was held that this was the difference between the act of the employees of the complainant company in combining to withhold the benefit of their labor from it, and the act of the employees of the defendant companies in combining to withhold their labor from them; that is, the difference between the strike and the boycott. The court probably meant to say, and perhaps did (but if it did it took a roundabout way to do it), that the difference in the with-

holding of labor by the employees of the complainant company and that of the defendant company was, that the former simply withheld their labor generally,—in other words, combined to engage in a strike; while the employees of the latter did not strike, as they had a lawful right to do, but simply refused employment so far as it consisted in handling the freight of the complainant company. The court in this case said, further, that ordinarily the only difference between the civil liability for acts in pursuance of the conspiracy and for the acts of the same character done by a single person is in the greater probability that such acts, when done by many in a combination, will cause the injury. The value of the case as an authority, like most of the cases, both English and American, involving the rights and liabilities of trade unions, so called, is lessened by the fact that the result was rendered necessary in order to carry out and enforce a statute.

See discussion of the same proposition in connection with *Quinn v. Leatham* [1901] A. C. 495, 70 L. J. P. C. N. S. 76, 85 L. T. N. S. 289, 50 Week. Rep. 139, 65 J. P. 708; *Vege-lahn v. Guntner*, 167 Mass. 92, 35 L. R. A. 722, 44 N. E. 1077; *National Protective Assn. v. Cumming*, 170 N. Y. 315, 58 L. R. A. 135, 63 N. E. 369, *supra*, and *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, *infra*, IV. b.

Where a merchant tailor has a large number of journeymen working for him by the piece, making up garments for his customers out of material furnished by him for that purpose, and, by a preconcerted arrangement among themselves, the journeymen, instead of finishing the work and thus enabling him to keep his engagements with his customers, all return the garments in an unfinished state, an action on the case for conspiracy and damage will lie in favor of the employer against the journeymen. *Mapstrick v. Range*, 9 Neb. 390, 31 Am. Rep. 415, 2 N. W. 739.

A conspiracy against a mechanic who is under the necessity of employing workmen in order to carry on his business, to obtain a sum of money from him which he is under no legal liability to pay, by inducing his workmen to leave him, and by deterring others from entering into his employment, or by threatening to do this, so that he is induced to pay the money demanded, under a reasonable apprehension that he cannot carry on his business without yielding to the illegal demand, is an illegal, if not a criminal,

WISCONSIN SUPREME COURT.

STATE of Wisconsin *ex rel.* George DURNER, Sheriff, etc., *Plff. in Err.*,

v.

Albert HUEGIN.

SAME, *Plff. in Err.*,

v.

Andrew J. AIKENS.

SAME, *Plff. in Err.*

v.

Melvin A. HOYT.

(110 Wis. 189.)

*1. Upon the review in this court of a case upon appeal or writ of error, a proper party to such appeal or writ is entitled to be heard by counsel regardless of whether that will, for the time being, recog-

*Headnotes by MARSHALL, J.

conspiracy, the acts done under it are illegal, and the money thus obtained may be recovered back; and, if the party succeeds in injuring his business he is liable to pay all the damage thus done to him. *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287. In this case the defendant had, for a pretended grievance, caused a fine to be levied upon plaintiff by a trades association, and threatened him, unless he paid the fine, to cause his workmen to leave his service, and did cause a number of them to leave, and further threatened him that he would, by power of the association, prevent him from obtaining suitable workmen for carrying on his business, and did so prevent him until he paid the fine. The court cited and approved all the English and American cases from *Keeble v. Hickeringill*, 11 East, 574, note, 11 Revised Rep. 273, note, 11 Mod. 74, *supra*, III. d, the wild-fowl case, down, holding that an action is maintainable against a person for doing an act with malice which otherwise would not be actionable, and also those cases which seem to hold that an act which would not furnish a cause of action if done by an individual, may furnish one when done by several in combination.

An action for damages will lie in favor of a steamboat company against the individual members of a union who, not being in the employ of the company and without any legal justification, procured the workmen of the company in various parts to quit work in a body, for the purpose of inflicting injury and damage upon the company until it should accede to the defendant's demands. Such procurement of workmen to quit work, being designed to inflict injury on the company, and not being justified, constitutes in law a malicious and illegal interference with the plaintiff's business, which is actionable. *Old Dominion S. S. Co. v. McKenna*, 30 Fed. 48.

Where a declaration alleges that the plaintiff and another were partners, and the defendant covenanted with them to furnish them with money to be used as capital in their partnership business; and did so furnish money for a certain time, and afterwards, maliciously intending and contriving to injure and ruin the plaintiff, and confederating and conspiring with his said part-

nize him as having a status which is one of the very matters to be decided on such review.

2. If, in a habeas corpus suit against a sheriff, he is required to restore his prisoner to liberty, he is a party aggrieved within the rule that only such a party is entitled to be heard on appeal or review on writ of error.

3. The statutory and judicial policy which precludes a private attorney from appearing for the state in a criminal case in a trial or appellate court, except by a special appointment for that purpose, does not apply to habeas corpus proceedings.

4. While an attorney cannot appear on the side of the state in a habeas corpus suit at public expense, he may appear by request of the proper officer at private expense, to represent the interests of the state, and he may appear regardless of such consent to represent the person charged with the wrong.

5. Regardless of what a habeas corpus

ner to injure and ruin the plaintiff in his said business, and to break up said partnership, refused any longer to furnish capital, according to his covenants, and brought a suit against said partners to recover the money furnished to them by him, and recovered judgment against them; took out execution, and caused their stock in trade to be sold on said execution at a great sacrifice, to pay the same; and that plaintiff's said partner, in pursuance of said conspiracy, had refused to join with the plaintiff in a suit against the defendant for a breach of said covenant,—the plaintiff, in order to maintain his action, must prove, not only that the defendant had broken his covenant, but that he did so with the intent and pursuant to the confederacy as set forth in the declaration. *Talbot v. Cairns*, 5 Met. 520.

In *Boutwell v. Marr*, 71 Vt. 1, 43 L. R. A. 803, 42 Atl. 607, where the members of a local, and also a general, association combined and refused to do business with, or to sell to, plaintiff, unless he would join the local association, whereby the plaintiff's business was ruined, such conduct was held to be actionable. The court, in giving its reasons for so holding, stated that, if it be true, as a general proposition, that several may lawfully unite in doing, to another's injury, even for the accomplishment of an unlawful purpose, whatever each has a right to do individually, it by no means follows that the combination may not be so brought about as to make its united action an unlawful means. That it might be that, if persons acting independently of any organization, and moved solely by similarity of interest and views, unite in withdrawing their patronage, the effect upon the person's business from which such patronage is withdrawn would be the same, and yet the persons so acting incur no liability; but in such case the united action would result from the free exercise of individual choice. Everyone engaged in business is liable to have it injured or destroyed by the action of those upon whom he depends for patronage. But when those upon whom he depends as patrons act as individuals he has a measure of security in the probability that different preferences will be shown

proceeding should be called under the Code, which divides all judicial proceedings into actions and special proceedings, it is to all intents and purposes a civil suit—a proceeding in the nature of a civil action—in which the party seeking to establish his right to personal liberty is plaintiff within the meaning of § 2601, Rev. Stat. 1898, regardless of the name by which such a party is commonly known, and the person charged with the wrong is an adverse party, to all intents and purposes a defendant, regardless of the name by which such a person is commonly known in such a proceeding.

6. An order or judgment in a habeas corpus suit is *res judicata* as to the person charged with unlawfully restraining another of his liberty, till reversed in some proper proceeding.

7. A necessary party to a judicial proceeding as a representative of public authority, having no interest in the litigation except to vindicate such authority, is a party in interest, and may be a party aggrieved within the meaning of the appeal statute and the practice on review on writs of error.

8. A warrant of commitment for trial

which states the offense charged with convenient certainty is sufficient if good in all other respects.

9. The formal language, "against the peace and dignity of the state, of Wisconsin and the statutes in such case made and provided," or equivalent formal words, is unnecessary to either a criminal complaint or warrant of commitment for trial.

10. The rule of convenient certainty as to describing the offense in a warrant of commitment does not require the facts to be stated in detail. A statement thereof according to their legal effect is sufficient.

11. The description of an offense in a warrant of commitment by its generic name, if it has one, whether the offense be statutory or one known to the common law, states by reasonable inference all the facts requisite to such offense.

12. The statutory form for a commitment found in § 4774, Rev. Stat. 1898, is satisfied by the use of language including all material elements, though such language departs from the particular wording of the form.

by persons left to their own choice; and, if some who desire to injure his business secure the cooperation of others by unlawful means, the law gives him a remedy.

A person has an absolute right to refuse to have business relations with any persons whomsoever, whether the refusal is based upon reason, or is the result of whim, caprice, prejudice, or malice, and there is no law which forces a man to part with his title to his property; but such privilege must be limited to the individual action of the party who asserts the right. It is not equally true that one person may, from such motive, influence another person to do the same thing. And a petition which alleges that the defendants, members of two different firms engaged in buying live animals fit to be slaughtered and sold as fresh butcher's meat, and in slaughtering the same, did combine, confederate, and conspire with each other and with a butcher not to sell the petitioner, for cash, live animals or slaughtered meat for the prosecution of his business, and that, in pursuance of such combination, they did refuse to sell, on being offered their own price in money, and that all this was done maliciously; by reason of which unlawful combination and malicious interference the petitioner was compelled to close his business and has been damaged,—states a good cause of action. *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111.

The case was afterwards tried upon the issues made by the answers of the defendants denying the allegations of the petition and averring, further, that the plaintiff was indebted to them, and they refused to sell him because they deemed it prudent for them to have no further dealings with him until he had paid them what was due them, which he refused to do; and upon the trial there was a verdict and judgment for the defendants. Upon appeal from an order refusing to grant a new trial, the order was affirmed, the court holding that, if the defendants, who were wholesale butchers, in order to compel dishonest and insolvent customers to pay their debts to them, and to protect themselves against such, and for the purpose of otherwise assist each other in the conduct of their business, had

agreed among themselves that each, at the request of the other, would refuse to deal with such customer, the latter would have no cause of action. 6 Tex. Civ. App. 11, 25 S. W. 50. The court stated that the supreme court had held in the same case, in overruling the demurrer, "that, if to serve some legitimate right or interest of his own, one does acts himself, or induces others to do them, which injuriously affect a third party, such acts give no cause of action to the person injured, unless they violate some definite legal right of his."

From the last two decisions it would appear that the sum of their reasoning is that, in the doing, by a person, of what he has a right to do, and in order to serve a legitimate purpose or intent of his own, he cannot be made liable to an action, even though the injury result to another; and further, that his motive in doing such act is not to be inquired of or considered; and that, this being so, he may induce others to join him in such acts, or such others may combine with him for a legitimate object having a similar interest or purpose to them, and for such combined action he, or they, will not be liable to a person injured by the acts of the persons so combining; but, where several persons combine for the malicious purpose of injuring another in his business or occupation solely with the motive of causing him injury, and without any legitimate benefit or interest for themselves, and, in furtherance of such conspiracy, commit acts tending to injure him in his business, they are liable to him in an action therefor.

See discussion of the subject in connection with *Quinn v. Leathem* [1901] A. C. 495, 70 L. J. P. C. N. S. 76, 85 L. T. N. S. 289, 50 Week. Rep. 139, 65 J. P. 708, *supra*, and *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, *infra*, IV. b.

A petition which alleges that the defendants, wholesale lumber dealers, unlawfully and maliciously, and with intent to oppress and ruin petitioners, and other mill men and manufacturers of lumber, issued a circular to lumber dealers with whom the petitioners had theretofore been dealing in selling lumber, counseling and

13. The rule that a form prescribed by statute must be strictly followed does not mean literally followed unless the statute clearly so indicates. That is not the case with § 4774, Rev. Stat. 1898.
14. Upon proceedings before a committing magistrate being properly brought to the attention of the court for review in habeas corpus proceedings, the court has jurisdiction to examine into the sufficiency of the complaint to charge a criminal offense, and of the evidence as regards whether it will admit of a reasonable inference of the existence of the ultimate facts necessary to hold the person charged for trial, i. e., that the offense was committed, and that there is probable cause for believing the accused to be guilty thereof.
15. A habeas corpus suit reaches only jurisdictional error. It does not reach beyond the commitment to the proceedings leading up thereto where the person in custody is detained by virtue of the final judgment or order of a court having jurisdiction of the subject-matter and the person. But such is not the case where the person in custody is being held on a commitment for trial.
16. A preliminary examination is not an action. The determination thereof is not a final judgment. The proceeding is not according to the course of the common law; it is purely statutory, and compliance with the statute is requisite to jurisdiction at every step.
17. An examination to determine whether a criminal prosecution shall be commenced is a judicial proceeding in that, so far as the magistrate acts within his jurisdiction, his decision is as binding for the purposes of such proceeding when it is right as when it is wrong. But, like the situation where a board is authorized by statute to act

advising them not to purchase lumber of the petitioners because they had sold lumber to consumers, and that the plaintiffs had, by the wrongful, wilful, and malicious acts of the defendants, been damaged and sought the recovery of the damages alleged, and also an injunction restraining defendants,—sufficiently states a cause of action. *Olive v. Van Patten*, 7 Tex. Civ. App. 630, 25 S. W. 428. The court, in holding the petition good, said that it followed *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111, *supra*, and that, applying the principles laid down by that case, they must hold, in this, that the petition set up a good cause of action in charging that the defendants had maliciously influenced others not to deal with plaintiffs to their injury.

Lumber dealers, who were members of a retail lumber dealers' association which had fined a wholesale lumber dealers' company for making a sale of lumber to a person in violation of the rules of the association forbidding wholesale dealers from selling to consumers, where, by reason of such fine and the threats of the defendant to enforce such rule against such wholesale company if they further violated such rules, the wholesale company refused to sell to such person, who was a lumber broker, by means of which he lost a contract,—are liable to him for the commission that he would have made upon such contract, and also for what he was obliged to pay to a regular dealer as commission for another contract. The court disapproved *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, *sub nom.* *Bohn Mfg. Co. v. Northwestern Lumbermen's Assn.* 21 L. R. A. 337, 55 N. W. 1119, *infra*, and, as a reason for its conclusion, among other things, said that the object of the association and the result attained were a monopoly of the trade by owners of yards, and the broker is simply ignored by the wholesale dealers. *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14.

This was the case in *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598, Affirmed in [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101, *infra*, and the House of Lords there distinctly held that they had a right to create a monopoly of the trade, and to go so far as to destroy the ability of the plaintiff to compete with the combination, in order to leave the field open for themselves the following year.
62 L. R. A.

In *Moore v. Bricklayers' Union No. 1*, 23 Ohio L. J. 48, the court held that the acts of the defendants in maintaining a boycott against the plaintiffs were actionable because they were malicious. The court distinguished *Frazier v. Brown*, 12 Ohio St. 294, *supra*, III. c. 2, and approved the opinion of Lord Penzance in *Capital & C. Bank v. Henty*, L. R. 7 App. Cas. 741, 52 L. J. Q. B. N. S. 232, 47 L. T. N. S. 662, 31 Week. Rep. 157, 47 J. P. 214, distinguishing between the effect of malice in the exercise of a man's right over his land and such a right as was here being discussed.

In *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881, the proposition that "malicious injury to the business of another has long been held to give a right of action to the injured party," was asserted and affirmed, and the various cases, English and American, which, either by their judgment, or by the dicta of the judges writing opinions therein, stated it, were cited, approved, and followed.

In *Hopkins v. Oxley Stave Co.* 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912, the court, in affirming the granting by the circuit court of a temporary injunction restraining the defendants, members of two trades unions, from notifying and dissuading plaintiff's customers from buying machine-hooped barrels and casks manufactured by the plaintiff, such customers to be so dissuaded through fear inspired by concerted action by the two organizations that the members of all labor organizations throughout the country would be induced not to purchase any commodity which might be packed in such machine-hooped barrels and casks, approved the doctrine laid down in *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, 50 L. J. Q. B. N. S. 305, 44 L. T. N. S. 75, 20 Week. Rep. 367, 45 J. P. 373, and *Temperton v. Russell* [1893] 1 Q. B. 715, 62 L. J. Q. B. N. S. 412, 4 Reports, 376, 69 L. T. N. S. 78, 41 Week. Rep. 565, 57 J. P. 676, *supra*, III. a, by Lord Esher, to the effect that, where it appears that a defendant has, by persuasion, induced a third party to break his contract with the plaintiff, either for the purpose of injuring the plaintiff, or for the purpose of reaping a personal advantage at the expense of the plaintiff, the act is wrongful and malicious, and therefore actionable. The court also distinguished *Mogul S. S. Co. v. McGregor*, 23 Q. B. Div. 598, Affirmed in [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101, Con-

in a quasi judicial capacity upon evidence, if there is no evidence reasonably permitting of action, a decision upon a contrary theory is in excess of jurisdiction.

18. Where an examining magistrate acts upon evidence, and such evidence, looking at it from the most favorable standpoint, will not reasonably permit of such action, the error is jurisdictional, strictly so called, remediable by writ of habeas corpus, within the rule that such errors only can be reached by such writ.

19. The doctrine that, where concert of action is necessary to an offense, a charge of criminal conspiracy does not lie, does not apply where the unlawful agreement is of itself an offense, but applies only where the agreement and the consummation thereof are so closely connected that the two constitute really but one offense, as in the case of the offense of adultery or that of bigamy.

20. Where concert is not a mere part of a criminal act, but is in aid of it and is itself criminal, the charge of conspiracy will lie against those concerting together to perpetrate such act, though only one of the parties, or neither one alone, could effect such purpose.

21. When a complaint charges the offense of conspiracy in the language of the statute, and a conspiracy to carry out the particular purpose of such conspiracy in a particular way is also charged, accompanied by a statement of overt acts pursuant to the conspiracy, the latter part may be rejected as surplusage in construing the complaint, but the two charges of conspiracy may be read together as charging a conspiracy of the nature indicated by the particular allegations as regards the method adopted for effecting the criminal purpose.

22. A complaint stating that three per-

tinental Ins. Co. v. Fire Underwriters, 67 Fed. 310; and Bohn Mfg. Co. v. Hollis, 54 Minn. 223, *sub nom.* Bohn Mfg. Co. v. Northwestern Lumbermen's Asso. 21 L. R. A. 337, 55 N. W. 1119, *infra*; and also questioned the correctness of the last decision. One judge of the three dissented, adopting the principles laid down in the cases distinguished and questioned by the writer of the prevailing opinion.

A conspiracy by several to refuse to deal with a dealer in farm produce having a profitable business, and to induce others to do likewise, it not appearing that the interference of the persons so conspiring, with his business, was to serve any legitimate interests of their own, but that it was done maliciously to injure him, and that the conspiracy had been carried into execution, whereby his business was ruined, furnishes a cause of action in favor of the injured party. *Ertz v. Produce Exchange*, 79 Minn. 140, 48 L. R. A. 90, 81 N. W. 737. The court assumed to distinguish *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, *sub nom.* *Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.* 21 L. R. A. 337, 55 N. W. 1119, *infra*, stating that in that case the defendants had similar legitimate interests to protect, which were menaced by the practice of the wholesale dealers in selling lumber to contractors and consumers; and that the defendant's efforts to induce parties not to deal with offending wholesale dealers were limited to the members of the association having similar interests to conserve, and that there was no agreement or combination or attempt to induce other persons, not members of the association, to withhold their patronage from such wholesale dealers. The court also said that one man singly, or any number of men jointly, having no legitimate interests to protect, may not lawfully ruin the business of another by maliciously inducing his patrons and third parties not to deal with him.

In *Cleland v. Anderson* (Neb.) 92 N. W. 306, the supreme court of Nebraska, in holding that, under a statute of that state, an action might be maintained by one who had been injured by unlawful combination, said, that, as a general proposition, a number of persons may do jointly, or by concert or agreement, anything which each of them might do singly, is beyond controversy; and that it was no less true that the motive with which a right is exercised does not render the exercise thereof unlawful. That, so long as one dealer may lawfully refuse to

buy of, or sell to, another, or others, as he pleases, whatever his motive, two or more may exercise the same power in concert. But that, on the other hand, it was equally well settled that combinations and conspiracies in restraint of trade are unlawful and actionable at common law, and that combinations between independent dealers, which have the effect of preventing competition, are within this rule, without regard to what may be done in pursuance of them, and although the object is merely to protect ruinous rivalry, without any attempt to charge undue and excessive prices. And that, while persons have a right to withdraw their trade from whom and as they please, they have no right to unite in restraint of competition; and, when they go beyond mere withdrawal of business, and employ coercion or intimidation to prevent free dealing, a different question is presented.

In *Doremus v. Hennessy*, 176 Ill. 608, 43 L. R. A. 797, 52 N. E. 924, 54 N. E. 524, the plaintiff conducted a laundry office; did none of the work herself, but procured it to be done by different laundries. The defendants, in order to compel her to raise her prices for work, which she refused to do, intentionally and for the purpose of preventing her from getting her work done, and by means of a pressure they were able to exert upon proprietors of different laundries, induced said laundries to refuse to do her work, whereby she lost her custom and suffered damage and injury. It was held that the action could be maintained. And, in so deciding, the court said: "Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable. Nor would competition of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive from business that other set and actually accomplishing that result, be actionable unless there was actual malice. Malice, as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and, if a wrongful act is done to the detriment of the right of another, it is malicious, and an act maliciously done, with the intent and purpose of injuring another, is not lawful competition."

A complaint which alleges that some of the defendants, wholesale coal dealers, and the oth-

sons, naming them, concerted together, using substantially the language of the statute, for the purpose of maliciously injuring another in his business, describes the conspiracy made criminal by § 4466a, Rev. Stat. 1898.

23. An agreement between several independent concerns, each publishing a newspaper and furnishing thereby means for advertising, to compel a fourth person engaged in like business to reduce his rates for advertising or lose customers, indicates a malicious purpose to injure the business of the latter within the meaning of § 4466a, Rev. Stat. 1898.

24. If § 4466a be regarded as describing a conspiracy between owners of independent enterprises to control the rates charged in their line of work in any locality, great or small, it is not constitutional. How-

ever, it cannot be so regarded, for it makes the malicious purpose to injure an essential.

25. Several persons, conducting independent business enterprises, may, in the absence of a statute, combine to control prices for the purpose of promoting their individual interests, and in their operations to that end impoverish a rival and drive him out of business, there being no malicious intent in their conduct, using the term in the sense of malice in law. Section 4466a does not go that far.

26. All agreements to maliciously injure another in any way are contrary to the policy of the law. Legislative authority is ample to outlaw such agreements to the extent of making the participants therein liable civilly and criminally.

27. A conspiracy to wrongfully injure another is actionable at the common law

ers, who were retail coal dealers, had united and confederated into a trust and combination, and created an active, vicious, and damaging trust and monopoly, to limit, manipulate, and control the retail coal trade in the locality, and to hinder and embarrass the plaintiff, a retail coal dealer, in his means of livelihood; and that, in furtherance thereof, they refused to sell plaintiff coal at any price; and that the defendants, the wholesale dealers, gave to the defendants, the retail dealers, the exclusive right to retail coal from their docks,—all for the purpose of controlling retail prices, and to force out of the retail coal trade all persons obnoxious to the wholesalers, and among others the plaintiff, to secure large profits to the defendants, to deprive the public of free competition in the coal trade, and to create and maintain a monopoly of the coal trade,—states a good cause of action at law in behalf of the plaintiff to recover damages. And the same facts will support an action in equity in favor of the plaintiff in behalf of himself and others similarly situated, to restrain defendants from a continuance of such acts. The court cited with approval *STATE ex rel. DUNN v. HUGGIN*, and stated that it was there held that persons have a right to combine together for the purpose of promoting their individual welfare in any legitimate way, but, where the purpose of the organization is to inflict injury on another, and injury results, a wrong is committed upon such other; and that this was so notwithstanding such purpose, if formed and executed by an individual, would not be actionable. That one person may, through malicious motives, attract to himself another's customers, and thus ruin the business of such other without redress; but, when a number of persons, acting wholly or in part from such malicious motives, combine together, the injury to such other is actionable. *Hawarden v. Youghloheny & L. Coal Co.* 111 Wis. 545, 55 L. R. A. 828, 87 N. W. 472.

The owner of a wharf cannot maintain an action against a superintendent of wharves who, as such, ordered the captain of a vessel which was discharging at such wharf to remove therefrom, by which the owner lost the profit that he was to receive for the use of his wharf, and which he would otherwise have received, without proving that such order was made with a fraudulent and malicious design to injure the plaintiff, and that that was the governing mo-

tive of the conduct of the defendant in making the order. *Gregory v. Brooks*, 35 Conn. 437, 95 Am. Dec. 278, 37 Conn. 365. In this case the court, at the trial, had charged the jury that it was not enough for the defendant simply to have believed that he had made the order in good faith; that he was bound to act with reasonable caution. In reversing the judgment of the court below, the supreme court of errors, referring to this particular instruction, said: "Here there was manifest error. The turning question in the case was whether the defendant was acting with the fraudulent and malicious design to injure the plaintiff and deprive him of his wharfage, or whether he was acting as a public officer in good faith, in the belief that he was doing his duty, without such malicious and fraudulent design. The whole case, then, turned upon the question of the existence of such a design. If that existed, the action lay, and the plaintiff was entitled to recover. If that did not exist, the injury to the plaintiff was remote, and he could not recover."

In an action for maliciously intending to injure the plaintiff, and deprive him of the use of his fishery, in wrongfully and injuriously stopping and anchoring a vessel so that the fishery was entirely obstructed, an instruction that, if the jury were satisfied that the defendant knowingly and without necessity, or any reasonable commercial purpose, anchored his vessel within the limits of the plaintiff's fishery so as to interrupt the same; or that the defendant, after he had anchored within the limits of the plaintiff's fishery as aforesaid, knowingly, and without necessity or any reasonable commercial purpose, remained within the same so as to interrupt the fishery, then the plaintiff was entitled to recover,—will be upheld. *Mason v. Mansfield*, 4 Cranch C. C. 580, Fed. Cas. No. 9,243.

Plaintiff's vessel was trading with the natives on the coast of Africa. The defendant was with his vessel near by, engaged in the same business. As a boat was returning to the shore from plaintiff's vessel, where it had been for the purpose of establishing a trade, the defendant, maliciously intending to hinder and deter the natives from trading with plaintiff, fired from his ship a cannon loaded with gun powder, and shot at the canoe, and killed one of the natives, whereby the natives of the coast were deterred and hindered from trading with

if executed to the damage of another, whether that other would have a remedy if the act were committed by a single person or not, or whether one person could commit such injury alone.

28. The doctrine that an act which is not actionable if done by one is not when done by many is not the law of this state. Neither is the doctrine, as applied to a combination of persons to wrongfully injure another, that an act, lawful without malice, does not become unlawful by adding such element.

29. A combination of persons to injure another without any just cause, such as an injury that is not an incidental effect of the promotion of the legitimate interests of the members of the combine, is a conspiracy to inflict a malicious injury upon another at common law, and is such an injury under the statute (Rev. Stat. 1898, § 4466a) if it relates

to such other's reputation, business, trade, or profession.

30. A combination of individuals for the purpose of inflicting a malicious injury upon another is in effect an agreement to injure by violence. It was the policy of the common law, as it is of the statute, to prevent such a wrong by civil and criminal liabilities.

31. The term "malicious injury," as used in the statute, is synonymous with that term in the law of conspiracy independent of the statute.

32. Section 4466a. Rev. Stat. 1898, is a mere declaration of the common law. Its only effect is, as to the particular matters stated therein, to remove the necessity for an overt act, which is required by the change in the common law by § 4568, Id.

(April 30, 1901.)

plaintiff, and he thereby lost the trade. Held that an action therefor could be maintained. *Tarleton v. M'Gawley*, Peake N. P. Cas. pt. 1, p. 205, 3 Revised Rep. 689. This case has been frequently cited as an authority that bad motive will create a cause of action which does not otherwise exist. But it does not appear that the defendant fired the gun that killed the native because he had any ill-will or feeling of any kind against the plaintiff in particular, but because he claimed that the natives owed him a debt, and that he would not suffer any ship to trade with them until that was paid; in pursuance of which he committed the act complained of by the plaintiff.

In *Rogers v. Dutt*, 13 Moore P. C. C. 209, the privy council decided that it was not actionable for the defendant, the superintendent of government pilots at Calcutta, to issue an order to pilots under his supervision not to pilot a vessel which employed the plaintiffs' steam tug to tow it from the mouth of the river to Calcutta. The order was issued with premeditation and for the reason, as alleged by the defendant, that the plaintiffs had endeavored to exact an exorbitant charge for towing up the river a vessel belonging to the British government in the time of extremity. The order was issued after consultation with the secretary of the government of India, who had advised him that the better course would be to inform the plaintiffs or their agents that, if they persisted in declining to take the government vessel in tow at government rates, such an order would be issued; but the same secretary had afterwards directed a revocation of the order. In this case it was further said: "It will be observed that their lordships are only dealing with a case in which no malice, in the most general sense of the term, is imputed, or proved against the defendant. It is unnecessary to consider what would have been their judgment in a case in which the defendant had given the same advice to the government, and done the same act towards the plaintiffs from any indirect motive, or with direct malice against them. It is enough to say that the decision of such a case would turn on totally different principles from the present."

What is meant by the statement above quoted can, of course, only be left to conjecture. But the case has been cited more than once as an authority that malice will create a cause of action which would not exist without it.

Plaintiff had made a contract with a railroad company of which the defendant was president and superintendent, by which the company agreed to transport from points on its road to a certain city a large number of cross-ties, which plaintiff had contracted to deliver in Cuba. After the contract had been partly performed, the defendant, being still president and superintendent of the company, maliciously and for the purpose of injuring the plaintiff refused to complete the contract, whereby the plaintiff was injured. It was held, approving *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780, *supra*, III. a, that the action could be maintained. *Jones v. Stanly*, 76 N. C. 355.

A body of traders who combined to get the whole of a limited trade into their hands by allowing a discount upon their freight accounts for the year to all customers who shipped no goods of a particular kind except by their vessels, the same being terms that they would not offer but for the object of keeping the trade to themselves, which terms, if confined to one particular period, would compel them to trade at a loss; and which terms were so offered and allowed by them in the belief that, by such competition, they would prevent rival traders competing with them, and so receive the whole profits of the trade to themselves; and who issued circulars to that effect to the various shippers and dealers in the commodity referred to; and, whenever certain rival traders sent ships to load such commodity at a port, sent one or more of their vessels to underbid them so that neither vessel could obtain cargo on remunerative terms, and took away the agency of other vessels from persons who also acted as shipping agents for such rival traders and other trade competitors outside the combination,—are not liable in an action brought by such rival traders therefor. *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598, Affirmed in [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101. In this case the majority of the court of appeal were of the opinion that there was no evidence of malice or ill-will on the part of the defendants towards the plaintiffs, and that it was simply a case of lawful trade competition whereby the defendants obtained the whole of the carrying trade of the commodity mentioned to the entire ultimate exclusion of the plaintiffs therefrom, thereby causing the plaintiffs in-

ERROR to the Circuit Court for Milwaukee County to review a judgment discharging defendants upon writs of habeas corpus from the custody of relator to which they had been committed to await trial for the offense of conspiracy to injure. *Reversed.*

Statement by **Marshall, J.:**

Writs of error to the circuit court for Milwaukee county to review orders thereof, in habeas corpus proceedings, discharging certain persons from custody who were under restraint, according to forms of law, to await trial for the offense of conspiracy to injure. The complaint charging the offense was under oath and as follows:

"Lucius W. Nieman and Lloyd T. Boyd,

jury and damage. But, inasmuch as all that was done was in lawful trade competition, without ill-will towards the plaintiffs, other than the desire on the part of the defendants to drive the plaintiffs out of that trade and absorb the same to themselves, their combining to do so could not be considered malicious or unlawful. Lord Esher, who dissented from the majority in the court of appeal, based his opinion on *Lumley v. Gye*, 2 El. & Bl. 218, 22 L. J. Q. B. N. S. 463, 17 Jur. 827, 1 Week. Rep. 432, and *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, 50 L. J. Q. B. N. S. 305, 44 L. T. N. S. 75, 29 Week. Rep. 367, 45 J. P. 373, *supra*, III. a, and adhered to the doctrine laid down by him (then Brett, L. J.) in the case last mentioned, to the effect that, where a person does an act for the indirect purpose of injuring another, or benefiting himself at the expense of such other, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it; and proceeded to say that the law was there laid down that a malicious motive in the defendant may make an act which would not be wrongful without the malice, a wrongful act when done with malice. He reasserted this doctrine in *Temperton v. Russell* [1893] 1 Q. B. 715, 62 L. J. Q. B. N. S. 412, 4 Reports, 376, 69 L. T. N. S. 78, 41 Week. Rep. 565, 57 J. P. 676, *supra*, III. a, and in the case of *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 40 Week. Rep. 258, *supra*, II. b, when it was in the court of appeal *sub nom. Flood v. Jackson* [1895] 2 Q. B. 21, 64 L. J. Q. B. N. S. 665, 14 Reports, 397, 43 Week. Rep. 453, 59 J. P. 388, which, as has been seen, was rejected and repudiated by the decision of the House of Lords on appeal.

In *Lough v. Outerbridge*, 143 N. Y. 271, 25 L. R. A. 674, 38 N. E. 292, the defendants ran a line of steamships from New York to Barbadoes regularly. A steamer belonging to other parties trading from a port in South America to New York passing by and stopping at Barbadoes was in the habit, whenever in New York, of taking on Barbadoes freight. The regular freight charged by the defendant was 40 cents a barrel. Whenever the steamer mentioned would be in New York loading for her regular trip and also taking on Barbadoes freight defendants gave notice that during that week they would carry freight to Barbadoes for any person who would load exclusively with them for 62 L. R. A.

of the city of Milwaukee, in said county of Milwaukee, being severally first duly sworn, complain to the police court for the city of Milwaukee, Milwaukee county, Wisconsin, that on or about the 5th day of April, A. D. 1900, at the city of Milwaukee, and within said county of Milwaukee, Andrew J. Aikens, Albert Huegin, and Melvin A. Hoyt, did then and there unlawfully conspire, combine, confederate, associate, agree, mutually undertake, and concert together for the purpose and with the intent then and there of wilfully and maliciously injuring the Journal Company, a corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin, in its trade and business, and for the purpose and with the intent then and there of wilfully and ma-

25 cents per barrel. Plaintiffs being accustomed to, and being then engaged in, loading freight on the South America steamer, applied to the defendants to take freight for them to Barbadoes and insisted that the rate should be 25 cents. Defendants offered to do so provided plaintiffs would ship exclusively by them all the freight they shipped during that week, which was refused, and the defendants then refused to ship such freight as plaintiffs desired to at 25 cents per barrel, but offered to ship the same for the regular rate of 40 cents. It was held that no action lay in favor of the plaintiffs against the defendants by reason of these facts.

With the exception that in this case there was no allegation of combination and conspiracy, the real defendant being a single corporation, whereas in *Mogul S. S. Co. v. McGregor* [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101, *supra*, the real defendants were a combination or conference of several steamship companies,—the two cases are about identical in their facts. The court in its opinion quoted copiously from that case and seemed practically to follow it.

In an action against two railroad companies it appeared that the plaintiffs were engaged in the transportation of crude oil in boats from the oil regions to the refineries in a certain city. One of the defendant railroad companies was engaged in the same business. This railroad company entered into an arrangement with the other defendant company, which was a trunk line, whereby the latter allowed to the refiners of crude oil, upon shipments upon its line from crude petroleum brought to their refineries from the oil regions by the other railroad, a drawback or rebate upon the freight or cost of transportation, but such drawback or rebate was not allowed upon oil from the same refineries or the vicinity from crude petroleum brought there in barges or boats by way of the river. The president of the first-mentioned railroad company had declared that he would "fix this barge business so there couldn't be any more barge oil run on that river," and, on another occasion, that he would compel the barges "to stop the business and go out of the business." It was held that, having the right to adopt rates lower than the crude oil could be carried in barges, the fact that the president of the railroad company expressed an intention of driving all the bus-

liciously injuring Lucius W. Nieman, Lloyd T. Boyd, and John W. Schaum, and each of them, in their trade, business, and occupation; that the said the Journal Company at all of said times was, ever since has been, and now is a corporation organized and existing under and by virtue of the laws of the state of Wisconsin, as aforesaid, and at all of said times was and now is the owner and publisher of a daily newspaper and advertising medium known as the Milwaukee Journal, published at the said city of Milwaukee which said newspaper at all of the times herein referred to had, and now has, a large circulation as a newspaper and advertising medium in the city of Milwaukee, and throughout the state of Wisconsin and elsewhere; that it was at all of said times,

and now is, the business and trade of said the Journal Company to publish said newspaper and to sell and furnish the same to its patrons and subscribers, and to solicit, receive, print, and publish in said newspaper for hire advertisements for merchants and other persons, as is customary with such newspapers, and that at all of said times, and especially at the time of the said combination and conspiracy, and subsequently thereto, the said the Journal Company had a large number of advertisers or patrons who advertised in said newspaper, the Milwaukee Journal, and that a large portion of the revenue of said the Journal Company was and is derived from such advertisements; that the said Lucius W. Nieman, Lloyd T. Boyd, and John W. Schaum

iness away from the barges cannot change the case; and the fact that he foresaw the result of his efforts in so doing, and also declared it, did not matter. *Minhall v. Pennsylvania R. Co.* 92 Pa. 150.

In *Ajello v. Worsley* [1898] 1 Ch. 274, 77 L. T. N. S. 783, 67 L. J. Ch. N. S. 172, it appeared that the plaintiffs were manufacturers of pianos, and that certain of their customers, who were retail dealers in pianos, declined to give them any further orders, on the ground that the defendant was selling pianos of the plaintiff's manufacture at the same price that the plaintiff was charging them, the customers, and they could not sell new pianos of the plaintiff's at the price advertised by the defendant; and that, so long as these advertisements continued, the public, believing they could be supplied with plaintiff's pianos by defendant at the price he advertised, would refuse to buy at higher prices. The action was for an injunction to restrain the defendant from maliciously or for the purpose of injuring the plaintiffs in their trade advertising, or otherwise offering for sale, certain pianos of the plaintiff's make. An injunction was denied upon the ground that the defendant had a legal right to issue the advertisement; that the owner of any property is entitled to sell or dispose of it for such consideration as he may see fit, and either at a profit or at a loss; and that it was settled by *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, *supra*, II. b, that the motives of the owner for so acting cannot be inquired into.

The case is almost, if not exactly, on all fours with *PASSAIC PRINT WORKS v. ELY & WALKER DRY-GOODS CO.*, but it does not appear, however, to have been cited or noted by either counsel or court in that case.

An association of fire underwriters was formed for the purpose of mutual protection under an agreement to regulate the business of its members and among them prevent competition of rates. The plaintiff, an insurance company, brought its action against the association for an injunction charging that the purpose of the association was to coerce plaintiff and others transacting business of like character to become members, and to obstruct and annoy it and its agents and assureds, in granting insurance, because it is not a member, with a view to induce it to become such. It was held that the agreement, which provided for 62 L. R. A.

the regulation of rates, the prevention of rebates, compensation of agents, and nonintercourse with companies not members, was not an illegal conspiracy, and the injunction to prevent the accomplishment of its purpose was denied. *Continental Ins. Co. v. Fire Underwriters*, 67 Fed. 310.

The case is very similar to *Mogul S. S. Co. v. McGregor* [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101, and while, like that case, holding that the combination involved was not unlawful, proceeds at considerable length to quote and approve extracts from the opinions of the judges therein, that, if the acts done by the defendants, if done wrongfully and maliciously, or if done in furtherance of a wrongful and malicious combination, would be ground for an action on the case at the suit of one who suffered injury from it.

Commencing with *Payne v. Western & A. R. Co.* 13 Lea, 507, 49 Am. Rep. 686, an interesting line of cases has developed. In each of these cases the question for the court was whether the conduct of an employer in interdicting trade or dealing by his employees with a third person, whereby the latter was deprived of the custom of the employees, and, in consequence, suffered damage and injury, was actionable. In the case mentioned the plaintiff was a merchant engaged in business at the terminus of the defendant railroad company, and was selling goods to, and doing business with, the agents and employees of the defendant. The general agent of the defendant issued an order to the yard master at the terminus to notify all the employees in his department that any employee on the pay roll of that department who traded with plaintiff from that day would be discharged. The consequence was that the plaintiff from that time forth lost the custom of the employees of the defendant. It was held that he could not maintain an action against the railroad company for damages. The case arose on a demurrer to the declaration which the circuit judge sustained. The referees recommended a reversal of his judgment, and the supreme court reversed the decision of the referees and affirmed that of the circuit court, but did so by a bare majority, one of the judges writing a vehement dissent in which another concurred. The case is quite voluminous, and the prevailing opinion squarely states the position taken by the plaintiff with his reasons and

were at all of said times, and now are, stockholders in said the Journal Company, and financially interested in the business and success of said the Journal Company; that the business and trade of the said Lucius W. Nieman is, among other things, that of editor of said the Milwaukee Journal, and the business and trade of said Lloyd T. Boyd is that of business manager of said the Journal Company and of the said the Milwaukee Journal; and that at all of said times the business of said John W. Schaum was and is that of treasurer of said the Journal Company.

"That the prices of advertisements and the advertising rates which newspapers such as said the Milwaukee Journal and the other newspapers herein mentioned are en-

titled to charge, and which advertisers and patrons are willing to pay, depend and are based largely upon the circulation of such papers and the number of their readers; that early in the year A. D. 1900, said the Journal Company in good faith established a new rate for advertising in said the Milwaukee Journal, based, among other things, upon its increased circulation, and notified the patrons of and advertisers in the said the Milwaukee Journal thereof, which said rate for advertising was an increase of about 25 per cent above that which was charged by said the Journal Company for like advertising in the year 1899.

"That at all of said times the said Andrew J. Aikens was, and now is, the business manager of the Evening Wisconsin, a daily

also the reason why the majority of the court considered them untenable. Space will not permit the giving of any of them, but the case turned upon the theory that the defendant corporation had a right to discharge its employees, and, having the right, the motive which operated to bring about the discharge could not be considered, and that having the right to discharge them, it had a right to notify them that it would, under any circumstances it chose to designate. The argument of the plaintiff and the opinion of the dissenting judges was that, whenever there is an act done with the purpose to injure another, and not simply in the exercise of one's legal right, and injury is produced, and the means used naturally tend to the end designed, then for that injury the party should be held responsible; that, although it must be conceded that the defendant had a right to discharge its employees without any reason, it did not follow that it had any right to coerce or intimidate the employee from acting as he otherwise would in trading with the plaintiff, by holding over him the threat of discharge in case he did so and thereby causing the plaintiff to lose his custom.

The defendant, a corporation or association engaged in cutting and shipping logs, maintained a store and issued checks which by their terms were good for merchandise at the store, and not transferable, to their employees in payment of wages. Although the checks were by their terms made "not transferable," the defendant was in the habit of receiving them where they had been given to other persons by the employees who received them in payment for anything. Plaintiff, the proprietor of another store, sold goods to the employees of defendant, who paid for the same in checks, and plaintiff in return bought goods of defendant and paid for the same in these checks, and traded some of the checks to others who were not employees of the defendant, who bought goods of the defendant and paid in checks. Defendant, for the purpose of injuring the plaintiff in his business, at a time after plaintiff had taken and received the checks of the defendant, stated to its employees that it would discharge each and every one of its employees from its service in case any one of them should buy goods, liquors, etc., or trade in any manner whatever with the plaintiff; and that it would not take up any checks, and receive the same in pay-

ment, of its goods, wares, and merchandise from any person whomsoever, when and where said checks had passed through the hands of plaintiff. The petition also alleged that defendant had, by its agents and employees, and for its own dishonest and corrupt purposes, and for the purpose of destroying the competition in trade of plaintiff in the sale of goods, wares, and merchandise, threatened its employees with discharge if they refused to sign a certain petition for a local option election, or if they voted against the same,—plaintiff being engaged in the sale of liquors,—which election, if it had carried, would have closed up plaintiff's business. A declaration stating the foregoing facts was held not to allege a cause of action. That it was legitimate for defendant to appropriate to itself all the customers it could command, even to the extent of driving plaintiff out of business, provided the means used for that purpose did not contravene any law, or violate a definite legal right of the plaintiff. That the latter had no right to protection against competition; he had no superior right to the trade of defendant's employees, or that of other persons. That, had the defendant had no proper interest of its own to subserve in so doing, but had acted wantonly in causing loss to the plaintiff, the rule would be different. And that the fact that defendant's purpose by its acts was to break plaintiff up in business would not give the cause of action, for that is the natural result of successful competition. *Robison v. Texas Pine Land Asso.* (Tex. Civ. App.) 40 S. W. 843.

In *Graham v. St. Charles Street R. Co.* 47 La. Ann. 214, 27 L. R. A. 416, 16 So. 806, the action was against the railroad company and its foreman, and the declaration alleged that the foreman had frequently and continuously instructed the men under his control that they must not deal at the petitioner's store, and that he would discharge them if they did, and that he especially instructed and directed three of the employees of the company to that effect, and that in all said conduct he was within the scope of his employment by the company, and that the petitioner had suffered loss in his business in patronage thus driven away and diverted which he would have otherwise enjoyed. There was an exception of no cause of action (practically a demurrer) to the petition, which was sustained in the lower court but reversed by the supreme court, where it was held that the

newspaper published in the city of Milwaukee, and having also an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire, like unto said the Milwaukee Journal; that at all of said times said Albert Huegin was, and now is, the business manager of the Milwaukee Sentinel, a daily newspaper published at the city of Milwaukee, having an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire, like unto the newspapers aforementioned; that at all of said times said Melvin A. Hoyt was, and now is, the editor of the Milwaukee Daily News, and the president of the News Publishing Company, the corporation owning said the Milwaukee Daily News, a daily newspaper published at

the city of Milwaukee and devoted to the purposes of a general newspaper and to advertising for hire, like unto the other of said newspapers.

"That on or about said 5th day of April, A. D. 1900, the exact date whereof being unknown to affiants, said Andrew J. Aikens, Albert Huegin, and Melvin A. Hoyt, with others unknown to affiant, in furtherance and in pursuance of said unlawful conspiracy, combination, confederation, association, agreement, and mutual understanding, for the purpose and with the intent then and there of wilfully, maliciously, and unlawfully injuring said the Journal Company in its trade and business, and also said Lucius W. Nieman, Lloyd T. Boyd, and John W. Schaum, and each of them, in their trade

intentional causing of loss by one man to another, without justifiable cause, and with a malicious purpose to inflict it, is of itself a wrong, and it is a general principle that every act of man which causes damage to another obliges him by whose fault it happened to repair it. That, while it may be conceded that a person has an absolute right to refuse to have business relations with any person whomsoever, whether the refusal be based upon reason, or be the result of whim, caprice, prejudice, or malice, and that there is no law which could reach him for so doing, it is not equally true that he can always, from such motives, influence another person to do the same without incurring legal liability. The cause was afterwards tried, and a verdict rendered in favor of the plaintiff against both defendants. On a review of the judgment entered upon such verdict, the supreme court reversed the judgment as to the railroad company upon the ground that the other defendant was not acting within the scope of his authority, and affirmed it as to the individual defendant. 47 La. Ann. 1656, 18 So. 707.

In affirming the judgment as to the individual defendant upon the last appeal, the court said: "We recognize the principle urged by the defense, that the employer has the right to employ those he chooses, and the same liberty is allowed as to their discharge." This is taken here for the purpose of comparing it with what was said in the next case, wherein the judge, inadvertently, or otherwise, seemed to make a distinction, which it is believed was not warranted.

The facts in the above case are almost identical with those in *Payne v. Western & A. R. Co.* 13 Lea, 507, 49 Am. Rep. 606, *supra*, but in neither decision of *Graham v. St. Charles Street R. Co.* is that case mentioned. In the *Payne* Case there was no question made but what the act was within the scope of the agent's authority, but the defendant railroad company was held not liable because it had a right to do just what was held to be actionable as to the foreman in the *Graham* Case.

In *International & G. N. R. Co. v. Greenwood*, 2 Tex. Civ. App. 76, 21 S. W. 559, the road master of the railroad issued the following order to a subordinate officer: "Give your men orders not to have any further dealings with this man Greenwood, and, if they do, discharge them." The petition alleged that the plaintiff

was the proprietor of a boarding house and saloon, and that the division road master, whose duty it was to employ men vigorously and maliciously prosecuted a boycott against the plaintiff, and declared it to be his intention to discharge and refuse employment to any and all men who should in any way patronize plaintiff, and instructed his section foreman to discharge and refuse employment to anyone known to patronize and deal with the plaintiff, and that upon being complained to, the defendant railroad company had refused plaintiff any redress, by which custom and trade were driven away from the plaintiff and he was injured in his business. The general demurrer was overruled, and defendant answered, and, upon the trial, a verdict for plaintiff was rendered, which was modified and affirmed, the court saying that the question was, Did the defendant have the right to prohibit its servants from patronizing plaintiff's hotel and saloon? and said that if, in issuing the order or authority, the defendant only exercised a legal right, it might be admitted that plaintiff could not complain, although it resulted in loss to him, whatever may have been the motive with which the act was done. That, if the company had the right to discharge its servants for doing the forbidden things, then it must follow that it could lawfully notify them that it would exercise it. That its right to discharge was not to dismiss the servants arbitrarily or capriciously, but for reasonable causes only, and that this applied only to rights of the master with reference to servants already in his employ. That the company had the right to determine for itself whom it would thereafter employ, and the reasons upon which it might act concerned no one but itself; and stated that there was a distinction between a discharge and a refusal to employ. So, the liability of the railroad company in this case seems to have been based upon the theory that, in threatening to discharge the employees for dealing with the plaintiff, they were threatening to do what they had no right to do, and therefore, if the plaintiff was injured, the company was liable. It does not appear whether this was the theory upon which the whole court affirmed the judgment, but, if it was, it is a theory entirely different from that expressed in the language quoted from the Louisiana supreme court in *Graham v. St. Charles Street R. Co.* 47 La. Ann. 1656, 18 So. 707, *supra*, and it is believed that that language ex-

and business, and to that end and with the purpose and intent aforesaid, did confederate, agree, and mutually undertake that, if any merchant or other person or corporation advertising or proposing to advertise in said the Milwaukee Journal should pay or agree to pay to said the Journal Company the increased rate for advertising established or fixed by it as aforesaid, that then and in that case any such person or corporation should not be permitted to advertise in any of said other three newspapers, to wit, said the Milwaukee Sentinel, the Evening Wisconsin, and the Milwaukee Daily News, unless such merchant, other person or corporation should advertise in each of said three papers and pay to each of them or to the respective owners or proprie-

tors of them, a corresponding increase over the rates respectively theretofore charged by such other three newspapers respectively, to wit, about 25 per cent in excess of what said last-mentioned three papers respectively were then charging and had theretofore charged for advertising; but that in case any merchant, other person or corporation should refuse to pay to said the Journal Company the said increased rate established by it as aforesaid for advertising in said the Milwaukee Journal, then and in that case such merchant or other person or corporation so refusing should be at liberty to advertise in any or all of the other of said three newspapers at the rates which had theretofore been charged by said other three newspapers respectively; that a large num-

presses the true theory, *viz.*, that the employer has the right to employ those he chooses, and the same liberty is allowed to discharge them.

But this was probably only the *dictum* of the judge writing the opinion, and the fair distinction is that the real reason for the decision lies in the fact that the officer or servant of the defendant was not doing what he did in virtue of any right or for the benefit of the company, but solely to injure the plaintiff, and therefore from unmixt malice.

Chiatovich v. Hanchett, 88 Fed. 873, was an action for libel heard on a demurrer to an amended complaint which stated that the defendants caused to be posted and circulated a notice to their employees stating that the plaintiff, entertained feelings of animosity for the defendants, that he had expressed his intention to hinder and embarrass them, and his action had tended to interfere with their business, and requested the employees to refrain from associating with him either directly or indirectly, to disclose to him nothing to indicate the condition of their business, demanded a total cessation of communication between them and him, and that no one of their agents or employees trade or deal with plaintiff in any manner, and ended by stating that his interests were so antagonistic to theirs—his purpose was so manifestly hostile—that those who favored him could not complain if defendants considered them as equally unfriendly to them. While treating it in form as an action of slander, in the reasoning upon the second question arising in the case the court entered into the propositions that were considered in the three previous cases in regard to the injury to one's business by another threatening to discharge his employees in case they had dealings with him, and on this subject the court said that, as a general rule, it might be said that every person has an absolute right to refuse to have any business relation with any particular person or persons. That this proposition, however, in so far as it applies to cases like the present, must be confined and limited to the individual action of the men who assert the right. That it is not true in law—although some authorities to that effect might be found—that one person, having the right himself, may, from his ill will, malice, revenge, or other evil motive, influence other persons to do the same thing. The demurrer was overruled.

62 L. R. A.

The case was afterwards tried before the same judge, who overruled the demurrer, and, in denying a motion for a new trial, he treated the case in the same manner as he had on the argument of the demurrer, citing and distinguishing the recent case of *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, *infra*, IV. b. in the House of Lords, which, as we have seen, was purely an action for depriving the plaintiffs of their employment, and treated *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373, and *Orr v. Home Mut. Ins. Co.* 12 La. Ann. 255, 68 Am. Dec. 770, in the same manner. 96 Fed. 681.

On appeal to the circuit court of appeals, the judgment in favor of the plaintiff was affirmed. 41 C. C. A. 648, 101 Fed. 742.

It will be noticed that the notice in this case was very similar to, if not substantially the same as, that uttered by the railroad company to its employees in *Payne v. Western & A. R. Co.* 13 Lea, 507, 49 Am. Rep. 666, *supra*, and that the plaintiff in each case claimed that the special damage to him was the same. The plaintiff in each case was a merchant, and the damage consisted, as alleged in the declaration in one case and the complaint in the other, in causing the employees of the defendant to cease trading with the plaintiff.

The reasonable conclusion from the foregoing cases would appear to be that the *Graham*, the *Robison*, the *Greenwood*, and the *Chiatovich* Cases were correctly decided, and that in the *Payne* Case the majority of the court were not in line with the weight of authority, and that the dissenting judges were.

In *West Virginia Transp. Co. v. Standard Oil Co.* 50 W. Va. 611, 56 L. R. A. 804, 40 S. E. 591, it was held that a charge in a count in the declaration that the defendant, through individuals interested in it, had become stockholders in an oil company through whose territory the plaintiff had laid pipe lines and from which it had for several years transported oil for compensation; and further, that the defendant had practically controlled the business of said oil company, and induced the construction of a pipe-line company and thereby ruined the business of the plaintiff, and all of which was done by combination and malicious conspiracy,—did not state an actionable wrong, as it did not appear that the defendant had harmed the plaintiff by doing unlawful things. That, in order to constitute a cause of action, the plaintiff

ber of merchants in the city of Milwaukee and other persons were at the time of said combination and agreement, and subsequently thereto, advertising in all of said newspapers, to wit, the Milwaukee Journal, the Evening Wisconsin, the Milwaukee Sentinel, and the Milwaukee Daily News, and that the right or privilege to advertise in two or more of said papers was and is considered and regarded by a large number of such merchants and other persons as a valuable right and privilege and one much to be desired; that all, or the greater part of the patrons of and persons advertising in said the Milwaukee Journal were, pursuant to said combination and conspiracy on the part of said Aikens, Huegin, and Hoyt, and in furtherance thereof, notified by them

of the said agreement, conspiracy, and combination between said Andrew J. Aikens, Albert Huegin, and Melvin A. Hoyt; that many of the patrons and advertisers in said the Milwaukee Journal were induced thereby to withdraw their advertisements therefrom, greatly to the injury of the business and trade of said the Journal Company and of said Lucius W. Nieman, Lloyd T. Boyd, and John W. Schaum; that pursuant to said combination, agreement, confederation, and conspiracy, and in furtherance thereof, said Andrew J. Aikens, Albert Huegin, and Melvin A. Hoyt did refuse to allow the advertisements of divers merchants and other persons to be inserted in either the Milwaukee Sentinel, the Evening Wisconsin, or the Milwaukee Daily News aforesaid, and

must have a right; that right must be injured by the defendants, and injured, too, by unlawful means, by acts which the defendants had no right to do. That it must be established that the defendants owed a duty to the plaintiff, and broke that duty to make an actionable tort; and that in this case the fact that the defendant was acting with the motive or intent of breaking down the plaintiff's business did not render his conduct actionable.

A declaration is bad on demurrer which alleges that the plaintiff's copartner and another conspired to compel plaintiff to withdraw from the firm and to dispose of his interest in it to them, and for that end procured creditors of the firm to attach all its stock in trade, and to petition the attaching officer to sell the goods forthwith, representing them to be liable to depreciate in value, whereby the plaintiff was forced to withdraw from the firm, the court saying the allegations of conspiracy, illegality, falsehood, and malice will not support this action, unless either the purpose intended, or the means by which it was to be accomplished, is shown to be unlawful. That the compelling the plaintiff to withdraw from the firm was not unlawful, and the means employed in doing so are not shown to be unlawful, for the plaintiff's creditors upon the allegations in the declaration had a lawful right to attach his property and to petition the officer to sell the goods attached. *O'Callaghan v. Cronan*, 121 Mass. 114.

The members of a master builder's association are not liable in an action brought by a builder, not a member of their association, to recover damages against the association and its members, based upon the facts that the defendants had each addressed a note to architects having charge of a building about to be erected, to the effect that they would decline to bid on the building if the plaintiff's bid was received in competition, for the reason that, as every man has a lawful right to work for or deal with, or to refuse to work for or deal with, any man or class of men as he sees fit, upon the same principle he has a lawful right to compete with, or refuse to compete with, any person or persons or class of men he sees proper; and in this case in the notice given by each of the defendants to the architects there was no threat, express or implied, either against the plaintiff or against the architects; nor was there any language, even suggestive

of coercion or intimidation. *Master Builders' Asso. v. Domascio*, 16 Colo. App. 25, 63 Pac. 782.

A combination of employers to resist an advance in wages determined upon by an association of employees, by refusing to sell to any persons who conceded such advance, is not an unlawful conspiracy, since the passage of the Pennsylvania statute making it lawful for employees to combine to raise wages, and to persuade by all lawful means others from working for a less sum, as such combination is, not to lower the price of wages as regulated by supply and demand, but to resist an artificial price made by a combination which by a statute is lawful; and the sending notices to wholesalers that members of the employers' organization formed to resist a demand by the workman for an increase in wages will withdraw their patronage if sales are made to persons acquiescing in the workman's demand is not such coercion or threat as will render the combination unlawful. *Cote v. Murphy*, 159 Pa. 420, 23 L. R. A. 135, 28 Atl. 190. To the same effect, *Buchanan v. Barnes (Pa.)* 28 Atl. 195; *Buchanan v. Kerr*, 159 Pa. 433, 28 Atl. 195.

In *Cote v. Murphy*, 159 Pa. 420, 23 L. R. A. 135, 28 Atl. 190, the court said that the combination of the employers was, not to interfere with the price of labor, as determined by the common-law theory, but to defend themselves against a demand made altogether regardless of the price, as regulated by the supply; that the element of unlawful combination to restrain trade because of greed of profit to themselves, or by malice towards the plaintiff or others, was lacking, and that this was the essential element on which are founded all the decisions as to common-law conspiracy in this class of cases.

Parker v. Bricklayers' Union No. 1, 21 Ohio L. J. 223, was an action against the defendants for, first, libel, second, for maintaining a boycott against the plaintiff. As the verdict was general for the plaintiff, the case is not an authority on the subject, except in what the judge said in charging the jury, namely, that, if the defendants combined to do only a lawful thing, solely by lawful means, and they in fact did nothing, either individually or in combination, but what they had a legal right to do, then the malice they had, if any, was immaterial.

The secretary of a voluntary association

did prevent the advertisements of divers merchants and other persons from appearing in all or any of said three last-mentioned newspapers because such merchants or other persons so prevented had paid or had agreed to pay to said the Journal Company the said increased rate for advertising established by it as aforesaid; and that by reason of said combination, conspiracy, and agreement many merchants in the city of Milwaukee and elsewhere, and other persons, were prevented from advertising in said the Milwaukee Journal, greatly to the injury of the business and trade of said the Journal Company, and of said Lucius W. Nieman, Lloyd T. Boyd, and John W. Schaum, and of each of them, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Wisconsin.

Wherefore, affiants pray that the said Andrew J. Aikens, Albert Huegin, and Mel-

vin A. Hoyt be arrested and dealt with according to law."

The complaint was filed with the police court in the city of Milwaukee and such proceedings were thereupon had, based thereon, that the defendants therein named were arrested and produced before such court for a preliminary examination, whereupon a motion was made for their discharge upon the ground that the allegations of the complaint were not sufficient to show that a criminal offense had been committed. The motion was overruled. Thereupon evidence was taken before the court, tending to establish the allegations of the complaint. At the close of the evidence a motion was made to discharge each of the defendants, which was denied. The court then decided upon the evidence that the offense charged in the complaint had been committed, and that there was probable cause for believing the

formed by a large number of retail lumber dealers who had mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers not dealers, at any point where a member of the association was carrying on a retail yard, and provided in their by-laws that whenever any wholesale dealer or manufacturer made any such sale their secretary should notify all the members of the fact,—will not be enjoined, in an action brought by a person who has made such a sale after the secretary has threatened to send notice of the fact, from sending such notice. *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, *sub nom.* *Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.* 21 L. R. A. 337, 55 S. W. 1119. In this case the court said, if an act be lawful,—one that the party has a legal right to do,—the fact that he may be actuated by an improper motive does not render it unlawful. As said in one case, "the exercise by one man of a legal right cannot be a legal wrong to another;" or, as expressed in another case, "malicious motives make a bad case worse, but they cannot make that wrong which, in its own essence, is lawful." The court said further, what one may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change the character of the act from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If an act be unlawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act. In a few cases there may be some loose remarks, apparently to the contrary, but they evidently have their origin in a confused and inaccurate idea of the law of criminal conspiracy, and in failing to distinguish between an unlawful act and a criminal one. It can never be a crime to combine to commit a lawful act, but it may be a crime for several to conspire to do an unlawful act which, if done by one individual alone, although unlawful, would not be criminal. Hence, the fact that the defendants associated themselves together to do

the act complained of was wholly immaterial in this case.

An association of master plumbers, in order to free themselves from the competition of those who were not members of the association, sent notices to wholesale dealers in plumber's supplies not to sell to others than members of the association under the penalty of a withdrawal of the latter's patronage. The wholesale dealers thereupon refused to sell to nonmembers, who were in consequence, unable to purchase supplies from such wholesale dealers. It was held that sending of the notices did not violate any legal rights of the nonmembers, and afforded no ground for relief in equity by injunction. *Macaulay Bros. v. Tierney*, 19 R. I. 255, 37 L. R. A. 455, 83 Atl. 1.

A petition charged that the defendants, who were officers of various insurance companies in a city, combined, confederated, and conspired wilfully and maliciously to injure and wholly ruin the plaintiff in his trade and occupation as commander of a steamboat, and having for that purpose, and with the intent to effect the object, refused, without cause, to take any insurance upon his boat, whereby he was deprived of all benefit from his occupation, and was compelled to sell his boat and abandon his business. To this petition there was a demurrer, which was sustained by the court below, and brought into the supreme court to determine the sufficiency of the petition. In affirming the judgment sustaining the demurrer, the supreme court held that each of the defendants might have declined to take any insurance on the plaintiff's boat, and that, too, from hatred and malice towards the plaintiff, and such individual would not have been liable to an action for such refusal. And it was not less clear that the whole of the defendants might, without combination with each other, have refused the insurance, and none of them would have been subject to an action. That, if the action could be maintained, it must be on the ground that the defendants have agreed, among themselves, that each should take no insurance on the plaintiff's boat, and therefore he was injured, and that, if this fact would sustain the action, it must be because the conspiracy itself is an important part of the cause of action; yet the court had

defendants guilty of such offense. Each defendant refused to give bail for his appearance before the municipal court of Milwaukee county for trial, whereupon he was duly committed to the custody of the sheriff of such county to await such trial. A commitment was delivered to the sheriff, as to each defendant, all being in the same form. The following is one of such commitments:

"In the Police Court of the City of Milwaukee.
State of Wisconsin, }
Milwaukee County. } ss.

The State of Wisconsin to the Sheriff, or His Deputy, or to Any Constable or Policeman, and to the Keeper of the Common Jail of Said County:

Whereas, Albert Huegin has this day been brought before the police court of said

city, charged on the oath of Lucius W. Nie-man and Lloyd T. Boyd with having on or about the 5th day of April, A. D. 1900, at the city and county of Milwaukee, committed the offense of conspiracy to injure.

And whereas, an examination of the said Albert Huegin has been held before said court, and the said court being satisfied that an offense has been committed as charged in said complaint, and that there is probable cause to believe the prisoner guilty thereof, whereupon the said court did require the said Albert Huegin to recognize with sufficient sureties in the sum of five hundred (\$500.00) dollars, for his appearance before the municipal court of said county, at the present term thereof, for the year 1900, and not depart said court without leave. And the said Albert Huegin having failed to recognize in due form of law.

Now, therefore, in the name of the state

shown from authority that conspiracy need not be proved, and that it was not the ground of the action. That the act charged upon the defendants as having been done by preconcert was an act which each and every one of the defendants had a right to do, and was no violation of any right which the plaintiff could claim under the law; and that, the moment it was established that the conspiracy was not a substantial ground of action, it followed that no action could be brought to recover damages for the joint act of several, unless the act itself was illegal. The court then proceeded to instance the case (which has since become of common occurrence in the "cornering" of produce in stock on the general market) as follows: "If an individual was known to be under an engagement to furnish a large quantity of any article, in a short time, at a stipulated price, and others, from hostility to him, should purchase all of the article in the market, and refuse to sell to him except at a ruinous price, so that he could not comply with his engagement, it would be difficult to find any principle upon which he could maintain an action against them, and recover the damage he had sustained in consequence of failing to comply with his contract. Although his ruin might be the consequence, he must bear it." *Hunt v. Simonds*, 19 Mo. 563.

In *South Royalton Bank v. Suffolk Bank*, 27 Vt. 503, the declaration stated that the plaintiffs, being a banking corporation, had put in circulation a large amount of their bills, and that the bills would have had a continued and extended circulation to the great gain and profit of the plaintiffs, but that the defendants, a rival banking corporation, maliciously, corruptly, and wickedly intending and ardently desiring to injure the plaintiffs, and ultimately to break down and destroy and annihilate the plaintiffs, bought up the plaintiff's bills from time to time and refused again to exchange them for other money, and kept them out of circulation, and compelled the plaintiffs to redeem large amounts of such bills at one time in specie in order to drain the vaults of the plaintiffs of their specie and keep their bills out of circulation; and a demurrer thereto was sustained. The court said that the charge in 62 L. R. A.

the declaration that the acts were done from bad motives in the defendants was not enough, as motive alone is not enough to render the defendants liable for doing those acts they had a right to do.

Plaintiff's statement of claim alleged that the defendant was publishing a circular containing copies of a report of experiments testing the zinc paints of plaintiff and defendant, which circular contained substantially the statement that the defendant's white zinc was equal to, and, indeed, somewhat better than, the plaintiff's, and that such statement was untrue, and that plaintiff had, by reason of the premises, been injured in his business and credit. The defendant moved (under the practice act) to strike out the statement of claim as showing no reasonable cause of action. The master ordered that it should be struck out unless the plaintiff amended by averring special damage with full particulars. From this order the defendant appealed, and the judge discharged the master's order, from which the defendant appealed. In reversing the order of the judge and sustaining the original order made by the master, the court of appeals held that such a statement, even if untrue and the cause of loss to the plaintiff, was not a cause of action; and that, moreover, an allegation that the statement was made maliciously was not enough to convert what was prima facie a lawful into a prima facie unlawful attachment; and *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, *infra*, IV. b, shows that malice in such a case is immaterial. *Hubbuck v. Wilkinson* [1897] 1 Q. B. 86, 68 L. J. Q. B. N. S. 34.

It is not an unlawful act for a school teacher to advise or persuade his pupils not to visit or purchase at a store of a person, or to threaten suspension to such pupils if they did so visit and purchase, whereby the proprietor of the store suffers damage by reason of the scholars being thereby deterred from purchasing at his store; and the fact that he did so advise, persuade, and threaten, maliciously, does not change the rule. *Guethler v. Altman*, 26 Ind. App. 587, 60 N. E. 355. The case cites nearly all the prominent cases mentioned herein which holds that a malicious motive will not make

of Wisconsin, you are hereby commanded forthwith to convey and deliver into the custody of the said keeper of the common jail, the body of the said Albert Huegin, and you, the said keeper, are commanded to receive the said Albert Huegin into your custody, in the said jail, and him there safely keep until he shall recognize as aforesaid or shall otherwise be discharged by due course of law.

Witness, the Honorable Neele B. Neelen, justice of the police court of said city of Milwaukee, this 30th day of June, in the year of our Lord one thousand nine hundred.

Thereafter each defendant, on a petition stating the proceedings to which reference has been made, sued out of the circuit court for Milwaukee county a writ of habeas cor-

pus to test the legality of his detention. The sheriff of the county made due return to each of such writs, justifying the detention by the commitment placed in his hands as before stated.

pus to test the legality of his detention. The sheriff of the county made due return to each of such writs, justifying the detention by the commitment placed in his hands as before stated.

Albert Huegin, one of the defendants, traversing the return of the sheriff, alleged that the proceedings upon which his detention was based were illegal and void and beyond the jurisdiction of the committing magistrate for the reasons set forth in his petition for the writ. Such reasons were, in substance, that the complaint failed to state facts sufficient to constitute a criminal offense. Melvin A. Hoyt, another of the persons in custody, demurred to the return to his writ, for insufficiency. Andrew J. Aikens interposed a traverse similar to that of defendant Huegin. On the hearing on behalf of defendants Huegin and Aikens,

that wrong which in its own essence is lawful.

Plaintiff adopted the name of the town in which its manufactory was situated as a trademark for its iron. Defendants, rival manufacturers in the same town, designedly stamped their iron with the same name for the purpose of imitating the plaintiff's mark and thereby to derive an advantage. The supreme court in affirming the decision of the court below dismissing a bill to restrain the defendants from using the name, held that such use by the defendants was not unlawful; and that the commission of a lawful act does not become actionable although it may proceed from a malicious motive. *Glendon Iron Co. v. Uhler*, 75 Pa. 467, 15 Am. Rep. 509.

b. *Causing loss of employment or service.*

An official of a boiler maker's society or union who had previously restrained certain members of his union from leaving their employment is not liable to an action in favor of two members of a shipwrights' organization because he informed the company, who was the common employer of both the boiler makers and the plaintiffs, that, unless the plaintiffs who had taken iron work under another employment were discharged, the members of the boiler maker's society would be called out or would leave the service of the company. *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, *Reversing Flood v. Jackson* [1895] 2 Q. B. 21, 64 L. J. Q. B. N. S. 665, 14 Reports, 397, 43 Week. Rep. 453, 59 J. P. 388. In this case it appeared that the plaintiffs had been hired for no particular time, and were liable to be discharged by the company at any time and without notice; but that, but for the action of the defendant, they would have remained until the job was finished, and the statement of the defendant was the sole cause of their dismissal. On the trial the jury, under instructions from the court, had found that the defendant in what he did acted maliciously, and the majority of the court of appeal had assumed the position that, even if the defendant had a right to do what he did, he would yet be liable on the ground of the malice directed by him against the plaintiffs. This doctrine seems to have been repudiated by the majority of the law lords who partici-

ipated in the decision of the case in the House of Lords, all of them substantially stating or assenting to the proposition that the defendant, having committed no unlawful act, but simply having done what he had a right to do, the motive which prompted him to act as he did could not be considered.

The two cases of *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, *supra*, and *Quinn v. Leatham* [1901] A. C. 495, 70 L. J. P. C. N. S. 76, 85 L. T. N. S. 289, 50 Week. Rep. 139, 65 J. P. 708, *supra*, IV. a, are very important as bearing upon the question under consideration. In *Allen v. Flood* the judges who were in the majority united in the proposition that the exercise of an absolutely legal right cannot be treated as wrongful and actionable merely because a malicious intention prompted such exercise. This proposition was acquiesced in by each and all of the law lords who wrote in *Quinn v. Leatham*, with the possible exception of the lord chancellor. And Lord Brampton, who took no part in *Allen v. Flood*, stated that the proposition was established as clear law by the House of Lords in *Bradford v. Pickles* [1895] A. C. 587, 64 L. J. Ch. N. S. 759, 73 L. T. N. S. 333, *supra*, III. c, 2, and that it was too late to dispute it, even if one were disposed to do so, which he was not.

Lord Macnaghten who was with the majority in *Allen v. Flood*, and delivered an opinion in that case sustaining their views, also wrote in *Quinn v. Leatham*, and in his opinion in the latter case said that *Allen v. Flood* laid down no new law; that it simply brushed aside certain *dicta*, which in the opinion of the majority of the House of Lords were contrary to principle and unsupported by authority, and that those *dicta* were first to be found in the judgment delivered by Lord Esher in behalf of himself and Lord Selborne in *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, 50 L. J. Q. B. N. S. 305, 44 L. T. N. S. 75, 29 Week. Rep. 367, 45 J. P. 373, *supra*, III. a; that they were repeated by Lord Esher and Lopes, L. J., in *Temperton v. Russell* [1893] 1 Q. B. 715, 62 L. J. Q. B. N. S. 412, 4 Reports, 376, 69 L. T. N. S. 78, 41 Week. Rep. 565, 57 J. P. 676, *supra*, III. a; but that they were not necessary for the decision in either case.

and in support of their pleas to the return of the sheriff, the evidence and proceedings had in the police court were offered and received in evidence. The commitments were also offered and received in evidence. The district attorney then moved the court that James G. Flanders and William H. Austin, attorneys of the court, be allowed to appear as counsel for the sheriff. The motion was denied upon the ground that habeas corpus proceedings are criminal in character, or involve an inquiry into a criminal proceeding, and that the duty devolves solely upon the district attorney to represent the state, the real party, in such a matter, the sheriff not being a party to the proceeding at all.

The court then decided that the proceedings which resulted in the several commit-

ments were illegal, because the facts alleged in the complaint did not constitute a criminal offense; that the statute under which the prosecution was commenced covers only cases where the purpose of the combination is to do such an injury that an action at law can be maintained for damages, against the members of the combination, in case its purpose is carried out. An order was accordingly entered to discharge each of the defendants from custody. Such orders are presented here for review by writs of error, as before stated.

After returns were filed to the writs of error issued out of this court, a motion was made on behalf of the sheriff of Milwaukee county for leave to be heard by private counsel, which motion was opposed by the defendants in error.

See what is said in connection with *Quinn v. Leatham* [1901] A. C. 495, 70 L. J. P. C. N. S. 76, 85 L. T. N. S. 289, 50 Week. Rep. 139, 65 J. P. 708, *supra*, IV. a.

In *Clemmitt v. Watson*, 14 Ind. App. 38, 42 N. E. 367, it was held that a compact or combination between two or more employees to quit the work at which they are employed if another employee is not dismissed, and quitting on the employer's refusal to discharge such other employee, by reason of which the whole work is stopped and the latter is thrown out of employment, do not constitute a conspiracy rendering the parties to such combination liable to such employee for being thrown out of work. In this case, in reversing a judgment in favor of the plaintiffs, the court held that the charges to the jury did not require the existence of malice, threats, intimidation, or violence, in order to support a verdict for the plaintiff. If the combination to quit and the quitting had been accompanied by either threats, intimidation, or violence, it would seem, according to the drift of the authorities, that either of those ingredients would have created a cause of action; and as the court classed malice along with them, it would seem that the judge who delivered the opinion at least meant to say that, if it could have been shown that malice existed upon the part of the defendants in making their combination and following it up by quitting work, the action might have been maintained. The court further said that it was not in accordance with our institutions or the law of the land to say that a body of workmen must respond in damages because they, without malice or any other motive, peaceably and quietly quit work which they are not required to continue, rather than remain at work with one who is for any reason unsatisfactory to them.

The superintendent of a granite quarry who is in full management thereof, and as such had entered into a contract with a person that he might cut paying block upon the quarry for a time terminable at the will of either party, is not liable to an employee of such person for procuring his discharge by threatening such person that, if he did not discharge his employee, he would terminate the contract, although he did so purely out of malice toward

the employee. *Raycroft v. Tayntor*, 68 Vt. 219, 33 L. R. A. 225, 35 Atl. 53.

In *Baker v. Metropolitan L. Ins. Co.* 23 Ky. L. Rep. 1174, 55 L. R. A. 271, 64 S. W. 913, the petition which was held to fail to state a cause of action, alleged that the defendant, an insurance company, had discharged the plaintiff from an employment which was for an indefinite period, at the instance and demand of another insurance company, the two companies with another having wrongfully, unlawfully, and maliciously confederated together for the purpose of preventing anyone (and especially the plaintiff) who had been in the employ of either of said insurance companies from receiving employment of either of the other of said companies within a certain time. The court said it would be observed that the plaintiff alleges that his employment was for an indefinite length of time. He had, therefore, the right to quit whenever he saw proper. The defendant had also a right to terminate the employment at pleasure. When it discharged him, therefore, it exercised only a legal right. The court quoted from and approved what was said in *Bourlier Bros. v. Macauley*, 91 Ky. 135, 11 L. R. A. 550, 15 S. W. 60, *supra*, III. a, and *Brewster v. C. Miller's Sons Co.* 101 Ky. 368, 38 L. R. A. 505, 41 S. W. 301, in which former case it was said: "Whether a legal wrong has been done or not depends upon the nature and quality of the act, not upon the motive of the person doing it." To the same effect, *Baker v. Sun L. Ins. Co.* 23 Ky. L. Rep. 1178, 64 S. W. 967.

A police justice of a city was paid by fees, and his income from such fees averaged \$4,000 a year. The mayor and common council of the city passed an ordinance fixing his salary at \$1,000 per annum, and directed him to pay his fees into the city treasury. The police justice claimed that the ordinance was void, and refused to pay over the fees or accept his salary. Thereupon the mayor and council, officers of the city, directed the police officers to make arrest and complaint under the state statutes rather than under the city ordinances, and to make returns of their arrest to justices of the peace instead of the police justices, by means of which the police justice was deprived of many thousands of dollars. In an action by the police justice against the mayor and members of the council in which the acts of the defendants were

Mr. A. C. Umbreit, with Mr. Howard Van Wyck, for plaintiff in error:

This being a civil proceeding to enforce the civil right of personal liberty, and the sheriff having been made a party by the defendants, he had a right to be represented by counsel of his own selection.

Ex parte Tom Tong, 108 U. S. 556, 27 L. ed. 826, 2 Sup. Ct. Rep. 871; *Ex parte Collier*, 6 Ohio St. 60; *Re Van Sciever*, 42 Neb. 772, 60 N. W. 1037; *State v. Collins*, 54 Iowa, 441, 6 N. W. 692; *Re Barker*, 56 Vt. 1; *Yudkin v. Gates*, 60 Conn. 426, 22 Atl. 776; *Hunt v. Haven*, 52 N. H. 162.

A court of competent jurisdiction having passed upon the sufficiency of the complaint, the circuit court had no power or jurisdiction to pass upon that same question on habeas corpus.

stated to have been done maliciously and unlawfully and under a conspiracy, a demurrer to the petition was sustained, the court holding that the defendants had a legal right, as city officers, to do what they did, and that, as they did nothing unlawful, it was immaterial whether they conspired to do so or not. An allegation that parties conspired together and maliciously did an act cannot alone make a cause of action where nothing unlawful has been done. *McHenry v. Snee*, 56 Iowa, 649, 10 N. W. 234.

A verdict for the defendants will not be disturbed where the trial judge submitted to the jury the question as to whether there was a malicious conspiracy between the defendants to hiss and hoot the plaintiff upon his appearance as an actor on the stage of a theater, intending by such conspiracy to drive the plaintiff from the stage and prevent his proceeding in his acting; a malicious conspiracy being the ground of the action. The act of hissing in a public theater is, *prima facie* a lawful act. *Gregory v. Brunswick*, 6 Mann. & G. 953, 7 Scott N. R. 972.

In *Perrault v. Gauthier*, 28 Can. S. C. 241, it was held that members of a trade union are not liable to a nonunion workman in carrying out the regulations of their union forbidding them to work with him without threats, violence, intimidation, or other illegal means, and in taking such measures as result in preventing him from obtaining employment where union working men are engaged. The court followed *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, *supra*, and practically held that the fact that the members of the union were actuated by bad feeling or motive toward the plaintiff cut no figure whatever.

A petition which alleges, in substance, that plaintiff was master of a steamboat and was receiving \$150 per month as wages, and, by means of his skill and experience and good reputation he was able to obtain employment and earn a competent livelihood for himself and family; that the defendants maliciously, and without any cause except that the plaintiff had made certain charges, which were reasonable charges, combined and confederated together and agreed that they would not insure anything on any steamer on which the plaintiff might be employed, nor adventure any risk on such steam-

State ex rel. Milwaukee v. Ludwig, 106 Wis. 226, 82 N. W. 158; *State v. Davie*, 62 Wis. 305, 22 N. W. 411; *State ex rel. De Puy v. Evans*, 88 Wis. 255, 60 N. W. 433; *Ex parte Watkins*, 3 Pet. 193, 7 L. ed. 650; *Re Coy*, 127 U. S. 756, 32 L. ed. 280, 8 Sup. Ct. Rep. 1263; *Bergemann v. Backer*, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727; *Turner v. Conkey*, 132 Ind. 248, 17 L. R. A. 509, 31 N. E. 777; *Re Semler*, 41 Wis. 525; *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787; *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; *Barton v. Saunders*, 16 Or. 51, 16 Pac. 921; *Re Eaton*, 27 Mich. 1; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 571, 19 Am. Rep. 211; *Hauser v. State*, 33 Wis. 678; *Re Crandall*, 34 Wis. 177; *State ex rel. Welch v. Sloan*, 65 Wis. 647, 27 N. W. 616.

er, by reason whereof the owner of the steamboat discharged petitioner from his position as master on said boat; and petitioner finds himself excluded from his business of steamboat navigation, and from all useful and honorable employment, and deprived of all means of livelihood for himself and family; and that he has been damaged etc.,—does not state a cause of action. The court, in making this decision, held that the motives of the act could not be questioned. Whether they were malicious, and with the sole design of injuring the plaintiff, or not, would be entirely immaterial in a legal point of view so long as there was no contract on their part and no legal obligation to insure the boat; and that the fact that the three insurance companies conspired and agreed with each other that they would not insure on any boat on which the plaintiff should be employed, in order to prevent him from obtaining employment, did not change the character of their act. *Orr v. Home Mut. Ins. Co.* 12 La. Ann. 255, 68 Am. Dec. 770.

No individual, or association of individuals, has any right wantonly so to interfere with a man in the exercise of his craft, business, or profession as to prevent him earning his livelihood therein; and, where it appears that the only motive which impels the interference is to prevent a particular individual from making his living, irrespective of other considerations, equity will interfere where no adequate remedy at law exists. But in an action against a trade union for a conspiracy to prevent the plaintiff from obtaining employment, where the only evidence of the plaintiff in regard to his employment is that his employer testified that his employment of the plaintiff was only temporary, and until he could get union men, such evidence is entirely inadequate to establish that the plaintiff was the object of a persecution based upon a determination to exclude him from working at his trade for anybody or under any circumstances. *Davis v. United Portable Hoisting Engineers*, 28 App. Div. 308, 51 N. Y. Supp. 180. (The last clause would seem to indicate that what was said in the first was not necessary to the decision.)

Plaintiff had compulsorily been a witness and given evidence against a railroad company of which the defendant was general manager. Thereafter the defendant maliciously procured the plaintiff's discharge by inducing the rail-

Whether § 4466a is declaratory of the common law, or in amplification thereof, the complaint in question sufficiently sets out either a common-law or a statutory conspiracy.

United States v. Fisher, 2 Cranch, 386, 2 L. ed. 313; *Encking v. Simmons*, 28 Wis. 272; *Sutherland*, Stat. Constr. §§ 229-254; *Weill v. Kenfield*, 54 Cal. 111; *People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221, 34 N. E. 785; *People v. Petheran*, 64 Mich. 252, 31 N. W. 188; *Walker v. Cronin*, 107 Mass. 555; *Arthur v. Oakes*, 25 L. R. A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 323; *Ertz v. Produce Exchange*, 79 Minn. 140, 48 L. R. A. 90, 81 N. W. 737; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890; *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111; *Barr v. Essex*

Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; *State v. Stewart*, 59 Vt. 275, 59 Am. Rep. 710, 9 Atl. 559; *Casey v. Cincinnati Typographical Union*, 12 L. R. A. 193, 45 Fed. 135; *Milwaukee Masons' & Builders' Asso. v. Niezerowski*, 95 Wis. 129, 37 L. R. A. 127, 70 N. W. 106; *Gatzow v. Buening*, 106 Wis. 1, 49 L. R. A. 475, 81 N. W. 1003; *Plant v. Woods*, 176 Mass. 492, 51 L. R. A. 339, 57 N. E. 1011; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. 36; *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 15 L. R. A. 598, 19 S. W. 274; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790.

The evidence taken before a committing magistrate cannot be reviewed by the officer issuing the writ of habeas corpus.

Schall v. Bly, 43 Mich. 401, 5 N. W. 651;

road company in whose employ the plaintiff was to discharge him because he had given such evidence. It was held that an action lay in favor of the plaintiff against the defendant for damages for maliciously and from motives mentioned procuring and inducing the discharge of the plaintiff from his employment. *Dannerberg v. Ashley*, 10 Ohio C. C. 538.

Persons who combine and unite in addressing a petition to a board of school directors asking them not to employ a person as teacher in the school, without giving any reasons or grounds therefor, and in reality having no reasons or grounds therefor, but being actuated solely by malice and hatred of such person; and by reason of such petition the latter is not employed and suffers damage therefrom,—are liable to him in an action therefor. *Vanarsdale v. Laverty*, 69 Pa. 103. The court said: The petition "preferred no charges and gave no reasons, and was a simple expression only of the wishes of the signers. It was the right of these citizens of the district thus to declare their desire. They had a right to express a preference, or to declare their objection to anyone applying for appointment. They were deeply interested, and had, therefore, a right to speak out. But . . . such a right of expression can [not] be made a channel through which men may gratify their malice and enmity. . . . The right of petition is [not] so sacred that the private purposes and motives of the actors cannot be inquired into. . . . A groundless petition instigated only by malice cannot surely be the right of any citizen where it actually results in harm to the object of its malicious purpose."

A trades union is liable in an action for damages, to a person whose discharge it and its officers have caused by threatening his employer, in the event of his not discharging him, to call out other persons in the service of the employer, it appearing that such action of the defendant and its officers was malicious; that plaintiff had endeavored to become a member of their union but had been refused; and that, but for the interference of the defendant, the plaintiff would not have been discharged. *Lucke v. Clothing Cutters' & T. Assembly No. 7,507*, K. of L. 77 Md. 398, 19 L. R. A. 408, 26 Atl. 505. In this case the court held that, although the employer had the legal right to terminate the employment, and in doing so he would have violated no right of the plaintiff, yet, inasmuch as it ap-

peared that he was perfectly satisfied and desired to retain the services of the plaintiff, so far as he himself was concerned, and only dismissed him because induced to do so by the fear that the defendant would call out its members in his employ, the doing so by the defendant was a malicious and wanton interference on its part for the mere purpose of injuring plaintiff, and was not the exercise of a legal right.

Plaintiff was treasurer of a labor organization, and by provisions of the by-laws he was annually called upon to surrender to the trustees the books of the organization. Being required to surrender a book to a committee appointed by the president, he refused to do so, claiming that it was his own. In consequence of such refusal he was "knocked off" by the framing of a resolution adopted by the organization, and, when he presented himself at his place of employment, the walking delegate of the defendant told the other men employed on the work that they must not work with the plaintiff because of the resolution; and thereupon the plaintiff was discharged from employment by the foreman of the work because the other men refused to work with him. It was held that he might maintain an action against the defendant as president of the organization for the damages sustained by him, as there cannot be any doubt but that a right of action exists in favor of a discharged employee against a third party who has maliciously procured his discharge, and labor organizations have no more right to inflict injury to or upon others than have individuals. *Connell v. Stalker*, 20 Misc. 423, 45 N. Y. Supp. 1048.

In *Mattison v. Lake Shore & M. S. R. Co.* 2 Ohio N. P. 276, it was held that the employee's right to employment is equally sacred with the right of the employer to employ him; that an employer is to judge, himself, whom he will have to work for him; and it makes no difference whether he refuses to let a man work for him because he is incompetent, or because he dislikes him; he has a right to seek his employees, but his right to discharge ends with his own employment, and he must not trench upon the right of the employee to seek other employment. This was said in overruling a demurrer to a petition which alleged, among other things, that the defendant, a railroad company, after discharging the plaintiff, had conspired, confederated, and connived together with a great many other rail-

Carver v. Chapell, 70 Mich. 51, 37 N. W. 879; *Lord v. Wirt*, 96 Mich. 418, 56 N. W. 7; *Birdsall v. Phillips*, 17 Wend. 464; *People ex rel. Hunting v. Highway Comrs.* 30 N. Y. 76; *Re Bion*, 59 Conn. 372, 11 L. R. A. 694, 20 Atl. 662; *Ex parte Jones*, 96 Fed. 200; *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; *Merriman v. Morgan*, 7 Or. 68; *People ex rel. Danziger v. Protestant Episcopal House of Mercy*, 128 N. Y. 180, 28 N. E. 473; *Roberts v. Warren*, 3 Wis. 740; *Owens v. State*, 2 Held, 456; *Baizer v. Lasch*, 28 Wis. 268; *State v. Huck*, 29 Wis. 202; *Callon v. Sternberg*, 38 Wis. 539; *Wright v. Wright*, 74 Wis. 439, 43 N. W. 145; *Fulton v. State*, 103 Wis. 238, 79 N. W. 234.

The orders and the commitments issued thereon are sufficient successfully to withstand challenge on this proceeding.

road companies already acting in concert to defraud and injure plaintiff and prevent him from securing employment in his avocation as a railroad man, and had wrongfully, maliciously, and unlawfully caused certain black-list rules to be enforced against the plaintiff, thus preventing him from obtaining employment. In so deciding the court said that, so long as the company simply discharged plaintiff, their right to make the discharge should not be questioned, but, if they made a combination, as was charged in the petition, with other companies that they should not employ him, they went beyond their legal right.

One who had obtained judgment against a firm which was his employer for injuries sustained by him while in the service of the firm, which firm held a policy of insurance issued to it by a guarantee and accident insurance company by which the firm were insured by the insurance company against loss from legal liability on account of personal injuries arising on its premises to employees; but who during the proceedings to obtain the judgment, and thereafter, remained in the employ of the firm, the members of which desired to retain him in such employment,—may maintain an action against such insurance company for inducing or compelling said firm to discharge him from their employment by threats of canceling such policy of insurance unless it did so discharge him, which threats were maliciously made by the officers of the company because he refused to accept their offer of a sum very much less than the amount of his judgment against the firm in compromise thereof. *London Guarantee & Acci. Co. v. Horn*, 101 Ill. App. 355.

In an action on the case brought against a superintendent of schools for illegally revoking a teacher's certificate, the defendant is not liable in damages unless his conduct has been willfully and maliciously wrong; and, if the defendant in such a case exercises his authority wantonly and wrongfully, the jury may properly infer malice. *Love v. Moore*, 45 Ill. 12.

Where a minor went to work in a plumbing establishment simply by contract of hiring, and was not in any sense an apprentice, and left and went to work for another plumber, and the proprietor of the establishment which he left thereupon issued a false and malicious circular

Howard v. United States, 34 L. R. A. 509, 21 C. C. A. 586, 43 U. S. App. 678, 75 Fed. 986; *People ex rel. Trainor v. Baker*, 89 N. Y. 461; *People v. Nevins*, 1 Hill, 154; *Ex parte Wilson*, 114 U. S. 422, 29 L. ed. 91, 5 Sup. Ct. Rep. 935; *Turner v. People*, 33 Mich. 363; *Cargen v. People*, 39 Mich. 549; *State v. Bloom*, 17 Wis. 521; *Ex parte Gibson*, 31 Cal. 620, 91 Am. Dec. 546; *Wilkinson v. State*, 106 Ala. 23, 17 So. 458; *State v. Cook*, 92 Iowa, 484, 61 N. W. 185; *Pointer v. United States*, 151 U. S. 418, 38 L. ed. 217, 14 Sup. Ct. Rep. 410.

Messrs. E. R. Hicks, Attorney General, **Winkler, Flanders, Smith, Bottum, & Villas**, and **W. H. Austin** also for plaintiff in error.

Messrs. Van Dyke, Van Dyke, & Carter, for defendant in error Hugin:

The attempt to charge, in the complaint,

letter to all the plumbers in the city, stating that the minor was an apprentice in his shop not out of his time, and had quit work without cause,—there being an agreement between all the plumbers that they would not employ an apprentice of another under such circumstances,—which caused the minor's discharge; and he was thereafter unable to procure employment,—such conduct on the part of the proprietor of the first-mentioned establishment is actionable. *Lally v. Cantwell*, 30 Mo. App. 524.

This decision was made in overruling a demurrer to the declaration. The case was afterwards tried, and on the trial proof was made that the defendant repeatedly said that the plaintiff should work nowhere in the city except for him, and other evidence tending to show that he acted purely from malice, and a verdict for the plaintiff was afterwards sustained. 40 Mo. App. 44.

An action lies in behalf of an employee against a person who has maliciously procured the employer to discharge him, and he is so discharged and thereby damaged; and neither the fact that the term of service interrupted is not for a fixed period, nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service, or to refuse to perform his agreement, is of itself a bar to an action against the person so maliciously and wantonly procuring the termination of, or refusal to perform, the agreement. *Chipley v. Atkinson*, 23 Fla. 206, 1 So. 934.

A declaration sufficiently states a cause of action which alleges that the plaintiff had for twenty-two years been in the employ of a company as a stone cutter, working by the piece; that he was making large profits out of his employment; that he would have continued in such employment from the day named until the date of his writ but for the wrongful acts, inducements, threats, persuasions, and grievances committed by said defendants against the said plaintiff as therein set forth; that on a day named, and at divers other times thereafter until the date of the plaintiff's writ, the defendants did unlawfully and without justifiable cause molest, obstruct, and hinder the plaintiff from carrying on his said trade, occupation, or business as a stone cutter for the said

an offense in the language of the statute is insufficient.

Steuer v. State, 59 Wis. 472, 18 N. W. 433; *Gelzenleuchter v. Niemeyer*, 64 Wis. 316, 54 Am. Rep. 616, 25 N. W. 442; *Peters v. State*, 66 Wis. 341, 28 N. W. 138; *Fischer v. State*, 101 Wis. 23, 76 N. W. 594; *State v. Crowley*, 41 Wis. 271, 22 Am. Rep. 719; *United States v. Carll*, 105 U. S. 611, 28 L. ed. 1135; *Pettibone v. United States*, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *United States v. Simmons*, 96 U. S. 360, 24 L. ed. 819; *Com. v. Clifford*, 8 Cush. 215; *Com. v. Bean*, 14 Gray, 52; *Com. v. Filburn*, 119 Mass. 297; *United States v. Britton*, 107 U. S. 661, 27 L. ed. 522, 2 Sup. Ct. Rep. 512; *United States v. Pond*, 2 Curt. C. C. 265, Fed. Cas. No. 16,067; *United States v. Hess*, 124 U. S. 483, 31 L.

ed. 516, 8 Sup. Ct. Rep. 571; *Ledbetter v. United States*, 170 U. S. 606, 42 L. ed. 1162, 18 Sup. Ct. Rep. 774; *Re Greene*, 52 Fed. 111; *Queen v. Peck*, 9 Ad. & El. 686; *Miles v. State*, 94 Ala. 106, 11 So. 403; *State v. Howard*, 66 Minn. 309, 34 L. R. A. 178, 68 N. W. 1096; *State v. Jackson*, 39 Conn. 229; *State v. Murray*, 41 Iowa, 580; *Quinn v. State*, 35 Ind. 485, 9 Am. Rep. 754; *State v. Williams*, 32 S. C. 123, 10 S. E. 876; *Luter v. State*, 32 Tex. Crim. Rep. 69, 22 S. W. 140; *United States v. Patterson*, 4 Inters. Com. Rep. 775, 55 Fed. 605; *St. Louis & S. F. R. Co. v. State*, 68 Ark. 251, 57 S. W. 796.

The complaint as a whole states no offense known to the law.

Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 598 [1892] A. C. 35; *Allen v. Flood* [1898] A. C. 1; 21 Reports Am. Bar

company, and wrongfully, unlawfully, and unjustly had him discharged, without any justifiable cause, from the employment of said company by wilfully threatening, persuading, inducing, and by other overt acts compelling the said company, against its will and without any desire on its part so to do, to discharge the said plaintiff from its employ for the sole reason that the plaintiff would not become a member in the order of a granite cutters' national union, whereby he suffered the injuries specially set out in his declaration. *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96.

c. Causing loss of employee or servant.

In *Ashley v. Harrison, Peake*, N. P. Cas. pt. 1, p. 194, 1 Ecp. 48, 3 Revised Rep. 686, it was held that an action on the case will not lie for maliciously publishing a libel of an actress by means of which she declines to perform for fear of the consequences of her doing so, whereby the plaintiff, the manager of the theater, who had engaged for her performance, lost profit.

And so an action will not lie in favor of a manager of a theater against one who beat a public singer engaged for the season at a salary, by means of which the plaintiff lost his services as a public performer, the chief justice stating that, if the present action could be supported, every man whose servant, whether domestic or not, was kept away a day from his business could maintain an action. The record stated that the person beaten was a servant hired to sing; but the chief justice was of the opinion that he was not a servant at all. *Taylor v. Neri*, 1 Esp. 381.

See *Lumley v. Gye*, 2 El. & Bl. 216, 22 L. J. Q. B. N. S. 463, 17 Jur. 827, 1 Week. Rep. 432; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, 50 L. J. Q. B. N. S. 303, 44 L. T. N. S. 75, 29 Week. Rep. 367, 45 J. P. 373, *supra*, III. a, and *Garret v. Taylor* (18 James I.) Cro. Jac. 567, *supra*, IV. a.

V. Injury to person or feelings.

One is not liable in an action for assault and battery for removing a person from a building of which the former has possession; and, where he has the legal right to do so, he is justified, and his justification does not depend upon the 62 L. R. A.

motive or the spirit in which the legal act was done. He may have been influenced by spite, ill will, or malice; but, if he only did that which he had a right to do, he is not liable. *Brothers v. Morris*, 49 Vt. 460.

A person who, in removing a trespasser from his premises, uses more force than is necessary, and thereby renders himself liable to an action by the trespasser therefor, is liable for compensatory damages only, and a charge that, if the jury find that his acts in making such removal were wanton and malicious, they may, in addition to the compensatory damages, return a sum by way of punitive or exemplary damages, is erroneous. *Kiff v. Youmans*, 86 N. Y. 324, 40 Am. Rep. 543. As a reason for so holding, the court said it was assumed in the very frame of the issue presented to the jury that some force was necessary, and that defendant might lawfully lay hands upon the plaintiff. Up to that point, therefore, including the exercise of force sufficient to remove the plaintiff, the defendant was without fault. Whatever injury the plaintiff sustained resulted, in part, at least, from its application, and so much the plaintiff brought upon himself. But all acts of the defendant upon this occasion were directed to the removal of the aggressor. And whether, in requiring that removal, the defendant was instigated by wantonness or malice is immaterial. The exercise of a legal right cannot be affected by the motive which controls it.

Plaintiff, a citizen of Vermont, was indebted to a citizen of New York. By the statute of limitations of Vermont such indebtedness was barred. Defendants enticed and persuaded the plaintiff to go into the jurisdiction of New York, and while there he was arrested on process issued out of the supreme court of New York at the instance of his creditor. The defendants had combined and conspired to persuade and induce plaintiff to go into New York in order to place him within the jurisdiction of the courts of that state. It was held that such combination and conspiracy were actionable notwithstanding his arrest was upon a just debt. *Whelps v. Goddard*, 1 Tyler (Vt.) 60, 4 Am. Dec. 720.

An action may be maintained against an inspector of election held by a religious society for refusing the plaintiff's vote thereat, but in

Asso. (1898) pp. 134, 335; *National Protective Asso. v. Cummings*, 53 App. Div. 227, 65 N. Y. Supp. 940; *Dela v. Winfree*, 80 Tex. 400, 16 S. W. 111; *Cooley*, Torts, 125; *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340; *Laverty v. Vanarsdale*, 65 Pa. 507; *Longshore Printing & Pub. Co. v. Howell*, 26 Or. 527, 28 L. R. A. 464, 38 Pac. 547; *Payne v. Western & A. R. Co.* 13 Lea, 507, 49 Am. Rep. 660; *Heywood v. Tillson*, 75 Me. 225, 48 Am. Rep. 373; *Raycroft v. Tayntor*, 68 Vt. 219, 33 L. R. A. 225, 35 Atl. 53; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 42 L. R. A. 407, 77 N. W. 13; *Doremus v. Hennessy*, 176 Ill. 608, 43 L. R. A. 797, 52 N. E. 924, 54 N. E. 524; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30

Atl. 881; *Re Greene*, 52 Fed. 118; *People v. Powell*, 63 N. Y. 88; *Queen Ins. Co. v. State*, 86 Tex. 250, 22 L. R. A. 483, 24 S. W. 397; *Atina Ins. Co. v. Com.* 106 Ky. 864, 45 L. R. A. 355, 51 S. W. 624; *Continental Ins. Co. v. Fire Underwriters*, 67 Fed. 310; *Orr v. Home Mut. Ins. Co.* 12 La. Ann. 255, 68 Am. Dec. 770; *Hunt v. Simonds*, 19 Mo. 583; *Snow v. Wheeler*, 113 Mass. 186; *Carew v. Rutherford*, 106 Mass. 14, 8 Am. Rep. 287; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223; *sub nom. Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.* 21 L. R. A. 337, 55 N. W. 1119; *Macaulay Bros. v. Tierney*, 19 R. I. 255, 37 L. R. A. 455, 33 Atl. 1; *Brewster v. C. Miller's Sons Co.* 101 Ky. 368, 38 L. R. A. 505, 41 S. W. 301; *Chambers v. Baldwin*, 91 Ky. 121, 11 L. R. A. 545, 15 S. W. 57;

such an action malice is an essential ingredient, without which the action cannot be supported. Malice in this connection means the refusal of a vote from improper motives, and contrary to the inspector's own opinion; and it is not necessary that this should be expressly proved. The jury may infer it from circumstances; direct and positive proof, in an action of this kind, is hardly to be expected. *Weckerly v. Geyer*, 11 Serg. & R. 85.

In *Jenkins v. Waldron*, 11 Johns. 114, 6 Am. Dec. 359, it was held, that, in order to maintain an action against inspectors of election for refusing plaintiff's vote, it must be shown that the inspectors acted fraudulently or maliciously.

On the trial of an action it was satisfactorily proved that the plaintiff was legally entitled to vote for governor, and that his vote had been refused by the defendant, who was the moderator of the meeting; but the court directed the jury that they ought not to find a verdict for the plaintiff, unless they believed that the defendant had refused the vote maliciously, and from improper motives, and, under this direction, the jury rendered a verdict for the defendant. The superior court of judicature, in denying a motion for a new trial and directing judgment on the verdict, said: "It seems that an action of this description cannot be maintained in England, without alleging and proving malice. *Ashby v. White*, 2 Ld. Raym. 938 [3 Ld. Raym. 320, 1 Smith, Lead. Cas. 10th ed. 231, 14 How. St. Tr. 695], 6 Mod. 45, 1 East, 555, 563, note, 1 Bro. P. C. 49. The law is settled to be the same in New York. *Jenkins v. Waldron*, 11 Johns. 114, 6 Am. Dec. 359. But in Massachusetts, it has been solemnly decided to be otherwise, and their courts hold that those who reject the vote of a qualified elector are liable, though not chargeable with malice. . . . But, notwithstanding we entertain the most entire respect for the decisions of that court, we have not been able, after the most mature reflection, to adopt their opinion upon this subject. . . . It is true that moderators may decide wrongfully with the best intentions, and then the party will be without remedy. And so may a court and jury decide wrongly, and then the party will also be without remedy. Perfect justice in all cases never was, and never will be, administered in any human tribunal, and yet human tribunals must be intrusted with the ul-

timate decision upon our most important rights. So long as moderators act honestly and conscientiously, no great injustice will be done, even if they be intrusted to decide finally upon the rights of electors." *Wheeler v. Patterson*, 1 N. H. 88, 8 Am. Dec. 41.

The trouble with the reasoning in this case is that a court and jury may not only decide wrongfully, but may do so with malice, and yet no civil action for damages lies against them.

In *Goetheus v. Matthewson*, 5 Lans. 214, the supreme court held that an action could not be maintained against inspectors of election for refusing to receive the vote of a qualified voter, unless it was shown that such refusal was malicious. The decision, however, was reversed by the court of appeals, and a new trial ordered, and in that decision the question of malice does not seem to have entered; but one of the judges, after holding that the inspectors acted ministerially, said that, even if it should be conceded that they acted judicially they were liable if they acted with malice. 61 N. Y. 420.

Defendant made accusations against the plaintiff, a married woman, to her husband, in consequence of which the latter forced her to leave his house and return to her father, whereby she lost the consortium of her husband. It was held that these facts would not sustain the action for the reason that they were not the natural and reasonable consequence of the slander, and therefore not the subject of special damage, because the charge, if true, was insufficient to justify the husband in doing what he did; and that, under such circumstances, that which did not afford a cause of action could not be made so by reason of the malice of the defendant in making the accusation. *Lynch v. Knight*, 9 H. L. Cas. 577, 5 L. T. N. S. 291.

Action on the case for falsely and maliciously suing out a commission of bankruptcy which was afterwards superseded is maintainable notwithstanding the existence of the statute which compels the petition creditor in bankruptcy to give a bond to the lord chancellor in the penalty of £200, to be conditioned for proving his debt, and the party a bankrupt before the commissioners, and upon a trial at law, if it shall appear that the commission was taken up fraudulently or maliciously, the chancellor may order satisfaction to the party aggrieved, or assign the bond to him and he may sue the same in his own name. *Chapman v. Pickersgill*, 2 Will. 145.

Bourlier Bros. v. Macauley, 91 Ky. 135, 11 L. R. A. 550, 15 S. W. 60; *Cœur D'Alene Consolidated Min. Co. v. Miner's Union*, 19 L. R. A. 382, 51 Fed. 260; *Farmers' Loan & T. Co. v. Northern P. R. Co.* 25 L. R. A. 414, note, 4 Inters. Com. Rep. 744, note, 60 Fed. 815; *Arthur v. Oakes*, 25 L. R. A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310; *Boyson v. Thorn*, 98 Cal. 578, 21 L. R. A. 233, 33 Pac. 492; *Schulten v. Bavarian Brewing Co.* 96 Ky. 224, 28 S. W. 504; *Dueber Watch-Case Co. v. E. Howard Watch & Clock Co.* 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 645; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 122, 29 C. C. A. 141, 59 U. S. App. 723, 85 Fed. 271; *Casey v. Cincinnati Typographical Union*, 12 L. R. A. 193, 45

Fed. 135; *Bowen v. Matheson*, 14 Allen, 499; *Vegelahn v. Guntner*, 167 Mass. 92, 35 L. R. A. 722, 44 N. E. 1077; *Dueber Watch Case Mfg. Co. v. E. Howard Watch & Clock Co.* 55 Fed. 851. See also *Huttley v. Simmons* [1898] 1 Q. B. 181; *Hubbuck v. Wilkinson* [1899] 1 Q. B. 86.

As to the meaning of the word "injury" when used in a penal statute, see—

Docter v. Riedel, 96 Wis. 158, 37 L. R. A. 580, 71 N. W. 119; *Metzger v. Hochrein*, 107 Wis. 267, 50 L. R. A. 305, 83 N. W. 308; *Macauley Bros. v. Tierney*, 19 R. I. 255, 37 L. R. A. 455, 33 Atl. 1; *Anderson's Law Dict. Injury*; *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 612; *Parker v. Griswold*, 17 Conn. 302, 42 Am. Dec. 739; *Chasemore*

The lord chief justice in rendering the decision said that the general grounds of this action were that the commission was falsely and maliciously sued out, that the plaintiff had been greatly damaged thereby, scandalized upon record, and put to great charges in obtaining a supersedeas to the commission; and that here was falsehood and malice in the defendant, and great wrong and damage done to the plaintiff thereby.

VI. Judge acting without, or in excess of, jurisdiction.

The judges of superior or general authority are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, except, perhaps, where the acts in excess of jurisdiction are done maliciously or corruptly. A judge of a court of general jurisdiction is not liable in a civil action for an order made removing an attorney, where the inquiry into his conduct was before the court before which he was notified to appear. Such attorney cannot seek redress in such event by an action against the judge of the court, there being no pretense or shadow of ground that he acted maliciously or corruptly. *Randall v. Brigham*, 7 Wall. 523, 19 L. ed. 285.

There would seem to be an intimation in the above case that, where a judge acts without or in excess of jurisdiction, and such acts are committed maliciously, an action will lie.

But in *Bradley v. Fisher*, 13 Wall. 335, 20 L. ed. 646, Field, J., in delivering the opinion of the court, said that the qualifying words, "unless, perhaps, when the acts in excess of jurisdiction are done maliciously or corruptly," which he had used in delivering the opinion in *Randall v. Brigham*, 7 Wall. 523, 19 L. ed. 285, *supra*, were inserted upon the suggestion that the previous language laid down the doctrine of judicial exemption from liability to civil actions in terms broader than was necessary for the case under consideration, and that, if the language remained unqualified, it would require an explanation of some apparently conflicting adjudications found in the reports; that they were not intended as an expression of opinion that in the cases supposed such liability would exist, but to avoid the expression of a contrary doctrine; and that in the present case (*Bradley v. Fisher*) the court had looked into the authorities, and were clear from them, as well as 62 L. R. A.

from the principle on which any exemption is maintained, that the qualifying words used were not necessary to a correct statement of the law; and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. He further stated, however, that a distinction must be observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter; that, where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible.

The trend of authority undoubtedly is that judges, whether of superior or inferior jurisdiction, are not exempt from liability for their acts if they act entirely without jurisdiction.

For authorities to this effect, and also to the particular effect of the element of malice or bad motive, see *note* to *Austin v. Vrooman*, 14 L. R. A. 138, and also *note* to *Thompson v. Jackson*, 27 L. R. A. 92.

VII. Abuse of process.

An action on the case will lie to recover damages for the malicious and illegal suing out of the process of the courts. The liability to such action extends to the attorney or agent who sues out such process through malice. So held in an action to recover damages for causing an execution to be sued out by the defendant in the name of his principal, maliciously and without probable cause. *Warfield v. Campbell*, 35 Ala. 349.

A count in the declaration in an action on the case stated that plaintiff was master and owner of a vessel, which he mortgaged to the defendants for \$80 under a stipulation that in the meantime the plaintiff should retain the command of the vessel and prosecute voyages therein for his own profit; that the defendants, in order to compel the plaintiff, through duress, to give up the register of the vessel, without which he could not go to sea, before the money lent on mortgage became due, threatened to arrest him for the same unless he immediately paid the amount; that, upon the plaintiff refusing to pay it, the defendants, knowing he could not provide bail, arrested him under a

v. Richards, 7 H. L. Cas. 349; *Bradford v. Pickles* [1895] A. C. 587.

As to the legal meaning of "wilful," see—*State v. Preston*, 34 Wis. 675; *State v. Castle*, 44 Wis. 670; *State v. Smith*, 52 Wis. 136, 8 N. W. 870; *Anderson's Law Dict. Wilful, Wilfully*; *Potter v. United States*, 155 U. S. 446, 39 L. ed. 217, 15 Sup. Ct. Rep. 144; *Com. v. Kneeland*, 20 Pick. 220; *Wass v. Stephens*, 128 N. Y. 123, 28 N. E. 21; *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 612.

As to meaning of word "malicious," see—*Tuttle v. Bishop*, 30 Conn. 85; *United States v. Ruggles*, 5 Mason, 192, Fed. Cas. No. 16,205; *Dexter v. Spear*, 4 Mason, 118 Fed. Cas. No. 3,867; *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 612; *Anderson's Law Dict. Malice*.

capias, indorsed to levy £95 17s. 6d., and kept him imprisoned until, by duress, he was compelled to give up the register, which the defendants then unlawfully detained; by means whereof plaintiff lost four voyages. The defendants pleaded the general issue; and, after a verdict for the plaintiff, upon application for a nonsuit, and on a motion in arrest of judgment, the court held, in answer to the latter, that the omission to allege want of reasonable and probable cause for the defendants' proceeding was no ground for a nonsuit. That this was an action for abusing the process of the law, by applying it to extort property from the plaintiff, and was not an action for a malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved, and the absence of reasonable and probable cause be alleged as well as proved. That this was a case *prima facie* *impressions*, in which the defendants are charged with having abused the process of the law, in order to obtain property to which they had no color of title, and there is no analogy between it and an action for a malicious arrest or malicious prosecution. That in an action like the present, where what is complained of is an abuse of the process of law for the purpose of extorting property to which the defendants had no claim, it is not necessary to allege or prove that the action in which the process was issued has been determined, or that the process was issued without reasonable or probable cause. *Grainger v. Hill*, 4 Bing. N. C. 212, 5 Scott, 561, 1 Arnold, 42, 7 L. J. C. P. N. S. 85. One of the judges stated that the action was not for maliciously putting process in force, but for maliciously abusing the process of the court.

Where a landlord distrains for more than is due for rent, an action on the case lies at the suit of the tenant, though the goods distrained are of less value than the rent really due. *Taylor v. Henniker*, 12 Ad. & El. 488, 4 Perry & D. 243, 9 L. J. Q. B. N. S. 383. This case seems to have been overruled by the decision in *Tancred v. Leyland*, 16 Q. B. 669.

An action will not lie for taking and selling goods under a distress for rent for a greater amount of rent than is actually due. *Tancred v. Leyland*, 16 Q. B. 669, Overruling *Taylor v. Henniker*, 12 Ad. & El. 488, 4 Perry & D. 243, 9 L. J. Q. B. N. S. 383.
62 L. R. A.

Motive is immaterial when the act done is not unlawful.

Docter v. Riedel, 96 Wis. 158, 37 L. R. A. 580, 71 N. W. 119; *Metzger v. Hochrein*, 107 Wis. 267, 50 L. R. A. 305, 83 N. W. 308; *Stevenson v. Neunham*, 13 C. B. 285; *Benjamin v. Wheeler*, 8 Gray, 409; *Randall v. Hazeltan*, 12 Allen, 415; *Frazier v. Brown*, 12 Ohio St. 294; *Chatfield v. Wilson*, 28 Vt. 49; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Bradford v. Pickles* [1895] A. C. 587.

On reargument.

Messrs. W. H. Timlin and N. S. Murphey, for defendants in error *Aikens and Hoyt*:

The statute in question should be construed strictly, because (a) it is a penal statute, (b) in derogation of the common law, (c) of common right, and (d) it inter-

In *Taylor v. Henniker* the claim was that the taking and selling as a distress was done falsely and maliciously. In *Tancred v. Leyland* there does not appear to have been any such declaration in the complaint.

In *Stevenson v. Newnham*, 13 C. B. 285, 22 L. J. C. P. N. S. 110, the court of exchequer chamber held that a count in the declaration could only be distinguished from that which was held bad by the same court in the case of *Tancred v. Leyland*, 16 Q. B. 669, by the immaterial circumstance that it contained an averment that the distress for the rent was "maliciously made,—that an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.

In *Hamilton v. Windolf*, 36 Md. 801, 11 Am. Rep. 491, it was held (approving *Tancred v. Leyland*, 16 Q. B. 669, which overruled *Taylor v. Henniker*, 12 Ad. & El. 488, 4 Perry & D. 243, 9 L. J. Q. B. N. S. 383) that no action will lie for distraining for more rent than is due in arrears where any rent is due, and an allegation in the declaration that the distress was maliciously made can make no difference, as such allegation is wholly immaterial, for an act which does not amount to a legal injury cannot be actionable because it may be done with a bad motive or intent.

Defendant leased premises to plaintiff for one year. Under a pretense that he had only rented by the month, he gave the plaintiff notice to quit, and at the expiration of the month summoned him to appear before a justice of the peace to show cause why he should not deliver the leased property to the lessor. Judgment was rendered against the plaintiff ordering delivery of the property. From this judgment he appealed to the third district court, making the affidavit required by the statutes to entitle him to a suspensive appeal, and furnished the required bond, which was accepted. Thereafter the defendant applied to a justice of the peace to dismiss the appeal, and the appeal was dismissed, and within two hours thereafter, without the knowledge of the plaintiff, and no opportunity being afforded him to remove the property himself, his furniture and effects were summarily removed from the house under the supervision of a constable, in a rough and careless manner, by which they were damaged, and a new leasee was immediately put in possession.

feres with legitimate business competition.

Black, *Constr. & Interpretation of Laws*, pp. 300, 301; Sutherland, *Stat. Constr.* §§ 346, 349, 350, 370; *Stone v. Lannon*, 6 Wis. 497; *Cohn v. Neeves*, 40 Wis. 393; *Cook v. Minneapolis, St. P. & S. Ste. M. R. Co.* 98 Wis. 646, 40 L. R. A. 457, 74 N. W. 561.

Inasmuch as the word "injuring" has two distinct meanings, one the popular and broad meaning, and the other a peculiar or appropriate meaning in the law, the latter meaning should be adopted.

Common-law words are interpreted according to their sense in the common law.

Sutherland, *Stat. Constr.* §§ 253, 254; Black, *Constr. & Interpretation of Laws*, pp. 232, 233; *Western U. Teleg. Co. v. Scircle*, 103 Ind. 229, 2 N. E. 604; *Buckner v. Real*

Estate Bank, 5 Ark. 536, 41 Am. Dec. 105; *Hillhouse v. Chester*, 3 Day, 211, 3 Am. Dec. 265.

The Constitution of Wisconsin, § 9, art. 1, provides: "Every person is entitled to a certain remedy in the law for all injuries or wrongs which he may receive in his person, property, or character." But, notwithstanding the liberal construction of the Bill of Rights, there are still acts *damnum absque injuria*.

Metzger v. Hochrein, 107 Wis. 267, 50 L. R. A. 305, 83 N. W. 308; *Duffies v. Duffies*, 76 Wis. 374, 8 L. R. A. 420, 45 N. W. 522; *Doster v. Riedel*, 96 Wis. 158, 37 L. R. A. 580, 71 N. W. 119; *Heiss v. Milwaukee & L. W. R. Co.* 69 Wis. 555, 34 N. W. 916; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 13

A peremptory mandamus was thereupon, upon the application of the plaintiff, issued by the district court, requiring the justice to grant the appeal and send up the record, and a writ of prohibition was also issued, and an injunction ordering all the furniture to be replaced in the house and the plaintiff restored to possession. These orders were entirely disregarded by both the defendant and the new lessee, who refused to obey them when called upon to do so. Thereafter the new lessee applied for and obtained an injunction from another district court restraining plaintiff from all further action to obtain possession of the premises, upon the service of which the plaintiff ceased further action in the direction he had pursued and fled the present suit for damages. It was held that an action for damages suffered by the plaintiff would be sustained; and that the gist or ground of the action was the acts of the defendant in prostituting legal proceedings to accomplish his purpose, by which means the plaintiff was damaged and his rights recklessly disregarded, which acts give plaintiff a right of action for damages. *Block v. Bonnet*, 28 La. Ann. 540.

Maliciously issuing an execution upon a judgment where the debt for which the judgment was entered had been paid before its entry, of which fact the person issuing the execution had knowledge, is actionable. Both malice and want of probable cause are essential to the maintenance of such an action. Knowledge of the fact that the debt has been paid was not in itself want of probable cause or malice, but it was pregnant evidence of it. *Barnett v. Reed*, 51 Pa. 190, 88 Am. Dec. 574.

There is a distinction between a malicious use and a malicious abuse of legal process. An abuse is where the party employs it for some unlawful object, not for the purpose for which it was intended by the law to effect,—in other words, a perversion of it; and in an action for such a malicious abuse it is not necessary to prove that the action in which the process issued has been determined, or to aver that it was issued without reasonable or probable cause. *Mayer v. Walter*, 64 Pa. 283.

Whenever there is a cause of action for issuing an execution regular on its face, it is founded upon the wrongful and malicious use of the authority of law. Malice is the gist of the action, and must be expressly alleged and proved. *Luddington v. Peck*, 2 Conn. 700. This was said in a case where the plaintiff had 62 L. R. A.

brought an action of trespass for the wrongful issue of such an execution, and had succeeded, and the judgment was reversed for the sole reason that, while there was a cause of action for the abuse of the process, yet it should have been case instead of trespass.

And in *Watson v. Watson*, 9 Conn. 140, 23 Am. Dec. 824, where the defendant, under pretense that a horse belonging to him had been unjustly impounded and detained by plaintiff, and it appeared that this was untrue, and that the horse was the property of the plaintiff, which the defendant knew, and also knew that it had not been distrained or impounded, and that he had no cause of action and no right to replevy,—it followed, as an undoubted consequence, that he had perpetrated a malicious wrong through the medium of legal process, but that the remedy of the plaintiff was case for the malicious motive and proceeding, and, as he had brought his action in trespass, a new trial was granted.

An action lies for the malicious abuse of lawful process, civil or criminal. It is to be assumed, in such a case, that the process was lawfully issued for a just cause, and is valid in form, and that the arrest or other proceeding upon the process was justifiable and proper in its inception. The grievance to be redressed arises in consequence of subsequent proceedings. The distinction between such an action and one of malicious prosecution is that in the latter the whole grievance complained of consists in the original institution of the process and no abuse in the manner of serving it. Another distinction is that, in an action for malicious prosecution, the action cannot be instituted until the prosecution complained of has been brought to a termination, but a termination of the proceeding in which the process for abuse in the execution of which the action is brought was issued is not essential. *Wood v. Graves*, 144 Mass. 365, 59 Am. Rep. 95, 11 N. E. 567.

In an equity action brought by the defendant against the plaintiff an order was obtained enjoining the plaintiff from moving himself or his effects from the commonwealth until he should secure to the plaintiff his debts and security-ships, and that the sheriff take into his possession the house and lot and furniture and slaves of the plaintiff. By virtue of the order, and in pursuance of its mandate, the sheriff took possession of the house and lot, inducing the plaintiff and his wife and children to go out and seek

Atl. 690; *Pennsylvania S. Valley R. Co. v. Walsh*, 124 Pa. 558, 17 Atl. 186; *Janesville v. Carpenter*, 77 Wis. 288, 8 L. R. A. 808, 46 N. W. 128; *Brittle Silver Co. v. Rust*, 10 Colo. App. 463, 51 Pac. 528; *Jordan v. State*, 142 Ind. 427, 41 N. E. 817; *People v. Howard*, 17 Cal. 63; *North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821; *Smith v. Wilcox*, 47 Vt. 537; *Woodruff v. North Bloomfield Gravel Min. Co.* 9 Sawy. 441, 18 Fed. 753; *Talcott v. Buffalo*, 125 N. Y. 280, 26 N. E. 263; *Chittenden v. Wurster*, 152 N. Y. 345, 37 L. R. A. 809, 46 N. E. 857; *Whitney v. Hirsch*, 39 Hun, 325; *Gibbs v. McNeeley*, 102 Fed. 594.

In § 4466a the words "wilfully and maliciously" in the context modify the words "injuring another."

shelter elsewhere, and locked the doors and nailed up the windows of the house. The circuit court quashed so much of the order as required the sheriff to take into his possession the house and lot. It was held that so much of the order as directed the sheriff to take into his possession the house and lot of the plaintiff was clearly illegal, oppressive, and unauthorized by the allegations of the bill or the statute. That to maintain an action for a malicious suit, as well as for a malicious prosecution, want of probable cause—malice in the defendant—and damage of the plaintiff must combine. Though there be probable cause, and even just grounds for the suit, if, from bad intentions or malicious motives, an illegal, oppressive, and vexatious order is procured by the attorney or client, or both, without probable cause or excuse, by which damage is done to the defendant, an action will lie against both, since, if it could not be maintained, then there might be a most grievous injury without a remedy. If the attorney, or attorney and client, if they acted in concert, cannot be made liable, then the injured party would be without redress. *Wood v. Weir*, 5 B. Mon. 544.

A prosecuting attorney who, by artifices and misrepresentation, procures a grand jury to find an indictment against a person which the grand jury did not intend to find, and the issuing by such prosecuting attorney of a warrant for the arrest of such person, and his subsequent arrest will not furnish ground for the maintenance of an action by him against such prosecuting attorney for malicious abuse of process. *Whitten v. Bennett*, 30 C. C. A. 140, 57 U. S. App. 145, 86 Fed. 405.

A constable is liable for taking, upon a warrant requiring him to collect the amount of it from the property of a person, property which he knows the warrant debtor would dislike to part with, where the latter turns to him and requests him to levy upon other property of more than sufficient value to satisfy the warrant and costs, where he does so with the malicious purpose of injuring the plaintiff and causing him distress on account of losing the property levied on. *Rogers v. Brewster*, 5 Johns. 125.

In an action of trover for making a wrongful levy the plaintiff gave some evidence tending to show that the plaintiff, in issuing the execution and causing the levy to be made, was influenced by malice growing out of rivalry in business. The court held that that fact, if established, 62 L. R. A.

State v. Clark, 29 N. J. L. 96; *Cohn v. Neeves*, 40 Wis. 393; *Folwell v. State*, 49 N. J. L. 31, 6 Atl. 619.

The words "injuring another in his trade," etc., cannot be disassociated from the words "by any means whatever" for the purpose of construction. "Effect is to be given to all parts of a statute if possible."

Battis v. Hamlin, 22 Wis. 669; *Black, Constr. & Interpretation of Laws*, 166.

If every time one proposed to exercise his constitutional rights he was obliged to consider the effect of their exercise on others, and study his own heart to see if his motive was good or bad, and act or refrain from acting accordingly as he found a just cause or excuse for the act, the theoretical result might be altruistic and Utopian, but the

could have no legitimate bearing upon any question at issue in the case. If the property seized belonged to the defendant in the execution, the execution creditor had a right to levy upon it, and his motives could not make his act a tort; if it did not, and he had no such right, his motives were still immaterial, as the dispute was then narrowed down to the value of the property converted. *Allen v. Kinyon*, 41 Mich. 281, 1 N. W. 963.

VIII. General and unclassified cases.

An action cannot be maintained by a corporation, organized under the general plank-road acts, against the owner of a farm adjoining a tollgate on the plank road of the corporation for moving his fence from the line of the road where it originally stood, back upon his farm, and grading a track by the side of the road, but entirely upon his own land, extending on both sides of the tollgate, so that persons traveling upon the road could, if disposed, leave the road and pass over this parallel track, thus avoiding the gate, even though his motive in doing so is malicious; as he has a right to use his property in this manner. Where an individual uses his own property in a manner which would otherwise be lawful he does not subject himself to an action if his motive in so using it is to injure another. *Auburn & C. Pl. Road Co. v. Douglass*, 9 N. Y. 444.

A postmaster who, by law, is directed to publish advertisements in newspapers which have the largest circulation is not liable for publishing in a newspaper not having a larger circulation than the plaintiff's even though in so publishing the defendant may have been actuated by malice. The law is not to give the printer a premium for superior activity, but to serve the public; and, however the latter might complain of disregard of the direction, plaintiff could not. And, as the plaintiff had not a legal right to the printing, he could ask for it only as a matter of favor; and even a malicious refusal of it would not entitle him to an action, as a man may withhold his benefits for his own reasons, and the most deserving claimants of them may be passed for the worst of motives. *Foster v. McKibben*, 14 Pa. 168.

It is not unlawful for the undertakers of a community to associate themselves together and agree to refuse to render service in their business to one who has refused or failed to pay a

practical result would be destructive of all legal rights.

Review of *Allen v. Flood* ([1898] A. C. 1), Am. Bar Asso. Reports, 1898; Cooley, Torts, 1st ed. p. 81; Legitimate Competition, 43 Cent. L. J. 302; *Auburn & C. Pl. Road Co. v. Douglass*, 9 N. Y. 444; *South Royall Bank v. Suffolk Bank*, 27 Vt. 505.

The apparent reason for the enactment of chapter 287, Laws of 1887, from which the revisers took § 4406a, Rev. Stat., was the labor agitation immediately preceding the appearance of the statute.

There was a condition of the law which permitted a boycott or strike which contemplated the doing of a civil injury to the boycotted person, and yet could not be reached by the criminal law. By a rule of construc-

tion we are not to extend the statute further than to reach such cases as those last mentioned.

Black, *Constr. & Interpretation of Laws*, pp. 234, 235.

Section 4406a makes penal combinations to injure another in his trade, etc. The offense thereby created consists in maliciously combining to inflict an injury upon one person. The public interest, however, is paramount. Competition is encouraged and tolerated, even to the extent of destroying a trade or business.

Post v. Southern R. Co. 103 Tenn. 184, 55 L. R. A. 481, 52 S. W. 311; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; *Re Terrell*, 51 Fed. 215; *Re Corning*, 51 Fed. 205; *Dolph v.*

bill due to some member of the association for similar service previously rendered; and an action for damages cannot be maintained against the members of such an association for a refusal to render such services, or furnish materials at a funeral for the person who has refused or failed to pay for such services previously rendered by some member of the association. One has the right to decline to enter into a business undertaking with another person; and this is so whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. And any number of persons can enter into an agreement by which they can decline to assume business relations with, or enter into any contract with, one or more persons. *Brewster v. C. Miller's Sons Co.* 101 Ky. 368, 38 L. R. A. 505, 41 S. W. 301.

A by-law of a liverymen's association which binds the members not to do business with any person who does not patronize its members exclusively, and prevents any of them from letting a hearse to a private party for a funeral where the undertaker in charge of it is reputed to patronize nonunion members, or to any person whose family for the occasion patronize a nonunion livery, is unlawful as against public policy; and the compelling of the withdrawal of such hearse and carriages from a funeral just at the time when they were wanted, in pursuance of an unlawful by-law of such association which prohibited doing business with any person who did not deal exclusively with its members, will justify an award of exemplary damages, where the act was done with full knowledge of the situation and for the purpose of demonstrating the power of the association to punish liverymen for doing business in an independent way, and to punish other persons for dealing with nonunion liverymen. *Gatzow v. Buening*, 106 Wis. 1, 49 L. R. A. 475, 81 N. W. 1003. The court said in this case that it was not necessary to decide to what length a combination of persons in restraint of trade, and interfering with personal liberty, may go to promote the interests of its members, without violating common-law rights and rendering such persons liable to respond in damages to persons specially injured. The court further said (very truly) that judicial expressions, in recent years at least, have not been in perfect harmony on the subject, and, inasmuch as the court 62 L. R. A.

said, further, that it would be hard to conceive of a combination more odiously detrimental to the public interests, and more heartlessly oppressive to individuals, than one which seeks to control the customary means used in the burial of the dead, by the resort to such wanton acts as were perpetrated by the defendants in aid of the purposes of their combination, it would seem that they based their finding (that the facts constituted a cause of action) on the fact that the defendants acted maliciously; and this was not said in connection with the consideration of the subject of exemplary damages. The case, however, was reversed on a question of practice, and it might be said that all that was said as to the merits was *obiter*, but this can hardly be, the appellate court having gone into the question of the merits of the cause of action after a full trial.

A declaration is insufficient, in that it fails to state a cause of action, which alleges that the defendants, a corporation engaged in the manufacture and sale of illuminating gas, after supplying the plaintiff with gas for a time, thereafter refused to do so, by means of which plaintiff was deprived of the means of lighting his rooms with gas, and had been put to great expense in providing other means of lighting them, but which did not allege any contract between the parties for the supplying of the plaintiff, by the defendants, with gas, although it was alleged that the defendants so refused contriving and intending to vex and annoy the plaintiff in the use and enjoyment of his premises, and did so maliciously and wantonly; the court deciding that the allegation that the defendants cut off the supply of the gas maliciously and wantonly, and with intent to injure the plaintiff, was of no importance in the determination of the question as to the sufficiency of the declaration. That where a party has a legal right to do a particular act at pleasure, the motive which induced the doing of the act at the time in question can never affect his legal liability for the act. *McCune v. Norwich City Gas Co.* 30 Conn. 521, 79 Am. Dec. 278.

In *Panton v. Holland*, 17 Johns. 92, 8 Am. Dec. 369, the court said: "In the exercise of a lawful right, a party may become liable to an action, where it appears that the act was done maliciously. Suppose Holland had declared that he would exercise his right of digging on his own ground contiguous to the plaintiff's wall, not to benefit himself, but for the sole pur-

Troy Laundry Machinery Co. 28 Fed. 553; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629; *Laubenheimer v. Mann*, 17 Wis. 542; *Richards v. American Desk & Seating Co.* 87 Wis. 512, 58 N. W. 787; *Palmer v. Toms*, 96 Wis. 367, 71 N. W. 654; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 68, 22 L. ed. 318; *Oliver v. Gilmore*, 52 Fed. 562; *Greenhood*, Pub. Pol. 683-769; *Taylor v. Blanchard*, 13 Allen, 370, 90 Am. Dec. 203; *Lawrence v. Kidder*, 10 Barb. 641.

The liberty of enjoying one's property, either singly or conjointly with others in any legal manner; of engaging singly or conjointly with others in any lawful trade or business; and contracting with others for that purpose,—are rights guaranteed to

every citizen, although injury in the broad sense may result to someone. To deny citizens such rights by making it a crime to exercise one's legal rights takes away all "liberty," deprives him of his property without any compensation, and holds him to answer for a criminal offense without due process of law.

State v. Julow, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781, 50 Am. St. Rep. 443, and note; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L. R. A. 265, 55 S. W. 627; *State v. Loomis*, 21 L. R. A. 789, note, 115 Mo. 307, 22 S. W.

pose of injuring the plaintiff; and digs accordingly, below the plaintiff's foundation, but takes care that there be no ground for the charge of negligence or unskillfulness in the exercise of his right; considering himself safely intrenched within the protection of the law, he desists from further operations; his object is accomplished, the adjoining foundation is loosened, and the building materially injured,—is there a question that, in such a case, the party injured would be entitled to recover damages? The gravamen would, in the case put, arise from the fact that the act was done maliciously." As the judge, immediately after making the above statement, said that the plaintiff's case was not of this character, it may be that the above was the judge's private opinion, as his last remark would indicate that it was not essential to the determining of the appeal.

Where the injury complained of consisted in the settling and falling away of the defendant's land, in consequence of excavations made upon an adjoining lot, it was held that, if the acts complained of were done with a malicious intent, or if the injury sustained by the plaintiff resulted from the careless and improper manner in which the work was executed, the plaintiff would be entitled to recover, and that the existence of improper motive, or of negligence or unskillfulness in the performance of the work, was a question of fact for the jury. *McGuire v. Grant*, 25 N. J. L. 356, 67 Am. Dec. 49.

Defendant captured plaintiff's negro slave in his watermelon patch, and caused him to be committed to jail as a runaway, when he knew he was not. It was held that such knowledge implied malice for which an action on the case can be maintained by plaintiff against him. *Hamilton v. Feemster*, 4 Rich. L. 573.

A person is liable for maliciously and by falsehood and deceit inducing a purchaser to reject a machine manufactured under a contract entered into by plaintiff with a third party to design and construct such machine which should produce certain results, but which the purchaser should have the right to reject if not satisfactory to him. *Morgan v. Andrews*, 107 Mich. 33, 64 N. W. 869. In this case the court said, in answer to the contention of the defendant, that he stood on the same footing with the purchaser, and had an interest in the machine,—that there were no contract relations between the plaintiff and the defendant. That, 62 L. R. A.

by the terms of the contract, it was the right of the purchaser to reject the machine if not satisfactory; but defendant had no right to reject, or to unlawfully or maliciously interfere with the acceptance of it by the purchaser. That the fact that the defendant had an interest in the business as a stockholder would give him the undoubted right to express himself freely about the machine; but that this question is framed upon his malicious and wilful fraud and deceit in inducing the rejection; and he could be held liable only on the theory that, without good cause, and actuated by ill-will and malice toward the plaintiff, he sought to injure him by inducing the purchaser to reject the machine.

Where owners of adjoining premises have jointly erected a fence completely across a road, each from his land to the middle of the road, and one, after harvesting his crop, threw down that part of the fence which he had placed on the road, and thus caused the other's grain to be destroyed by the cattle which were let in upon it, the person throwing down his part of the fence is not liable therefor, even though his act proceeded from a malicious motive. *Jenkins v. Fowler*, 24 Pa. 308. Mr. Justice Black, who delivered the opinion of the court, after using the expression from Cooley, so frequently heard: "Malicious motives make a bad act worse; but they cannot make that wrong which, in its own essence, is lawful,"—proceeded further to show the exact manner in which malice operates in an action, and to give some very simple illustrations, as: "In slander, if the defendant proves the words spoken to be true, his intention to injure the plaintiff by proclaiming his infamy will not defeat the justification. One who prosecutes another for a crime need not show, in an action for malicious prosecution, that he was actuated by correct feelings, if he can prove that there was good reason to believe the charge well founded. In short, any transaction which would be lawful and proper if the parties were friends cannot be made the foundation of an action merely because they happened to be enemies. As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to him who searches the heart."

An employer of men is not liable to the owner of a house for refusing further to employ one of his men unless he would cease to occupy the house, whereby the owner of the house lost his tenant; and this although it was perfectly ap-

350; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285, 25 Am. St. Rep. 863, 881, note; *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313; *Shaver v. Pennsylvania Co.* 71 Fed. 931; *Vilas v. McDonough Mfg. Co.* 91 Wis. 617, 30 L. R. A. 778, 65 N. W. 488; *Mallory v. La Crosse Abattoir Co.* 80 Wis. 180, 49 N. W. 1071; *Jones v. Great Southern Fireproof Hotel Co.* 79 Fed. 477; *Re Eight Hour Law*, 21 Colo. 29, 39 Pac. 328; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Lou v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *Re House Bill No. 203*, 21 Colo. 27, 39 Pac. 431; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454, 46 Am. St. Rep. 315, and

note; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624; *Chicago v. Netcher*, 48 L. R. A. 261, and note, 183 Ill. 104, 55 N. E. 707; *Ruhstrat v. People*, 185 Ill. 133, 49 L. R. A. 181, 57 N. E. 41; *Ex parte Bailey*, 39 Fla. 734, 23 So. 553; *State v. Dalton*, 22 R. I. 77, 48 L. R. A. 775, 46 Atl. 234; *People ex rel. Valentine v. Berrien Circuit Judge*, 124 Mich. 664, 50 L. R. A. 493, 83 N. W. 594; *Kuhn v. Detroit*, 70 Mich. 534, 38 N. W. 470; *Re Ah Jow*, 29 Fed. 181.

A combination to diminish an individual's gains or profits is lawful or unlawful according to the means employed. 2 Whart. Crim. Law, § 2322; *Com. v. Hunt*, 4 Met. 111, 38 Am. Dec. 346.

And in a case like this the complaint or

parent that the employer did what he did out of pure malice and bad feeling toward the owner of the house. *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 873. The case is very valuable as a collation of nearly all the principal authorities favoring the theory that one can never be liable for an act which he may lawfully commit because he does it with a malicious intent to injure the person who is injured.

One may erect upon his own property, immediately adjacent to the homestead dwelling of another, small and temporary habitations vastly inferior to the latter's residence, and place in occupation of them people who are not of a high grade in society, and is not liable for so doing; and the fact that his motive in doing so is to annoy his neighbor because he refused to sell his property to him at a price offered will not render him liable, as, having a right to erect the buildings and place the poor persons in occupancy of them, his motive in doing so cannot be questioned or considered. *Falloon v. Schuling*, 29 Kan. 292, 44 Am. Rep. 642.

In *Smith v. Johnson*, 76 Pa. 191, it appeared that the defendant and the owner of the land occupied by the plaintiff had a dispute about a line fence, and the defendant built a fence along the whole line, which crossed a turnpike road, some distance inside of the line, thus leaving a gap at the turnpike road sufficient to allow cattle to enter. Plaintiff built a fence along the line, and at the road extended it across the defendant's land to his fence. That portion which was on his land was thrown down by the defendant and cattle entered plaintiff's premises through the gap and destroyed his crops. It was held that he could not maintain an action against the defendant therefor as he had no right to build the fence on the defendant's land, and the defendant was perfectly justifiable in removing it, even though he did so maliciously.

Where a trust is put in commissioners by act of Parliament, if in executing it they act arbitrarily and tyrannically, although within their jurisdiction, and aggrieve and damnify the subject, they are answerable in the King's bench *ovifiter* in damages to the party injured. *Leader v. Moxon*, 2 W. Bl. 928, 3 Wils. 461.

An action cannot be maintained against one acting under authority, or by direction, of a surveyor of highway for doing an act lawful to be done by such surveyor; and evidence that 62 L. R. A.

such person, in doing the act, acted wantonly and for the purpose of injuring the plaintiff is inadmissible, as an act done within the scope of the officer's authority does not become illegal by reason of the motive which may have influenced his mind in doing it. *Benjamin v. Wheeler*, 8 Gray, 409, 15 Gray, 486; *Morrison v. Howe*, 120 Mass. 565.

Where, by the provisions of a statute, the erection of buildings on the embankment of a railroad without written permission given under the authority of the canal commissioners is forbidden under a penalty, persons who, acting under the authority of the proper state officers, removed buildings erected contrary to the terms of the act, are not liable to an action by the owner of the buildings, provided the act of removal was not done maliciously. The state acts by means of officers clothed with its discretion, and liable only as it directs, and it always makes them liable for malice. *Downing v. McFadden*, 18 Pa. 334.

IX. Conclusion.

It is believed that the weight of modern judicial opinion sustains the following propositions:

A person who suffers damage from an act the commission of which does him no legal injury cannot maintain an action against him who does it with malice and bad motive.

If one does an act which he has a perfect legal right to do, to accomplish some real benefit or pleasure to himself, or others in whom he has a genuine interest, and for doing which in good faith no action would lie, he is not rendered liable to an action therefor by the fact that he did it from bad motive and with intent to injure another, and such injury results.

But if one, with the sole and malicious purpose of injuring another, and without any benefit, interest, or pleasure (other than that which he derives from his wicked intent) to himself or others, commit an act which, if done in good faith, would be justifiable, he is liable in an action in favor of such other person for the damages he may have sustained therefrom.

The foregoing cases exhibit the diversity of judgment upon the subject under consideration. The trouble has chiefly arisen from a failure of the different courts in which the question has been discussed and variously adjudicated to come to an agreement as to what is "justifiable

indictment must show the nature of the unlawful means employed.

Id. §§ 2322, 2323.

A conspiracy to injure the reputation or business of another has been indictable at the common law for more than one hundred years.

Rex v. Eccles, 1 Leach C. L. 274; *King v. Eccles*, 3 Dougl. 337; *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 616; *People v. Petheram*, 64 Mich. 252, 31 N. W. 188; *Farmers' Loan & T. Co. v. Northern P. R. Co.* 25 L. R. A. 414 note, 4 Inters. Com. Rep. 744, note, 60 Fed. 815.

Since by the common law the only intent required to establish the offense was a purpose to commit it, if Rev. Stat. § 4466a, is to be held as injecting a new element into the offense, by requiring averments and proof that the act was done "wilfully or maliciously," it would seem to follow that the only effect of that statute is to lay a new burden upon the state, of not only proving that the act was intentionally committed in pursuance of the conspiracy, but that it was done "wilfully or maliciously;" and in such case the requirement is that the malice proved must be more than technical, and "amount to actual malevolence," as distinguished from technical malice.

Rideout v. Knox, 148 Mass. 368, 2 L. R. A. 81, 19 N. E. 390; *Com. v. Walden*, 3 Cush. 558.

Although a conspiracy to do an act not indictable when done by an individual may become such when done by two or more (2 Wharton, Crim. Law, § 2314), yet the act to be done in pursuance of the conspiracy in such a case must be quasi criminal or immoral.

2 Whart. Crim. Law, §§ 2288-2314; 4 Am. & Eng. Enc. Law, p. 598, note 8.

cause." Chief Justice Field, in *Vegelahn v. Guntter*, 167 Mass. 92, 35 L. R. A. 722, 44 N. E. 1077, *supra*, IV. a, at p. 102, states what is undoubtedly true in saying: "What constitutes justifiable cause remains in some respects undetermined." It would seem, however, that the tendency of modern decision is toward declaring illegal and actionable any act committed solely out of bad motive, or what has been aptly termed "unmixed malice" without justifiable cause, and which materially injures, or is reasonably likely materially to injure, the person or feelings, or the business or occupation—in other words, the property rights—of another; and, as held in *STATE ex rel. DURNER v. HURGIN* (approved and followed in *Hawarden v. Youghleny & L. Coal Co.* 111 Wis. 545, 55 L. R. A. 828, 87 N. W. 472), and also *Boutwell v. Marr*, 71 Vt. 1, 43 L. R. A. 803, 42 Atl. 607; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287, and *Dels v. Winfree*, 80 Tex. 400, 16 S. W. 111, *supra*, IV. a, that such malicious act, committed under circumstances which would not be actionable if done by an individual, may become so if done by a combination or conspiracy of several; 62 L. R. A.

Neither the confederacy, the means, nor the end, is singly indictable.

2 Whart. Crim. Law, § 2316.

No information will lie against the defendants for the alleged offense stated in the complaint; nor would it lie if the same stated (as it does not) an admitted criminal offense.

2 Wharton, Crim. Law, ed. 1874, § 2289, ed. 1896, § 1339; *Shannon v. Com.* 14 Pa. 226.

Marshall, J., delivered the opinion of the court:

Because of the long delay in announcing the decision in this case it is deemed proper to say, as a justification therefor, that the number and importance of the questions involved were such that the case seemed to call for the most careful study by each member of the court which the amplest opportunity therefor would permit, and to require that a decision should be rendered only when it could embody the best judgment of each such member, if that result could be reached within such time as not, by reason of the delay, to materially prejudice the administration of justice. There is room for congratulation that the purpose of the long deliberation upon the case has been accomplished. To circumstances which were unavoidable, preventing that full discharge of official duty, as regards individual study of the case, which was desired prior to settling upon the final conclusions, the delay must be in the main attributed. The questions legitimately discussed by counsel are so numerous that in the preparation of the opinion a choice had to be made between stating mere conclusions with appropriate supporting authorities, and discussing such questions at length. By the former method

and that such tendency has been brought about largely by the changed state of affairs in society and business relations, due, to a considerable extent, at least, to the great increase of labor organizations, and, correspondingly, to trusts, syndicates, and other combinations or associations of employers, and to consequently numerous cases arising out of the differences between employer and employee, labor and capital. It must be admitted, however, that this has not been brought about without a struggle on the part of not a few courts and judges to maintain the doctrine that an act that will not subject an individual to a civil action cannot be made the foundation of a cause of action against several who combine to commit the same. *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, *sub nom.* *Bohn Mfg. Co. v. Northwestern Lumbermen's Assn.* 21 L. R. A. 337, 55 S. W. 1119; *Hunt v. Simonds*, 19 Mo. 583, —*supra*, IV. a; *Orr v. Home Mut. Ins. Co.* 12 La. Ann. 255, 68 Am. Dec. 770, *supra*, IV. b; *Brewster v. C. Miller's Sons Co.* 101 Ky. 368, 38 L. R. A. 505, 41 S. W. 801, *supra*, VIII.

P. H. V.

a brief opinion would have sufficed to cover the case; by the latter a lengthy opinion was unavoidable. The former course would have required but little labor compared with the latter, but it seemed that the careful preparation of the case and presentation of it by numerous and able counsel for the respective parties could not be adequately responded to, so as to fairly indicate the appreciation felt here for the assistance received from such preparation and presentation, otherwise than by a pretty full discussion of each of the points decided which counsel upon either side deemed of sufficient importance to require them to present for that purpose. Acting upon that conviction, we will discuss each of such points with sufficient fullness to satisfy all reasonable expectation, and endeavor to make the conclusions reached a definite declaration of the law, so that in addition to adjudicating the rights of the parties to the suit, the result will be valuable, as regards each point presented, in guiding the courts and the profession in this state in future cases.

Opposition to the motion on behalf of the relator to be heard in this court by private counsel in his behalf was based on the following grounds: (1) It involves consideration of one of the errors claimed to have been committed by the court below which should only take place upon the consideration of the other errors. (2) The attorney general is required by § 163, Rev. Stat. 1898, to appear for the state and prosecute or defend all proceedings in the supreme court, in which the state is interested or a party, and that precludes appearance by private counsel in criminal proceedings, the law being the same as to the attorney general in the supreme court as it is as to the district attorney in the circuit court. (3) The sheriff is not a party, and has no personal interest in the result of the review of the proceedings called in question by the writs of error. Each of such propositions involves an important question of practice, which is regulated either by statute or by the judicial policy of the state, and has received consideration resulting in the following conclusions.

1. If the sheriff of Milwaukee county, by whom the state sued out the writ of error, is a party to the proceedings in this court, and in any event is entitled to be heard as such, he cannot be denied that right because to allow it would be inconsistent with a ruling of the court below, sought to be reviewed by the writ of error. If he is properly here as a party, obviously, his rights as such cannot be jeopardized by any decision made by the court below which is a subject for review on the writ of error. That seems too clear for reasonable controversy. 62 L. R. A.

If counsel's position be correct, no person denied the right to be heard in a trial court upon the ground that he is not interested in the controversy, can be heard on appeal from the decision except there be a judgment for costs against him, because recognition here to present his case would be a recognition of his claim that he was a party to the proceeding in the trial court. We cannot sanction that doctrine. The sheriff was the actor in suing out the writ of error. He appears at the bar of the court and asks to be heard by counsel. If he is a party to the proceeding he must be heard regardless of any incidental bearing the decision may have upon any question involved in the review of the proceedings upon the writ. Manifestly, if he was a party in interest in the habeas corpus proceedings, he is a party to the suit commenced in this court by the writ of error to review the result thereof, if he was bound thereby to his injury, to some appreciable degree, either directly and immediately or so that direct injury of some sort may probably come to him therefrom; in short, if he is "a party aggrieved." Our appeal statute on that point (Rev. Stat. 1898, § 3048), is no broader at most than the common-law rules governing the subject of parties in suits commenced by writs of error, or section 3043, *Id.* A writ of error lies in favor of him "who is a party to the record;" a man who "is aggrieved by an error in the foundation, proceeding, judgment, or execution, in suit," said Justice Grier, in *Bayard v. Lombard*, 9 How. 530, 13 L. ed. 245, quoting from early common-law writers. See also 7 Enc. Pl. & Pr. p. 856. That the relator here is a party aggrieved within the rule stated it seems is quite clear, but we will refer to the subject more at length in the discussion of the third proposition.

2. The second proposition assumes that proceedings to test the right of a person to his personal liberty are criminal in character and governed by the rule declared in *Biemel v. State*, 71 Wis. 444, 37 N. W. 244; *State v. Duff*, 83 Wis. 291, 53 N. W. 446, and other cases. Whether habeas corpus proceedings are in their nature civil or criminal we do not deem necessarily material. If the decision were to turn on that question, though, as at present advised, it would result in favor of the proposition that the remedy by habeas corpus is a civil remedy, as contended by the relator. The writ *ad faciendum*, *subjiciendum*, et *recipiendum* of the common law was the sole legal remedy of a person wrongfully restrained of his liberty. The purpose of a proceeding instituted by it was not to punish for the wrongful act of restraining him of his liberty, nor did it concern, necessarily, the wrongful act causing his detention. It was confined to

compelling the immediate human instrument of the unlawful restraint to restore his victim to liberty notwithstanding any charge made against him. The case cited to our attention by relator's counsel, *Ex parte Tom Tong*, 108 U. S. 556, 27 L. ed. 826, 2 Sup. Ct. Rep. 871, opinion by Waite, Ch. J., states briefly and clearly the true nature of such proceedings, as they are uniformly regarded in the books: "The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody under the criminal process." In a later case, *Cross v. Burke*, 146 U. S. 82, 36 L. ed. 896, 13 Sup. Ct. Rep. 22, the court, speaking by Fuller, Ch. J., said: "It is well settled that a proceeding in habeas corpus is a civil, and not a criminal, proceeding." So the authorities in this state, that it is the policy of the written law that no one but the public prosecutor or his assistant, duly appointed, shall be permitted to represent the commonwealth in criminal cases against the accused, do not extend to a civil action or proceeding in the nature of a civil suit commenced by the issuance of a writ of habeas corpus, because, if for no other reason, it is not a criminal suit. The law that makes it the duty of the district attorney of a county to appear and prosecute or defend all actions, applications, or motions, civil or criminal, in the courts of his county wherein the state is interested or a party, except for assault and battery (Rev. Stat. 1898, § 752), precludes legal services being rendered by way of assisting the district attorney in a civil matter at public expense. That has often been decided. *McDonald v. Milwaukee County*, 41 Wis. 642; *Manitowoc County v. Sullivan*, 51 Wis. 115, 8 N. W. 12; *Cutts v. Rock County*, 58 Wis. 642, 17 N. W. 636; *State v. Duff*, 83 Wis. 291, 53 N. W. 446; *Frederick v. Douglas County*, 96 Wis. 411, 71 N. W. 798. But it has nowhere been decided that the state's attorney, either of the county or the 62 L. R. A.

state at large, cannot obtain or receive assistance at his own expense or the expense of others in a civil proceeding. In *McDonald v. Milwaukee County*, 41 Wis. 642, the sheriff employed counsel to defend against proceedings commenced by writ of habeas corpus. He made a claim against the county for his disbursements for such services. The claim was held invalid, because of the duty of the district attorney of the county to attend to such matters as a part of his official duties, made so by § 3433, Rev. Stat. 1898, which provides that, when it appears from the return to a writ of habeas corpus that the person seeking to obtain his liberty is detained upon a criminal accusation, no order shall be made for his discharge until opportunity shall be given to the district attorney of the county to be heard, if to be found within the county; and because such provision is exclusive of the right of the sheriff to employ counsel at public expense. The case must be read in the light of what was under consideration, that is, the right of the sheriff to employ counsel at public expense. There is nothing in that to militate against a person other than the district attorney standing in court as the representative of the people in a civil action by consent of the public attorney. No judicial policy with which we are familiar is thereby violated, nor any constitutional right. Such a representative cannot claim compensation for his services except as against the individual employing him. That is as far as the decisions of this court go. No reason is perceived why a reputable attorney in a mere civil action cannot be heard in court on behalf of the state by permission of the officer whose duty it is to stand responsible for the due protection of the public interests, without the violation of any right secured by the Constitution or any law, to the person standing in the capacity of an adversary to the public in the proceedings. It has been the universal practice in this state to permit private counsel in this particular class of cases, as is abundantly shown by the decisions cited by counsel for the relator. *Re Booth*, 3 Wis. 1; *Re Falvey*, 7 Wis. 630; *Re Pierce*, 44 Wis. 411; *Re Eldred*, 46 Wis. 530, 1 N. W. 175; *State ex rel. Dunn v. Noyes*, 87 Wis. 340, 27 L. R. A. 776, 58 N. W. 386; *State ex rel. Larkin v. Ryan*, 70 Wis. 676, 36 N. W. 823; *Re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299.

3. What has been said goes upon the theory that the state is the only party interested in habeas corpus proceedings adversely to the petitioner, when the person alleged to be wrongfully restrained of his liberty is detained upon a criminal charge; but, as indicated in the brief discussion of the first

proposition, we cannot agree with the learned counsel for defendants in error that the respondent in such a proceeding is not a party thereto. The issuance of a writ of habeas corpus is to all intents and purposes the commencement of a civil action, not an action strictly so called, within the meaning of § 2629, Rev. Stat. 1898, to be commenced by the issue of a formal summons, but in the same sense that proceedings to enforce the remedy by mandamus and proceedings by writ of error are civil suits, as has been repeatedly held. The issuance of the writ is the commencement of a proceeding in a court of justice for the enforcement or protection of a right within the meaning of § 2595, Id. In *Ex parte Tom Tong*, 108 U. S. 556, 27 L. ed. 826, 2 Sup. Ct. Rep. 871, the issuance of the writ of habeas corpus was denominated the commencement of a suit to enforce a civil right. That was said in the same sense that this court declared, in *Paine v. Chase*, 14 Wis. 653, that the issuance of a writ of error is the commencement of an original suit and regarded as the commencement of an action, and in the same sense that it was said, in *State ex rel. Green Bay & M. R. Co. v. Jennings*, 56 Wis. 113, 14 N. W. 28, that a proceeding by mandamus is essentially a suit. True, the issuance of either of the writs mentioned, as before indicated, is not the commencement of an action strictly so called within the meaning of the Code, because it is there declared that all remedies in courts of justice are divided into actions and special proceedings (§ 2594, Rev. Stat. 1898), and that a civil action shall be commenced by the service of a summons (§ 2629, Id.). But the grant of power to circuit courts to issue writs of habeas corpus and mandamus, among other common-law writs, contemplated their use for the purposes they were devoted to before the adoption of the Code, i. e., for the commencement of suits within the broad meaning of the term; and their essential character in that regard has not been and cannot be changed by any legislative enactment. Whether the issuance of such a writ be called by the Code the commencement of a civil action or a special proceeding, it is to all intents and purposes the commencement of a suit and the final determination thereof is a final judgment in a suit or proceeding in the nature of a civil action. In *Holmes v. Jennison*, 14 Pet. 540, 564, 10 L. ed. 579, 591, Chief Justice Taney said: "If a party is unlawfully imprisoned, the writ of habeas corpus is his appropriate legal remedy. It is his suit in court to recover his liberty." The court further said, in effect, that the term "proceedings in a suit" and the term "proceedings in an action" are synonymous; that when a law con-

fers, in general terms, jurisdiction upon an appellate court to review on writ of error the final judgment in any suit, it includes jurisdiction to review the final determination in habeas corpus proceedings.

It follows from what has been said that the habeas corpus proceedings in question must be regarded as a civil action,—an ordinary proceeding in a court of justice to enforce a personal right,—within the meaning of § 2595, Rev. Stat. 1898, which says that such a proceeding is an action. That is in harmony with the decisions of this court to the effect that, without any statutory regulations, a writ of error lies to review a final determination on habeas corpus (*State ex rel. McCaslin v. Smith*, 65 Wis. 93, 26 N. W. 258), and with *State v. Kemp*, 17 Wis. 669, and cases which followed it, denying to the state the use of the writ of error in criminal cases. That rule was one of judicial policy only, in a field where it was supposed the court was free to establish the law for this state, and has been abrogated by statute (§ 3043, Rev. Stat. 1898). This was the suit of the defendants in error and their only adequate remedy to vindicate their right of personal liberty. The immediate instrument of the wrong complained of was the sheriff of Milwaukee county. The petitioners for the writ sought to establish their right to personal freedom notwithstanding the commitment under which the sheriff justified his conduct. They were, to all intents and purposes, plaintiffs, within the meaning of § 2601, Id., regardless of the name by which such parties are commonly known. The adverse party on the record was the sheriff. He was to all intents and purposes the defendant in the proceeding, regardless of the name by which such a party is commonly known. The statute (§ 2595, Id.) says: "An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right," and, unless the state is the plaintiff and the proceeding is against the defendant for the punishment of a criminal offense, it is a civil action, and every person necessary to a complete determination of the controversy as against the plaintiff is a necessary party and an interested defendant. § 2603, Id. The term "party to a suit (or action)" applies as properly to persons seeking, by writ of habeas corpus, to vindicate their right to personal freedom, and to the adverse party who is restraining them of it, as to contestants upon the record in any other suit. The former are persons seeking to establish their legal rights; the latter, persons on whom it is sought to impose an immediate duty or liability to recognize such rights. 15 Enc. Pl. & Fr. p. 463.

Upon the district attorney was imposed the duty of guarding the interest of the state, but he had no duty to perform by virtue of his office for the sheriff as an individual. The latter was a party, and an interested party, because he was charged with being guilty of the particular wrong which it was the purpose of the writ to redress; hence the law must be construed as according to him the same right as to any other party to be heard by counsel. True, as counsel for defendant in error say, § 3436, Rev. Stat. 1898, protected the sheriff from any liability for obeying the order discharging, or directing a discharge of the prisoners, but there is no statute protecting him from liability for the wrongful imprisonment.

We are not unmindful that there are decisions to the effect that an adjudication in habeas corpus proceedings is not binding in a subsequent suit to vindicate the same right between the parties, or a suit between such parties where the same question is material. *Re Quinn*, 2 App. Div. 103, 37 N. Y. Supp. 534; *People ex rel. Lawrence v. Brady*, 66 N. Y. 182; *Hurd, Habeas Corpus*, § 386. That doctrine was based on a supposed common-law rule that a decision on habeas corpus is not subject to review on appeal or writ of error. Such doctrine has been modified by judicial policy in many jurisdictions and in others displaced by statute, as it has been in this state, so far as it before prevailed here. *Church, Habeas Corpus*, 2d ed. p. 577; *Ex parte Cuddy*, 40 Fed. 62; *Perry v. McLondon*, 62 Ga. 598; *Ex parte Jilz*, 64 Mo. 205, 27 Am. Rep. 218. Section 3437, Rev. Stat. 1898, which is the same as the Missouri statute that governed *Ex parte Jilz*, expressly changed the common-law rule as regards the effect of a final determination of a habeas corpus proceeding. It expressly prohibits the commencement of a second habeas corpus proceeding for the same cause, while the determination in the first remains unreversed. That, and the remedy for a review of such a final determination by writ of error sued out by either party to the writ, which is given by our statute (§ 3043, Id.), effectually changed the common-law rule, so that the doctrine of *res judicata* has now the same applicability to habeas corpus proceedings as to other suits.

We have not overlooked the suggestion that the doctrine that ruled *McCarty v. Ashland County*, 61 Wis. 1, 20 N. W. 654; *People ex rel. Breslin v. Lawrence*, 107 N. Y. 607, 15 N. E. 187, and *Bryant v. Thompson*, 128 N. Y. 427, 13 L. R. A. 745, 28 N. E. 522, and some other cases, applies to the status of a person defending against the charge in habeas corpus proceedings of un-

lawfully restraining another of his liberty. That doctrine is that a person or tribunal, exercising judicial functions between parties, is not a party to a proceeding to challenge a decision made by him so that he may himself take an appeal or be a party to an appeal involving such decision. In *McCarty v. Ashland County* a decision of the board of supervisors had been reversed on writ of certiorari and the board attempted to appeal. In *People ex rel. Breslin v. Lawrence* a judge whose decision of a matter had been reversed on certiorari attempted to appeal. The mere statement of the circumstances under which courts have applied the doctrine referred to is sufficient to show that it has no application here. If the court that heard the habeas corpus proceedings or the examining magistrate were here claiming to be a party to the writ of error, and demanding an opportunity to be heard, the cases cited by counsel would be in point. It has been repeatedly held that a person or body not acting in a judicial capacity, but a party to a judicial proceeding as a representative of the public, even though having no pecuniary interest in the litigation, has an appealable interest in a judgment adverse to his or their authority. *State ex rel. School Dist. No. 2 v. Wolfrom*, 25 Wis. 468; *Moede v. Stearns County*, 43 Minn. 312, 45 N. W. 435; *People ex rel. Burnham v. Jones*, 110 N. Y. 507, 18 N. E. 432.

What has been said, it seems, covers every suggestion that has been made why the sheriff of Milwaukee county was not entitled to be heard by counsel in the circuit court in the habeas corpus proceedings, and why he is not entitled to be heard in this court as a party to the writ of error. He was and is a party in every sense of the word, and is, so far as concerns himself, entitled to be heard by counsel of his own choosing.

The first question on the merits is, Does the warrant of commitment state any offense known to the laws of this state? That involves an inquiry into whether a statement of the facts—necessary to the jurisdiction of the offense, if there be one, and in substance that the person named in the commitment on a particular day named was brought before the court charged on oath with committing the offense of conspiring to injure, and that such court, from the examination had, was satisfied that the offense charged had been committed and that there was reasonable ground to believe such person guilty thereof—shows an adequate cause for holding such person for trial. Defendants in error claim that it does not, because it fails to show, in detail, the existence of the facts necessary to constitute the offense of conspiring to injure, with some approach,

at least, to the technical accuracy of an indictment at common law, so as to identify the alleged wrongful conduct with either the common-law offense of conspiracy or the offense stated in § 4466a, Rev. Stat. 1898. Counsel do not state the rule of certainty, by which they contend the commitment should be tested in the exact language we have used, but it seems from their reasoning that what has been said fairly expresses their contention. They say the warrant was fatally defective because it did not show with whom the person named therein conspired, nor the fact that there was more than one guilty participant so as to make a combination possible; that it failed to state the facts constituting the offense; that it omitted to recite that the alleged combination was entered into for the purpose of wilfully or maliciously injuring another; that it did not literally follow the statute; and that it did not conclude with the words "in the form of the statute in such case made and provided."

We do not understand that any such degree of certainty in a commitment as that contended for is required. Authorities may be found here and there tending to support counsel's contention; for example *Ex parte Branigan*, 19 Cal. 133, cited to our attention, which is contrary to later decisions made by that court and out of harmony with the current of authority, as we shall show. The general rule is that it is sufficient, in a commitment for trial, to state with reasonable clearness the nature of the offense with which the person is charged, and conclusions of fact in general language, justifying his detention on such charge; that a statement of the specific facts in detail, on which the charge is based, is unnecessary. A multitude of authorities to that effect might be cited, commencing with the older books and coming down to date. In *Collins v. Brackett*, 34 Minn. 339, 25 N. W. 708, the offense charged was one created by statute. The particular section was not referred to, nor were the facts essential to the offense stated in detail; but there was sufficient in the commitment to clearly indicate the kind of offense for which the accused was held to answer, and sufficient to indicate by reasonable inference the statute creating the offense. The court said that it satisfied the rule of convenient certainty by which such instruments are to be tested; that it pointed by reasonable inference to the statute creating the offense, and therefore, by reasonable inference, stated everything necessary to the offense which was not specifically set out. It is not necessary, said the court, in such an instrument, to set forth the facts constituting the offense particularly. It is impossible to construe the 62 L. R. A.

commitment as referring to any other than the statutory offense. While it does not set forth every ingredient in such offense, it contains specifications enough to indicate the general nature of the crime charged, and that is sufficient. In *State v. Everett*, Dud. L. 295, a case often referred to by courts and text writers, the commitment under consideration merely described the offense as the crime of larceny, no fact being stated essential to that offense; yet it was held, on habeas corpus, that the commitment was sufficiently certain to justify the officer in detaining the prisoner; that it is a great mistake to suppose that such a warrant need enumerate any fact or circumstance accompanying the offense, the nature of which is set forth therein; that it is sufficient to merely state the offense with convenient certainty; that it should not be for felony generally, but that the instrument should indicate the special nature of the felony. That decision is in harmony with the authorities generally, though directly contrary to *Ex parte Branigan*, 19 Cal. 133, which supports counsel's views as we have before indicated. All the cases cited, it will be found, declare for the rule of convenient certainty merely. But while the California case regards that degree, as it seems, to call for certainty to a certain intent in particular, it is obvious that convenient certainty is satisfied where language is used which, by reasonable inference, points with reasonable clearness to the particular subject intended to be expressed. The doctrine which we say generally prevails was followed in later California cases. *Ex parte Moan*, 65 Cal. 216, 3 Pac. 644; *Ex parte Walpole*, 85 Cal. 362, 24 Pac. 657. True, reference is there made to a form for commitment prescribed by statute, which is, however, substantially identical with the one which, it is said in § 4774, Rev. Stat. 1898, may be used. The California court, in the early case, while reaching a conclusion directly opposite to that declared in *Collins v. Brackett*, 34 Minn. 339, 25 N. W. 708, and the cases to which we will presently refer, referred to the same authorities for support, *i. e.*, 1 Chitty, Crim. Law, 109, and 2 Hale, P. C. 122. A careful reading of those authorities discloses the fact that what is said about the higher degree of certainty is merely advisory. When it comes to the necessities of the case the lower rule is stated with many illustrations: For example, quoting from 1 Chitty, Crim. Law, 111: "It is necessary to set forth the particular species of crime . . . with convenient certainty. . . . If the commitment be for felony it ought not to be generally *pro felony*, but it must contain the special nature of the felony briefly as for felony of the death of J. S. or for

burglary in breaking the house of J. S., etc. But though it was formerly thought otherwise, it appears now to be settled that a commitment for high treason, or suspicion of treason generally, or for treasonable practices, without stating any overt act or other particulars of the crime, is sufficient. And . . . there are precedents of commitment for felony in general in good authors, without stating the specific accusation. So in *Wilkes' Case*, 2 Wils. 153-159, a commitment for publishing 'a most infamous and seditious libel entitled "The North Britons, Number 45," tending to inflame the minds and alienate the affection of the people from His Majesty, and to excite them to traitorous insurrections against the government,' was held sufficient, though it was urged that the libel ought to have been set forth in order that the court, on a habeas corpus, might be able to fix the *quantum* of bail. So it has been held that a commitment which charged the party generally with insulting justices of the peace in the execution of their office, without specifying what he said or did, is sufficient. It is, however, in general advisable to describe the offense concisely but in substance as in an indictment." There is obviously a wide difference between what is advisable and what is necessary in such cases. It would be a mistake to adjudicate rights upon the basis of what is merely advisable, losing sight of the necessities of the case. We cite the following additional authorities sustaining the view expressed. *Re Howard*, 26 Vt. 205; *People v. Johnson*, 110 N. Y. 134, 17 N. E. 684; *Ex parte Wiloughby*, 14 Nev. 451; *People v. Gray*, 67 How. Pr. 456; *State v. Killet*, 2 Bail. L. 289; *Re Kelly*, 46 Fed. 653; 4 Enc. Pl. & Pr. pp. 577, 578, and cases cited.

It follows from what has been said that if the general statement in the commitment, in its literal sense or by reasonable inference, points clearly to the offense intended to be charged, and such offense, so called, is one in fact, for which an accused person can properly be held, the commitment was a complete defense to the habeas corpus suit till overturned by some defect of a jurisdictional nature in the proceedings upon which it was based, unless it was fatally defective by reason of the statute (§ 4774, Rev. Stat. 1898). As we have seen, the description of an offense well known to the law, by its generic name, as the offense of arson, burglary, larceny, or murder, by reasonable inference indicates the existence of all the essentials of the offense. That is just as true of a mere statutory offense when it has a name which individualizes it and points with reasonable certainty to the statute on the subject. *Re Kelly*, 46 Fed. 653; *Collins v. Brackett*, 34 Minn. 339, 25 N. W. 708; 62 L. R. A.

and *People v. Johnson*, 110 N. Y. 134, 17 N. E. 684, fully cover that question. Applying that rule to the commitment in question, no difficulty whatever is perceived. It says the accused was charged with having committed, on a day named, the offense of conspiring to injure. The use of the term "conspiring" suggests without possibility of doubt that two or more persons were concerned in the offense. The only law in this state making a mere agreement between two persons to do an act injurious to another under any circumstances an offense is § 4466a, Rev. Stat. 1898. Therefore the language, "the offense of conspiring to injure," with reasonable clearness refers to such statute. It includes by inference, a statement of all the facts necessary to satisfy the calls of the statute. The statement of the name of the crime states with convenient certainty the nature thereof, and of course suggests the existence of facts necessary thereto. The general statement includes the details, if such general statement is sufficient to suggest them with reasonable clearness. A commitment so drawn as to satisfy the degree of certainty thus indicated is sufficiently precise to satisfy every part of it, and is according to the prevailing rule on the subject.

The idea advanced by counsel that the commitment is fatally defective for want of the preliminary words, "against the form of the statute in that case made and provided," can hardly be considered as being seriously urged. There was a time when substance in judicial proceedings was in some respects sacrificed to mere form, or when mere form was considered to be as essential as substance; but in the progress of events the law has developed to a point so far away from such notions that they are regarded as obsolete. So long as the commitment shows that the accused was held for trial for a criminal offense, the unavoidable inference is that the act charged took place, if at all, contrary to law. Any mere formal statement of that, as a concluding phrase in the commitment, was wholly unnecessary. This court, in *Nichols v. State*, 35 Wis. 308, characterized a useless expression, similar to the one in question, as a mere rhetorical flourish, adding nothing to the substance of the indictment, and as wholly unnecessary in the absence of a constitutional or statutory mandate making it so. That was affirmed in *Murphy v. State*, 108 Wis. 111, 83 N. W. 1112. There is no such mandate in the way as to the matter under consideration.

A suggestion is made by one of the learned counsel that the commitment is void because it does not follow strictly the form prescribed by statute, and another says there is

no statutory commitment for such a case. The first suggestion will be considered without deciding that the officer in this case was required to use the particular form referred to. Section 4740, Rev. Stat. 1898, requires a warrant to contain the substance of the complaint on which it is issued, and § 4774, Id., prescribes a form of commitment for trial that "may be used," which indicates that the offense should be stated "as in the warrant." The rule is that where a form is prescribed by statute it must be strictly followed. That has been held to mean, followed with almost technical accuracy where the language of the statute so indicates. *Keniston v. Chesley*, 52 N. H. 564. But § 4774 does not so indicate, unless we read "may" as "must" or "shall" and give thereto its full meaning down to immaterial details. Nothing of the kind, we think, was intended. *Streeter v. Frank*, 3 Pinney (Wis.) 386, did not go that far. It dealt with a material omission from a statutory form. Section 4774 is open to a reasonable construction, requiring only that the form be followed strictly as to the substance of things, not literally. There is a difference between following a form literally and following it strictly. The former goes to minuteness of detail in mere matters of form, while the latter may be satisfied by the essential elements. In *Streeter v. Frank* one of those elements was omitted. The words in the form under discussion, "state the offense as in the warrant," taken in connection with the requirement that the warrant shall recite the substance of the complaint, mean no more than that it shall state the same offense as the one named in the complaint with sufficient accuracy that its identity will appear with convenient certainty. What has been said on another branch of the case as to such degree need not be repeated. The complaint charged in general language, or attempted to do so, and also by all the particulars, the commission of the offense to injure, going further in such particular than the specific offense as created or declared in § 4466a, though it is plain that such statute was what the complainant had in mind. The substance of the complaint was that the accused were guilty of having committed, on a day named, the offense of conspiring to injure, and that was substantially carried into the commitments.

If we were to hold that the commitments do not show with convenient certainty, within the rules above stated, that the defendants in error were imprisoned to await their trial upon a charge of having violated § 4466a, Rev. Stat. 1898, the circuit court none the less erred in discharging them,—if the complaint upon which they were arrested charged an offense known to the law, 62 L. R. A.

and the record of the examination which the court had properly brought to its attention showed that there was evidence tending to support the charge on these two essentials: First, that the offense was committed; second, that there was probable cause for believing that the accused were guilty thereof,—regardless of whether the decision of those questions, or either of them, by the committing magistrate, was right or wrong. That was substantially the rule at common law, and it was preserved by the constitutional grant of power to circuit courts to issue writs of habeas corpus,—especially since there is no statute in any way restricting the jurisdiction of such courts in that regard. So far as the statutes of this state treat the subject they confirm and broaden the common-law rule. Express provision is made for bringing to the notice of the court, in a habeas corpus suit to vindicate the right of a prisoner, detained for trial upon a criminal charge, to his personal liberty, the record of the examination including the evidence taken, and it is made his duty to examine such evidence, and, if thereby it appear to him that the accused is guilty of the offense, to commit him for trial or admit him to bail regardless of any irregularity in the original commitment. § 3429, Rev. Stat. 1898; *State v. Bloom*, 17 Wis. 521. It is also the duty of the court on habeas corpus to examine the complaint, and discharge the prisoner if it does not state an offense known to the law; and to examine the evidence and treat the decision of the examining magistrate as outside of his jurisdiction if no competent evidence is found upon which such magistrate could properly have acted. That is well settled by the authorities. *Church, Habeas Corpus*, §§ 231, 236; *Re Wadge*, 21 Blatchf. 300, 16 Fed. 332; *Re Oteiza y Cortes*, 136 U. S. 330, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031; *Nishimura Ekiu v. United States*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; *Ex parte Bollman*, 4 Cranch, 75, 125, 2 L. ed. 554, 570. Whatever conflict apparently exists on this question in the books will be found on careful examination not to be a conflict in fact, but is explainable by reference to statutory regulations. We have no statutory regulations in conflict therewith, but, on the contrary, the statutes of this state substantially declare the common-law rule. True, at common law the writ of habeas corpus reached only jurisdictional defects; but, as the term is rightly understood, it goes further than counsel for plaintiffs in error seem to concede. Some courts use the term in the restricted sense of jurisdiction of the person and of the subject-matter, while others, and those it is believed holding the correct doc-

trine, extend it to include excess of jurisdiction, treating a decision—other than one upon the trial of an issue—that a complaint is sufficient when it does not state any offense known to the law, or one that the essential facts exist warranting the commitment of a person for trial on a criminal charge, where there is no competent evidence for the judgment of an examining magistrate to reasonably act upon, as on the same basis as any other jurisdictional defect in the proceeding. That was early declared as the common-law doctrine and the one to be followed where there is no statute affecting the subject otherwise. *Ex parte Bollman*, 4 Cranch, 75, 125, 2 L. ed. 554, 570. Chief Justice Marshall there said, after recognizing the distinction between imprisonment upon a final judgment and detention under a commitment to stand trial: "It is unimportant whether the commitment be regular in point of form or not; for this court, having gone into an examination of the evidence upon which the commitment was grounded, will proceed to do that which the court below ought to have done." P. 114, 4 Cranch, and p. 567, 2 L. ed. "This being a mere inquiry, which, without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held for trial. . . . 'If,' says a very learned and accurate commentator, 'upon this inquiry it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him. Otherwise he must either be committed to prison or give bail.'" Pp. 124, 125, 4 Cranch, and pp. 570, 571, 2 L. ed. That declaration has always been adhered to by the Federal courts, and followed generally by all courts where jurisdiction in habeas corpus proceedings, or the practice therein, is not otherwise regulated by statute.

There is no need to go further to demonstrate that the common-law office of the writ of habeas corpus, as it came to us and has been preserved by our state Constitution, is as indicated by the decision referred to. While it is true that such writ never takes the place of a writ of error, and is confined to jurisdictional defects, when it is resorted to merely for the purpose of liberating a person detained in custody to await his trial on a charge of being guilty of a criminal offense, the questions of whether there was any evidence for the magistrate to act upon and whether the complaint charges any offense known to the law are jurisdictional matters. The reviewing court, in the exercise of its function, must necessarily pass upon and reverse or affirm the decision 62 L. R. A.

of the committing magistrate, if such matters are properly presented for its consideration, according to its determination thereof, and in doing so it does not go beyond jurisdictional defects. It can examine the evidence only sufficiently to discover whether there was any substantial ground for the exercise of judgment by the committing magistrate. It cannot go beyond that and weigh the evidence. It can say whether the complaint will admit of a construction charging a criminal offense, or whether the evidence rendered the charge against the prisoner within reasonable probabilities. That is all. When it has discovered that there was competent evidence for the judicial mind of the examining magistrate to act upon in determining the existence of the essential facts, it has reached the limit of its jurisdiction on that point. If the examining magistrate acts without evidence, he exceeds his jurisdiction; but any act, upon evidence worthy of consideration in any aspect, is as well within his jurisdiction when he decides wrong as when he decides right.

Counsel for plaintiff in error cite to our attention a large number of cases to support their contention that the circuit court had no jurisdiction to review the evidence, many of which are cases decided by this court. We have taken time to examine each of such cases, and are unable to discover that they furnish any support for counsel's position. For example, *Ex parte Jones*, 96 Fed. 200, one of the significant cases referred to, states the rule in the syllabus, which is fully borne out by the opinion, thus: "The sufficiency of the evidence on which an accused was committed by a magistrate is not open to review in a proceeding by habeas corpus, but where, although there was evidence of the commission of the offense, there was no competent evidence even tending to incriminate the person charged, he should be discharged on habeas corpus." The concluding language of the opinion is as follows: "It is true that there was evidence before the commissioner tending to show that the offense charged had been committed by someone, but a careful examination discloses no legal evidence on which the commissioner could exercise his judgment in holding the petitioner for trial. An order will be made discharging the petitioner." The decisions of this court cited, in the main, refer to the scope of the jurisdiction of a court in reviewing the final judgment of another court upon writ of certiorari or habeas corpus. Manifestly, they do not touch the question here under discussion. Neither a writ of certiorari to review a final judgment of a court upon a trial, nor a writ of habeas corpus for that

purpose, reaches the evidence. That is undoubtedly true. No common-law rule is better settled than that, while the contrary is just as well settled as regards the functions of a writ of habeas corpus in testing the legality of a commitment for trial for a criminal offense.

True, as counsel say, the expression has often been used by this court that, upon habeas corpus proceedings, only jurisdictional errors can be considered, and that has been used without qualification and in a way to indicate—to a person who has not in mind the distinction between jurisdiction for the trial and determination of a cause, and jurisdiction to hold a judicial inquiry to determine whether a prosecution shall be instituted—that insufficiency of evidence, no matter how great, cannot be considered, because, the court having jurisdiction of the subject-matter and the person, a decision upon insufficient evidence or without any evidence is judicial or mere error, not jurisdictional error. What the court said in each one of the cases referred to was correctly said as applied to the case. The following are some of the cases: *Re Milburn*, 59 Wis. 34, 17 N. W. 965; *Wright v. Wright*, 74 Wis. 439, 43 N. W. 145; *Re Graham*, 76 Wis. 366, 44 N. W. 1105; *Re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; *Re Meggett*, 105 Wis. 291, 81 N. W. 419; *Re Pikulik*, 81 Wis. 158, 51 N. W. 261; *Re French*, 81 Wis. 597, 51 N. W. 960; *Re Eckart*, 85 Wis. 681, 56 N. W. 375. They all follow the well-known rule that, where there is jurisdiction to try and determine an issue, there is jurisdiction to commit error to the extent of deciding the ultimate fact involved without competent evidence tending to support it, and that the error can only be corrected upon writ of error or appeal where one is allowed; that the writ of habeas corpus or writ of certiorari cannot reach the mischief. But a proceeding before an examining magistrate is not a judicial trial. It is a mere judicial inquiry, as before indicated, for the purpose of determining whether an offense has been committed and there is a probability that the accused is guilty thereof and should be placed on trial therefor. No plea or issue is necessary. No jury is demandable or proper. The doctrine of *res judicata* does not apply so that the result of one inquiry will preclude another. It is a proceeding that was unknown to the common law,—a mere statutory creation, a personal privilege which the accused must be accorded unless he waives it. Being statutory and special, evidence tending to establish the facts justifying a commitment, or holding to bail for trial, is jurisdictional the same as any other statutory essential. The statute awarding

the privilege provides that the examining magistrate shall act, in determining the facts, upon evidence; and that contemplates that there must be evidence, and competent evidence, tending to establish the facts. It is jurisdictional in the same sense that the production of some competent evidence before a quasi judicial body, authorized by statute to act only upon evidence, is jurisdictional. The rule in such cases is that a clear violation of law in doing those things that are within the scope of the power of the officer or body to do is jurisdictional error. *State ex rel. Moreland v. Whitford*, 54 Wis. 150, 11 N. W. 424; *State ex rel. Wood County v. Dodge County*, 56 Wis. 79, 13 N. W. 680; *State ex rel. Heller v. Lawler*, 103 Wis. 460, 79 N. W. 777. For further authorities to support the views here expressed, see *Church, Habeas Corpus*, §§ 237-247; *People v. Martin*, 1 Park. Crim. Rep. 187; *Re Snell*, 31 Minn. 110, 16 N. W. 692; *Re Hardigan*, 57 Vt. 100; *Re Simon*, 37 N. Y. S. R. 48, 13 N. Y. Supp. 399; *State v. Hayden*, 35 Minn. 283, 28 N. W. 659; *People ex rel. Van Riper v. New York Catholic Protectory*, 106 N. Y. 604, 13 N. E. 435; *Ex parte Becker*, 86 Cal. 402, 25 Pac. 9; *Ex parte Willoughby*, 14 Nev. 451; *Jones v. Darnall*, 103 Ind. 569, 2 N. E. 229.

Some writers who have favored the profession with text-books in recent years speak of this doctrine as a departure from the common law, through a failure to distinguish between a judicial determination according to the course of the common law and a mere statutory proceeding which, though judicial, is not final in any sense, and is not an action, but a proceeding preliminary to an action. The misconception referred to is very marked in the work of an able writer who cites *State ex rel. Dunn v. Noyes*, 87 Wis. 340, 27 L. R. A. 776, 58 N. W. 386, to support a suggestion that this court has not departed from the general rule as to the review of judgments on habeas corpus in the treatment of the scope of the writ as regards reaching behind the determination of an examining magistrate. That case did not deal with anything but the general rule, that only jurisdictional defects can be reviewed on habeas corpus, and the one that a *de facto* judicial officer or body has the same jurisdiction as any other as regards collateral attack. The case is in harmony with the idea that some evidence is necessary to preclude successful collateral attack upon an examining magistrate's conclusion because that is a statutory requisite thereto.

Independently of the common-law rule it has been repeatedly held, in states having statutes similar to ours, that they contemplate the examination of the proceedings

before the committing magistrate, where property brought to the attention of the court on habeas corpus proceedings, so far as necessary to determine whether the magistrate acted upon competent evidence tending to establish the facts; and also the introduction of new evidence on issue joined as provided. *People ex rel. Van Riper v. New York Catholic Protectory*, 106 N. Y. 604, 13 N. E. 435; *People v. Richardson*, 18 How. Pr. 92; *Re Henry*, 13 Misc. 734, 35 N. Y. Supp. 210; *People v. Tompkins*, 1 Park. Crim. Rep. 224. In the report of *People v. Martin*, 1 Park. Crim. Rep. 187, there is a full review of American and English authorities, and as a result it is said, reading from the syllabus: "In criminal cases where an indictment has been found, he [the court, upon habeas corpus,] cannot go behind the indictment because there are no means of ascertaining upon what [it] the indictment was founded. But on a commitment before indictment the whole question of guilt or innocence is open for examination on the return to the writ of habeas corpus, and the inquiry is not necessarily confined to an examination of the original depositions. In such cases, under our Revised Statutes, the proceedings on a habeas corpus are in the nature of an appeal from the decision of the committing magistrate." It is not to be understood by that language that the court held that, on such appeal, so called, the court could go further in reviewing the decision of the committing magistrate on the evidence on which he acted than to determine whether it furnished some reasonable ground for a decision. Church, in his work on Habeas Corpus, expresses the view that such statutes as those in New York and in this state are mere declarations of the common law. He is borne out by the holdings of the New York court, but we need not discuss that subject here. It is quite clear, though, that chapter 147, Rev. Stat. 1898, was intended to cover the entire field of practice in habeas corpus suits so far as relates to original proceedings. The scope of § 3425, Id., is broad enough, if a statute was required on that question, to enable the petitioner for writ of habeas corpus, by his petition, to bring to the attention of the court all the proceedings before the committing magistrate or by presenting the same as evidence in support of his answer to the return, where such answer contains allegations rendering such proof competent. Section 3427, Id., precludes examination into the proceedings upon which the determination of the court was had in committing the person, only when such detention is upon a final judgment or order. That manifestly does not include a determination of a mere judicial inquiry. Section 3429, Id., refers

to the former section, and contemplates the examination of evidence produced before the examining magistrate where it is properly brought to the attention of the court.

Sufficient has been said to demonstrate that counsel for plaintiff in error have confused the scope of a habeas corpus suit calling in question the validity of a final judgment or order and the scope thereof as to reaching the proceedings of a committing magistrate. It is not understood, it seems, that failure to comply with the statute requiring such magistrate, in his inquiry, to act upon evidence, is not an error committed in acting within his jurisdiction, as is the act of entering a judgment, by a court, upon the trial of an issue, without competent evidence to warrant it, but is error in going beyond his jurisdiction. The general rule invoked by counsel is as claimed, but the application of it contended for is wrong.

The point made by counsel for plaintiff in error that the circuit court erred in going beyond the warrant of commitment and examining the complaint, and that it would have been error to have taken into consideration the evidence taken before the committing magistrate, which was properly produced as part of the habeas corpus proceedings, cannot be sustained. The position of counsel for defendants in error, that the question of whether the complaint states any crime known to the law, and that of whether there was any evidence tending to show the facts essential to the detention of the accused for trial upon the charge, were open, is approved.

The doctrine is invoked by the learned counsel for defendant in error Melvin A. Hoyt, that "where concert of action is necessary to the offense, conspiracy does not lie." That principle is familiar, but its application, as its language clearly indicates, is necessarily confined within very narrow limits. It does not reach a situation where mere combination to effect an object is itself criminal and not merged in a crime of higher degree, else the absurd result would follow that the offense of conspiracy would be impossible either at common law or under the statute. The rule applies where the immediate effect of the consummation of the act in view, which is the gist of the offense, reaches only the participants therein, and is in such close connection with a major wrong as to be inseparable from it, as, for instance, in the offense of adultery, or bigamy, or incest, or dueling. This illustration, in a different way, is given at § 1339, Wharton, Crim. Law, which is cited to our attention and relied upon by counsel, but which, as it seems, is wholly misunderstood in urging it upon the attention of the court as applicable to the facts of this case. Where

an act is an offense, as that of adultery, a crime, it cannot be made a different offense because of the circumstance that in the conception of it a precedent agreement by two persons is necessary; but if the act is preceded by an agreement between several persons to cause the offense to be committed by others, or between a member of the combination and a person outside of it, the gist of the precedent concurrence is the wrongful agreement; that of the object thereof is the adulterous act. In the latter there is the element of *concursum necessarius*,—the concurrence in the ultimate act constituting the crime, precluding its being prosecuted as the crime of conspiracy. In the former there is also the element of *concursum facultativus*, making it a distinct offense. Those concerting to cause the crime to be committed may be prosecuted for the offense of conspiracy, and those guilty of the act the combination was formed to bring about may be prosecuted for that, though the effect thereof be to prosecute one of the parties for both offenses. In the latter the plurality of agents, really, as Mr. Wharton says, in effect, is in aid of the conception to commit the ultimate act of adultery. In the former the plurality of agents is as necessary to the full conception of the offense so as to preclude the possibility of failure thereof, as to the consummation of the offense itself. In the one, concert is essential to the act and a necessary part of it; in the other, concert, itself an offense, is a mere aid to the act which is the ultimate purpose thereof,—a purpose that is susceptible of being abetted without, though not as effectually as with, the specific, independent act of combination. It is only where the concurrence to commit an offense and the consummated act are so connected that they really constitute one act, every element inculpatory of each party, so that separation of the whole into its constituent elements and a prosecution for each as a distinct offense would place the parties twice in jeopardy, that the rule applies.

Shannon v. Com. 14 Pa. 226, and *Miles v. State*, 58 Ala. 390, cited by counsel to sustain his view, are in harmony with what has been said. In the first case cited the rule is stated thus: "Where concert is part of a criminal act, it is not a subject of indictment as a conspiracy to commit the act." That is, as applied to this case, if the mere infliction of an injury to the Journal Company in its business was a criminal act, and obviously it was not such, the infliction thereof by two persons acting in concert and by mental concurrence could not

be prosecuted as a conspiracy. But, as said in *Shannon v. Com.*, where an act is an integral offense, and not an integrant part of one, a guilty participant may be prosecuted for both. The term "act" as there used manifestly refers to an act which is illegal in the sense that it is wrong, tested by the rules of good morals. In this case the sole offense, if any is charged, is the combination of several persons wilfully and maliciously to injure the Journal Company in its business. There is no room whatever for saying that the prosecution for that offense would result in the separation of it from another and greater offense, as in the case where persons guilty of the crime of adultery were attempted to be prosecuted for a conspiracy to commit that offense. The fact that it would not be practicable, or even possible, in such a situation for one person alone to commit the act, i. e., of injuring the business of the Journal Company, which is the alleged object of the combination, does not militate against the prosecution of all the parties to the combination as guilty of the crime of conspiring to wilfully and maliciously injure the Journal Company in its business. Counsel admits that there is a dearth of authority to support the application contended for, of the principle under discussion. He failed to cite to the attention of this court any that meet the situation when fairly analyzed, while the explanation of the rule we have given, showing that it has no application to the prosecution under discussion, is supported by ample authority, as it is by reason and common sense. We cite the following: *United States v. Stevens*, 44 Fed. 132; *United States v. Boyden*, 1 Low. Dec. 286, Fed. Cas. No. 14,632; *Reg. v. Boulton*, 12 Cox, C. C. 87; *United States v. Rindskopf*, 6 Biss. 259, Fed. Cas. No. 16,165; *United States v. Bayer*, 4 Dill. 407, Fed. Cas. No. 14,547; *State v. Sprague*, 4 R. I. 257; *Ochs v. People*, 124 Ill. 399, 426, 16 N. E. 662; *Queen v. Whitchurch*, L. R. 24 Q. B. Div. 420; *United States v. Martin*, 4 Cliff. 156, Fed. Cas. No. 15,728; *Reg. v. Rowlands*, 5 Cox, C. C. 466. In *Queen v. Whitchurch* a woman conspired with others to administer drugs to herself or by some other means to cause her to abort a child with which she was pregnant, and it was held that all the parties concerned in the combination could be prosecuted for the offense of conspiracy. Lord Coleridge, Ch. J., in delivering the opinion of the court, said: "I cannot entertain the slightest doubt that, if three persons combine to commit a felony, they are all guilty of conspiracy, although the person on whom the offense was intended to be committed could not, if she stood alone, be guilty of the intended offense." In *United States v.*

Bayer the facts were these: Under the statutes of the United States on the subject of bankruptcy there was an offense that could be committed only by the bankrupt. Such person and others colluded together to facilitate the commission of the offense by him. All were prosecuted for the offense of conspiracy and the prosecution was sustained. Dillon, J., in delivering the opinion of the court, said, in the main, "Conspiracy to commit a crime is of itself criminal [at common law]. . . . The fact that one of the conspirators could not himself commit the intended offense neither relieves him of guilt nor disables him from co-operating with another person who is able to commit it." In that situation the conspiracy and the consummated act are different offenses, in the sense, at least, that the fact that the offense has been committed is no legal bar to a prosecution for the conspiracy. In *Ochs v. People*, 124 Ill. 399, 426, 16 N. E. 662, it was said that it is not essential to a conspiracy that the object thereof be possible. We will not further discuss this question. It is not improbable that more has been already said than is warranted in its proper solution. We confess that, when it was first suggested on the oral argument, it hardly seemed to be worthy of serious attention, or that the learned counsel so supposed. But an examination of the full discussion of the subject in counsel's brief satisfies us we were at least in error as to the state of his mind, and we have treated it accordingly, and put all the labor upon it which the gravity thereof would call for if there were a reasonable doubt, before a study of the subject, as to whether the case might turn upon its solution.

We have now considered, we believe, all the important contentions and suggestions advanced by counsel for the respective parties, which from any point of view could stand in the way of an examination of the complaint and the evidence, assuming, without intending to decide, as yet, that § 4406a, Rev. Stat. 1898, is a valid provision of law. It has been seen that the commitment, on its face, justified the sheriff in holding the defendants in error to await their trial for a violation of such section, and that it was competent for the circuit court, in the habeas corpus suit, the proceedings before the examining magistrate having been duly presented for consideration, to go behind the commitment and determine whether the complaint, by any reasonable construction, stated an offense within the meaning of such statute, and whether there was any evidence tending to establish the two essentials for holding the accused for trial, i. e., that the offense charged had been com-

mitted, and that there was probable cause to believe the accused guilty thereof. Sufficient has also been said to show that the general language of the complaint, standing alone, to the effect that the accused did, on a day and at a place named,—which satisfied the requisites of the statute to that extent,—concert together with intent maliciously to injure the Journal Company and the other persons named, in their trade and business, sufficiently charged the doing of those acts made an offense by the statute. That such general language substantially follows § 4406a, and that such section is the only statute making a conspiracy without an overt act a criminal offense, is not questioned. It follows that the complaint must be construed with reference to such statute, and be held to satisfy it unless the general language thereof is connected with allegations which take therefrom some essential element.

At this point we meet the claim of counsel for defendants in error that the statement of the particulars of the alleged wrongful agreement, and of the acts done pursuant thereto, explains the meaning of the general charge, and in that way renders the complaint insufficient. To that, answer is made by counsel for plaintiff in error that the allegations as to acts done pursuant to the conspiracy were unnecessary, the offense being complete as soon as the agreement was made to commit the malicious injury, therefore that such allegations should be rejected as surplusage. That is undoubtedly a correct rule, but no reason is perceived why the statement of the particulars of the agreement can be rejected. It is plain that, while the complaint states generally an agreement to maliciously injure the persons named in their trade and business, in the terms of the statute, and then states that the members of the unlawful combination, pursuant to their unlawful purpose, agreed to do certain specific acts mentioned, the real purpose of the complainant was to state but one offense,—not an unlawful conspiracy to injure, generally, the persons named in their business, and also an unlawful conspiracy to injure them in such business in a particular way. The facts were stated first according to their legal effect, and, second, in detail. That is the only reasonable construction of the complaint. It should be read as if the language were to the effect that the accused maliciously conspired together to maliciously injure the persons named in their business, in that they agreed and concerted together, in manner and form as stated in the statute, to maliciously injure such persons by doing the particular things alleged. That was the conclusion reached by the circuit

judge. He disposed of the case at that point on a supposed insufficiency of the complaint. If he had gone further and examined the evidence, the result would not have been different; for that only tended to establish the truth of the complaint. Viewed in the light of the particular allegations as to the nature of the combination, the evidence, for that purpose, was ample to give the examining magistrate jurisdiction to pass upon the truth of such allegations to the extent necessary to hold the accused to trial.

At this time it seems necessary to restate the charge contained in the complaint as we have construed it. Upon that turn the remaining questions to be considered.

According to the complaint it was, in substance, agreed between the defendants in error Melvin A. Hoyt, representing the Daily News, Albert Huegin, representing the Milwaukee Sentinel, and Andrew J. Aikens, representing the Evening Wisconsin,—each controlling the columns of the paper with which he was connected, each paper being a daily newspaper published in the city of Milwaukee and a medium for advertising business in the same field occupied by the Journal Company, the publisher of a newspaper called the Milwaukee Journal, also a medium for advertising business,—that, whereas the latter had raised its rates 25 per cent above those customarily charged for such service by it and the proprietors of the other papers named, if any person, agreed to pay, or paid the Journal Company its increased rates for advertising in its paper, he should not have the privilege of advertising in any of the other newspapers unless he should advertise in all of them at such increased rates; but that any person who should decline to pay the Journal Company said increased rates for advertising in its paper should have the privilege of advertising in any or all of the other papers at the old rate. Now, it is said there is nothing in that from which a reasonable inference of the malicious purpose called for by the statute can arise; that such intent means bad intent to injure another in the sense of committing an actionable injury, while the terms of the agreement indicate only a purpose on the part of those concerned in it to promote their own interests regardless of those of their competitor. The malice of the statute is evidently malice in law, not necessarily ill will or malice in fact. It means, as is commonly said, a wrongful act done intentionally without just cause or excuse. The statute does not deal with things corporeal, as the person or property of another, but with his reputation, trade, business, or profession. If we can see in the agreement, by 62 L. R. A.

reasonable inference, the independent purpose to harm the Journal Company in its business of furnishing to the trade facilities for advertising, that is sufficient as regards the element of malice. There seems to be no difficulty about that. The principle that everyone is presumed to intend the natural and probable consequences of his voluntary acts suggests at once, upon looking at the agreement, that the primary, if not sole, end in view was to force the Journal Company to reduce its advertising rates to the old standard or cause it to lose custom, either of which alternatives would result in pecuniary loss to it, and one of them in the destruction of the freedom of action everyone is entitled to enjoy in the conduct of his business, without turning any pecuniary or other legitimate gain to its competitors. If the agreement contemplated that any legitimate benefit, under any circumstances, would flow to the participants therein or the concerns they represented, by compelling the Journal Company to reduce its rates for advertising, the ground for it is not disclosed by the transaction as stated, and it is one of those mysteries of a special calling that persons outside thereof cannot comprehend. How could any material benefit have been expected by any member of the combine, from causing a customer or customers of the Journal Company to leave it rather than be denied the use of any other efficient newspaper medium for advertising in the field occupied by the four competitors? No one has seemed to seriously attempt to answer that for defendants in error. Any benefit that could be suggested would be so remote and trifling as not to appeal to our reason as the purpose of forming such an elaborate and far-reaching scheme. In only one view that we can even imagine can it be said that substantial contemplated benefits to the members of the combine could have been expected, and that is this: Assuming that the reasonable necessities of business required at least two newspaper mediums for advertising in the particular field in question, the advantages of the Journal Company's paper was so great that rather than forego the use thereof, it was supposed that advertisers, in considerable numbers, would pay the severe penalty prescribed by the agreement. But that, so far as anything goes which appears in the complaint or the evidence, has little or nothing to rest upon. So, instead of looking into the agreement in vain for anything reasonably suggesting an intent to harm the Journal Company in its business, we have great difficulty in discovering any other intent, and are not able to solve that difficulty without resorting to conjecture.

It follows that we reach the conclusion that the complaint admits of a construction which will satisfy the statute, and also that there was some proof that the defendants in error made the agreement to maliciously injure the Journal Company in its business as charged. We are next to consider whether it was such an injury as satisfies the calls of the statute. Counsel for defendants in error say it was not; that it was only an ordinary agreement between independent persons in their own business, to maintain prices at a particular level for the promotion of their legitimate interests; that such a combination is not illegal in the sense of being actionable at common law; that the statute does not change that, or, if it does, that it is unconstitutional.

We have already proceeded beyond some elements of the above somewhat compound proposition, but those parts to which we have already adverted were so exhaustively gone over by the able counsel who argued the case, both in the main argument and on the reargument thereafter accorded for that special purpose, that we will give some further attention in this connection to what has already been referred to incidentally.

Assuming, for the moment, that the agreement is of the nature contended for, as indicated, and that the statute is aimed at such, it does not follow, in our judgment, that entering into it was not a criminal offense. That one person, acting by himself, or many in combination, may, in the legitimate pursuit of their own business, injure the business of a rival, even to the extent of impoverishing him and driving him out of the field of industry occupied in common, leaving him remediless for his misfortune in the absence of a statute to the contrary, must be admitted. National and state legislatures have dealt with that subject in many instances, in recent years, and uniformly with success so far as regards constitutional limitations,—with such success, in fact, that the man of learning must be recognized as one of courage who will attempt at this late day to challenge legislative power in that regard on constitutional grounds. The time seems past for that, as regards combinations of individual independent interests, designed to remain independent for most purposes, but to act in combination to control trade. By numerous decisions of the highest courts in this country, the police power incident to sovereignty has been held to be broad enough to permit the legislature to deal, by creating civil or criminal liability, or both, with all combinations in restraint of trade which are void by common-law rules on grounds of public policy, and, within reasonable limits to be set by courts in the light of consti-

tutional safeguards, to say that things are contrary to public policy not so before, to legislate against them and to enforce the legislative will by civil or criminal liability, or both,—within the broad field indicated, to regulate or prohibit any combination of the kind we are talking about, formed for the purpose of restraining trade or disturbing those natural business conditions, where every individual is supposed to be free to contend with every other in the regular course of business. We are speaking here of independent interests concerning together for the purpose mentioned. That must be kept in mind. These questions have been so firmly settled that no court will now venture to do more than to follow what has been decided. Contracts that operate merely in restraint of trade, such as it is contended the one in question was, even though unreasonable, were not actionable at all at the common law. They were void, merely. The courts would not enforce or give effect to them. But new conditions have arisen creating new dangers, or intensifying old ones that were once considered so trifling as to pass unnoticed, calling for new restraints and new remedies. Who can say that sovereign power has been so surrendered as to be left incapable of dealing with that subject. Right or wrong, those dangers have been considered so great, and power to deal with them so ample, that legislation has gone to the length we have indicated, making combinations to stifle independent, individual competition, illegal and actionable, civilly and criminally, all upon the broad ground that legislative authority exists in the administration of the police power, to regulate or prohibit those things which are contrary to public policy by the rules of the common law; and to go further and determine, in the light of new conditions, what is detrimental to the public welfare, and to legislate accordingly.

On what has been said, the following of many authorities that might be cited are in point: *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *Gibbs v. McNeely*, 102 Fed. 594; *Nester v. Continental Browsing Co.* 161 Pa. 473, 24 L. R. A. 247, 29 Atl. 102; *People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221, 34 N. E. 785; *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14; *People ex rel. Morse v. Nussbaum*, 32 Misc. 1, 66 N. Y. Supp. 129; *Leonard v. Poole*, 114 N. Y. 371, 4 L. R. A. 728, 21 N. E. 707; *People v. Milk Exchange*, 145 N. Y. 267, 27 L. R. A. 437, 39 N. E. 1062; *Ford v. Chicago Milk Shippers' Assn.* 155 Ill.

166, 27 L. R. A. 298, 39 N. E. 651. The number of cases that could be cited on this subject is so great that no attempt has been made to do more than collect here a few that contain pretty full discussions thereof. A study of them reveals the fact that the power of public opinion in favor of preventing combinations to stifle individual freedom in business and the sacrifice of those benefits that are popularly supposed to flow from free competition, has led to legislation in most of the states of the Union, as well as by the Federal Congress, and that in but very few instances has such an enactment met the bar of the constitution of state or nation. A late work that treats of police powers sums up the subject here under discussion thus: "It is believed that the constitutionality of none of the numerous anti-trust statutes has been successfully questioned on the ground that they infringed the personal liberty of contract, in punishing civilly or criminally the entrance into a contract or combination in unreasonable restraint of trade. That such contracts and agreements are void, independently of statute and at the common law,—so far, at least, as to justify the courts in refusing to enforce them or in any other way to give the parties to them the aid of judicial process in protecting and enforcing the rights of parties, which grow out of such agreements—has been too long the settled rule of law, to admit of any serious question now. And the power of the state to declare such contracts unlawful being conceded, it is completely within the discretion of the legislature to determine whether such unlawful contracts and combinations shall be simply ignored by the courts, or the parties to them be subjected to criminal or civil liabilities." 1 Tiedeman, *State & Federal Control of Persons & Property*, § 112.

Coming back to the question of whether the malicious injury which the complaint charges against the defendants in error is such an injury as the one named in the statute, it seems that it makes little difference whether we view the statute as merely declaratory of the common law, or as in the line of the numerous state statutes to which we have referred, condemning combinations in restraint of, or injurious to, trade. It has the distinctive element of malice which satisfies common-law requirements of a malicious combination to injure, which is actionable for civil damages and punishable as a criminal offense by common-law rules, as we shall see later. Much confusion is created in cases of this kind by using expressions of courts made on one state of facts or as regards one form of action, to support a conclusion in a case 62 L. R. A.

involving a different principle. A large number of cases are cited to our attention where it is said that, if an act committed by one is not actionable, it is not where committed by many acting in concert. The fallacy of that, as applied to conspiracy in its criminal aspect, where there is the distinct and substantive wrong of intent to injure, was sufficiently treated by this court in *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840. Counsel for defendants in error, however, insist upon that doctrine in this case, citing many civil cases where it has some application, damages being the gist of the action, among which are three late English cases that deserve careful consideration. If the doctrine of those cases, as settled in the last of them, is to prevail, we must all revise our notions of the law of conspiracy, and the books must be rewritten. The following are the cases referred to: *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598, decided in House of Lords and reported in [1892] A. C. 25; and *Huttley v. Simmons* [1898] 1 Q. B. 181. The first case involved a combination to monopolize trade at the expense of plaintiff, but no element of malice was found. The action was to recover damages. In that situation it was true that the defendants were not liable in combination if one of them would not have been had he acted alone. The interesting feature of that case is absence of malice. When first decided all the learned judges who wrote upon the question reached the conclusion on which the judgment of the court was entered, upon the theory that no specific intent on the part of the defendants to injure the plaintiff wrongfully, no malice, was disclosed by the testimony. Bowen, L. J., said: "Certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several." "A combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights." Fry, L. J., said: "I . . . lay out of consideration this case of competition used as a mere engine of malice, even where I do not in terms repeat the exception." Lord Hannen said: "I know of no restriction imposed by law on competition by one trader with another, with the sole object of benefiting himself. I consider that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one, namely, to injure plaintiffs, whether they, the defendants, should be benefited or not." The *Mogul S. S. Co. Case*, as appears from the opinions rendered in both courts, is full of

expressions showing that it was not supposed then that an act, not actionable if perpetrated by one, could not be made so when perpetrated by several in combination, or that liberty to form business combinations to promote the business of the members thereof in the free course of trade applied to combinations of traders in the same calling to maliciously injure a rival. The free course of trade that one, or a number in combination, may legitimately enjoy, does not include the right to maliciously injure another in his free course of trade. Such is the decision in the *Mogul S. S. Co. Case* on its face. We should say that must have been the view of the learned men who pronounced the opinions in that case, if it were not for what followed in the subsequent case, because it is in harmony with many decisions cited and approved in the opinions, a good instance being *Gregory v. Brunswick*, 6 Mann. & G. 205, where it was held that preconcerted hissing of an actor for the purpose of injuring him in his profession was actionable. That and many other cases decided on the same principle were approved. If we say that such principle had prevailed in the English courts for two centuries prior to the *Mogul S. S. Co. Case*, we are supported by the lord chancellor in *Allen v. Flood* [1898] A. C. 1. There the element of conspiracy was absent, but the element of malice was present. The majority of the court there, contrary to what was said, inferentially at least, and what all of the judges were so careful to say as to indicate that it was the turning point in their minds, in the *Mogul S. S. Co. Case*, decided that malice in and of itself could not render that a ground for civil liability which without it would be lawful. The reasoning to support that and the decision, at least as applied to a conspiracy with malice, is out of harmony with right and justice, and out of harmony with a multitude of cases that had been theretofore decided by English courts, and the teachings of those who had built and filled the storehouses of learning from which all draw, outside of legal opinions. How can it be harmonized with *Gregory v. Brunswick*, where the conspirators were held liable because of their malicious purpose; and *Clifford v. Brandon*, 2 Campb. 358, a similar case; or *Garret v. Taylor*, Cro. Jac. 567, where malicious impeding of workmen was held actionable,—the authority of which, up to *Allen v. Flood*, had never been questioned. Those simple cases contain all the principles which govern this case, on the particular question under discussion.

The decision in *Allen v. Flood* was not reached by any great weight in number. 62 L. R. A.

Lord Watson, who delivered the main opinion in favor of it, confessed that the rule established was new in English law. The lord chancellor labored with great vigor to stem the tide of what he considered would amount to a judicial destruction of a system of law, on an important subject, which was as old as the common law. He said that the decision overruled the views of the most distinguished judges of England who had spoken on the subject for two hundred years; that it was a departure from the principle that had theretofore guided the courts in the preservation of individual liberty. He cited numerous expressions of the character of those which we have quoted from the opinions of the judges in the *Mogul S. S. Co. Case*, and said that, "if the elements, which each noble lord in turn pointed out did not exist in that case, had in fact existed, the decision would have been the other way." Lord Morris said that the decision overturned "the overwhelming judicial opinion of England." In that situation one can discover very little in the case to warrant adopting it and extending the principle thereof to a combination to maliciously injure.

After *Allen v. Flood*, it was but a step to reach *Huttley v. Simmons* [1898] 1 Q. B. 181. The conclusion there was in harmony with what Lord Halsbury evidently anticipated would be the final outcome of the rule he so vigorously dissented from. The court held, combining the doctrine of the *Mogul S. S. Co. Case* and that of *Allen v. Flood*, that a conspiracy with malice, to do an act, gives a right of action only when the act agreed upon to be done, and in fact done, would have been, without preconcert, actionable as a civil injury; because an act lawful without malice is not made unlawful by the addition of the element of malice.

While it is true that the doctrine of the cases referred to, even up to the final conclusion in *Huttley v. Simmons*, has to some extent influenced the judicial policy of this country, it is safe to say that the teachings thereof have not, up to this time, been adopted here in any material degree. In courts where it has been partially adopted there have often been most vigorous dissents, as, for example, *Passaic Print Works v. Ely & W. Dry-Goods Co.* 44 C. C. A. 426, 105 Fed. 163. Mr. Eddy, in his work on Combinations, published the present year, after a very careful review of all of those cases, said, speaking of *Huttley v. Simmons*: "If this decision be sound, there is little indeed to the law of civil conspiracy. The conclusion reached is logically correct if the premises be admitted. If the proposition is sound that a conspiracy to do cer-

tain acts gives a right of action only where the acts agreed to be done, and in fact done, would have involved a civil injury to the plaintiff regardless of any confederation, then the combination is entirely immaterial, and the entire law of civil conspiracy is a superfluous discussion. . . . But, notwithstanding the decision in *Huttley v. Simmons*, we believe the law for England, and certainly for the United States, to be well settled to the effect that parties to a conspiracy may be liable for damages occasioned by acts which, if done by individuals severally, would not give rise to a cause of action." § 503. In order to well understand that characterization, one must know that, after a review of numerous cases, the author deduced the conclusion that the element of malice, the intent to injure on the part of several acting in combination, will make that actionable that would not otherwise be so.

This court has often held that an executed conspiracy to inflict a malicious injury is actionable. To hold otherwise now and follow *Huttley v. Simmons*, would be to overrule those cases. *Bratt v. Swift*, 99 Wis. 579, 75 N. W. 411; *Milwaukee Masons' & Builders' Asso. v. Niczerowski*, 95 Wis. 129, 37 L. R. A. 127, 70 N. W. 166; *Gatzow v. Buening*, 106 Wis. 1, 49 L. R. A. 475, 81 N. W. 1003. The great weight of authority, almost all authority, is to the same effect. We give a few citations. 1 Hawk. P. C. 72, § 2; *State v. Steicart*, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; *Carew v. Rutherford*, 106 Mass. 14, 8 Am. Rep. 287; *Ertz v. Produce Exchange*, 79 Minn. 140, 48 L. R. A. 90, 81 N. W. 737; *State v. Buchanan*, 5 Harr. & J. 317, 9 Am. Dec. 534; *Com. v. Waterman*, 122 Mass. 57; *Farmers' Loan & T. Co. v. Northern P. R. Co.* 25 L. R. A. 414, note, 4 Inters. Com. Rep. 744, note, 30 Fed. 803; *State v. Norton*, 23 N. J. L. 33; *State v. Glidden*, 55 Conn. 46, 8 Atl. 390; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307; *Smith v. People*, 25 Ill. 17, 76 Am. Dec. 780; *Re Crump*, 84 Va. 927, 6 S. E. 620; *Doremus v. Hennessy*, 176 Ill. 608, 43 L. R. A. 797, 52 N. E. 924, 54 N. E. 524.

In the last case above cited, Phillips, J., speaking for the court, summed up the subject under discussion thus: "Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable. Nor would competition of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive from business that other set and actually accomplishing that result, be actionable unless there was actual malice. Malice, as here used, does not

merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another, it is malicious; and an act maliciously done, with the intent and purpose of injuring another, is not lawful competition." That expresses the common-law doctrine and the one that prevails here. How contrary it is to *Huttley v. Simmons* appears without a suggestion.

The late English doctrine seems not to be one of those changes which come from mere development; it is a revolution. The pressure of desire for freedom to combine to monopolize trade and render combinations successful by the malicious destruction of the business of competitors is not liable to find favor with the courts in this country, especially at a time when public opinion to the contrary is so strong that much of the time of legislatures is occupied in inventing new methods of preventing combinations which are perfectly lawful by rules of the common law. The ideas pressed upon the attention of the court in this case have been pressed upon every court in the land where opportunity therefor has been presented since the decision in the *Mogul S. S. Co. Case*. So far as then developed they were presented in *Farmers' Loan & T. Co. v. Northern P. R. Co.* 25 L. R. A. 414, note, 4 Inters. Com. Rep. 744, note, 60 Fed. 803, and rejected, the learned circuit judge who wrote the opinion quoting with approval from *Com. ex rel. Chew v. Carlisle*, Brightly (Pa.) 36, the following: "It will therefore be perceived that the motive for combining, or, what is the same thing, the nature of the object to be attained as a consequence of the lawful act, is, in this class of cases, the discriminating circumstance. Where the act is lawful for an individual, it can be the subject of a conspiracy when done in concert only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence."

Frequent recurrence to the fundamental principles of actionable conspiracy is essential to keep from ingrafting upon a judicial system something which is entirely new, to meet the desires of those who arrogate to themselves the right, not only to monopolize trade or effort in some particular field, but, under the guise of fair trade, to control or destroy the business of competitors without any expectation of profit to themselves,—to wrongfully harm such

competitors merely because they insist upon individual right to conduct individual business in one's own way. A combination with the malicious purpose indicated is an actionable wrong. Had it not been for § 4568, Rev. Stat. 1898, adding to the common-law essentials of an indictable conspiracy the necessity for an overt act, § 4466a would have been unnecessary to enable the court to punish, criminally, such wrongs. That is a mere declaration of the common law. It operates as a repeal, by implication, of § 4568 so far as otherwise a specific overt act would be required to render a malicious conspiracy, to injure the trade, business, reputation, or profession of another, an offense. The old doctrine, with its ancient meaning, should be referred to in construing § 4466a. An actionable conspiracy is a combination of two or more persons for the purpose of accomplishing a criminal or unlawful object by criminal or unlawful means or a lawful object by criminal or unlawful means. One may, through purely malicious motives, attract to himself another's customers and the injury be so slight in contemplation of law that *De minimis non curat lex* applies; but when he unites others with him to maliciously injure the business of another for the mere gratification, in whole or in part, of a desire to inflict such injury, the condition of there being the combined force of many directed towards another, characterized by the element of malice, renders the act of combining for the particular purpose unlawful and a substantive offense, in the absence of a statute requiring some additional element. As said, in effect, in *Farmers' Loan & T. Co. v. Northern P. R. Co.* 25 L. R. A. 414, note, 4 Inters. Com. Rep. 744, note, 60 Fed. 803, the union of individual forces by agreement, to accomplish the injury gives to such agreement the character of a purpose to reach the end in view by violence, and the accomplishment thereof the character of a purpose effected by violence. The law never has, and probably never will, leave an individual, or class of individuals, remediless against such a wrong.

This opinion has been carried to great length. The justification therefor, if there is any, lies in the importance of the case and the numerous questions presented for 62 L. R. A.

decision. All of such questions, as regards the character of the wrong complained of, from the standpoint of counsel for defendants in error, have their best support in the three English cases to which we have particularly referred. A full discussion of them, as it seems, leaves little more that need be said. As indicated at the commencement, a long opinion was unavoidable if reference was to be made, even briefly, to the many points presented in the voluminous briefs of counsel. As it is, there are some to which we have referred only briefly, though it is believed that all have been covered in principle. Our conclusion is this: The term "malicious injury," as used in the statute, is synonymous with that term at the common law; it refers to the infliction of a wrongful injury intentionally; such a wrong is actionable even though the same purpose, if formed and executed by an individual, would not, in contemplation of law, be considered sufficiently serious to call successfully for legal redress. There is nothing in this militating at all against the right of individuals to combine and associate together for the purpose of promoting their individual welfare in any legitimate way. It strikes only at the assertion of a right of combining to resort to the use, as a simple power, of the individual abilities and resources of two or more to wrongfully accomplish harm to another in the line of those things mentioned in the statute. It is in harmony with the doctrine, so definitely stated by Baron Bramwell in *Reg. v. Druiitt*, 10 Cox, C. C. 593, that it has often been quoted by courts and text-writers and nowhere rejected: "The liberty of a man's mind and will to say how he should bestow himself and his means, his talents and his industry, was as much a subject of the law's protection as was that of his body;" and "if any set of men agree among themselves to coerce that liberty of mind and thought by compulsion and restraint, they are guilty of a criminal offense."

The orders of the Circuit Court discharging the defendants in error are severally reversed, and the cause is remanded with directions to remand them to the sheriff of Milwaukee County.

Dodge, J., took no part.

LOUISIANA SUPREME COURT.

Mattie CRISMAN *et al.*

v.

SHREVEPORT BELT RAILWAY COMPANY *et al.*, Appts.

(110 La. 640.)

*1. It is negligence on the part of an electric railway company whose line traverses a city to have one of its cars in the charge of a young man only eighteen years old, whose experience in the handling of an electric car dates only twenty days back.

2. For the shortcomings of such a motorman, in a case where the death of a human being has ensued, the car company will be held to the strictest accountability; and doubt as to whether the life of the deceased might not have been spared had the car been in the hands of a more experienced and more competent motorman will be construed against the car company.

3. The situation having been that the street was one thoroughfare, with continuous pavement from curb to curb, the car track being in the center, the rails laid flush with the surface, and nothing setting them off from the rest of the street, and that, as the car ran, the deceased was riding on horseback somewhat ahead of the car, close enough to the track for his proximity to challenge attention (not so close, however, as to be within the line of danger), and that the car was gaining upon him, and that the street was somewhat crowded,—*Held*, first, it was not negligence under the circumstances not to have checked the speed of the car before the actual emergency had arisen; secondly, it was incumbent on the motorman, under the circumstances, to prepare for emergencies by turning off his current and winding the slack out of his brake, and the failure to do the latter was negligence.

4. From the fact that the car was not stopped within the space within which it was possible to stop it, there arises an inference that the motorman was not as prompt or as energetic as it was possible for a motorman to be, and this inference overcomes the statement of witnesses that the motorman did all that was possible to stop the car.

(Nicholls, Ch. J., and Monroe, J., dissent.)

(December 15, 1902.)

APPEAL by defendants from a judgment of the First Judicial District Court for the Parish of Caddo in favor of plaintiffs in an action brought to recover damages for

*Headnotes by PROVOSTY, J.

NOTE.—As to liability for injuries by street-car collisions with vehicles or horses, see also *Hicks v. Citizens' B. Co.* 25 L. R. A. 508, and note; *Baltimore Consol. R. Co. v. Pierce*, 45 L. R. A. 527; and *Rider v. Syracuse Rapid Transit R. Co.* 58 L. R. A. 125. 62 L. R. A.

the alleged negligent killing of plaintiffs' intestate. *Affirmed.*

The facts are stated in the opinion.

Messrs. William Henry Wise and Edward Beverly Herndon for appellants.

Messrs. Holbert & Barrett, for appellees:

A defense based upon contributory negligence will not avail if, by reasonable care on the part of the motorman in charge of the car, the accident could have been avoided.

Ellis v. Lynn & B. R. Co. 160 Mass. 341, 35 N. E. 1127; *Philadelphia Traction Co. v. Lightcap*, 10 C. C. A. 46, 17 U. S. App. 605, 61 Fed. 762, 60 Fed. 212; *Benjamin v. Holyoke Street R. Co.* 160 Mass. 3, 35 N. E. 95; *Hearn v. St. Charles Street R. Co.* 34 La. Ann. 163; *McGuire v. Vicksburg, S. & P. R. Co.* 46 La. Ann. 1543, 16 So. 457; *Nelson v. Crescent City R. Co.* 49 La. Ann. 491, 21 So. 635; *Barnes v. Shreveport City R. Co.* 47 La. Ann. 1219, 17 So. 782; *Kramer v. New Orleans City & L. R. Co.* 51 La. Ann. 1689, 26 So. 411; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; *Grand Trunk R. Co. v. Ives*, 144 U. S. 420, 36 L. ed. 490, 12 Sup. Ct. Rep. 679; *Pickett v. Wilmington & W. R. Co.* 117 N. C. 616, 30 L. R. A. 257, 23 S. E. 264; *Clark v. Wilmington & W. R. Co.* 109 N. C. 430, 14 L. R. A. 749, 14 S. E. 43; *Sautter v. New York & W. S. S. Co.* 88 N. C. 123, 43 Am. Rep. 736; 1 Shearm. & Redf. Neg. 5th ed. § 99, p. 165; *Thompson v. Salt Lake Rapid Transit Co.* 16 Utah, 281, 40 L. R. A. 172, 52 Pac. 92.

Provosty, J., delivered the opinion of the court:

The defendant companies operate the street electric railway system of the city of Shreveport. James P. Crisman was run over and killed by one of their cars, and his widow and the tutor of his minor son bring this suit in damages for his death and for the sufferings he underwent.

The circumstances of the accident are these: The deceased was on horseback, going in the same direction as the fatal car, to the right of the motorman, not so close to the track as to be within the line of danger, but close enough to induce the motorman to sound the gong in order to warn him of the approach of the car. How far he was ahead of the car when attention was first attracted to their juxtaposition is variously estimated by the witnesses, some placing him parallel, and some 90 feet ahead. From the evidence as a whole, we gather that he was ahead of the car, and that it was gaining upon him. When he had reached a point 20

feet from the line that would be formed by projecting across the path of the car the near sidewalk of the cross-street ahead, which was Murphy street, his horse, by a sudden movement to the left, went upon the track 10 to 15 feet ahead of the car, and the car, despite the efforts of the motorman to stop it, ran upon him.

He was thrown upward, and he fell to the side of the car, fracturing his skull in the fall. Also one of his legs was run over by the car. The horse was thrown to the ground, the front platform of the car passed over him, and the front truck pushed him along the ground until the car came to a stop. When the car was backed from over him he rose and walked off, not seriously injured. Crisman himself was found to be unconscious. He died about four hours afterwards, without having regained consciousness.

Plaintiffs allege negligence on the part of the defendant companies in the following respects: (1) That in approaching the Murphy street crossing, where the accident occurred, the motorman should have had, and did not have, his car under control, current off, and slack out of his brake, ready for any emergency. (2) That the speed of the car was excessive. (3) That the motorman was not competent. (4) That he did not see Crisman in time to stop the car. (5) That the car was not properly equipped with fenders and safeguards.

Defendants plead the general denial, and specially that Crisman was intoxicated, and by his gross carelessness and negligence contributed to the accident.

The theory that Crisman was under the influence of liquor, and was racing with the car, and tried, with the foolhardiness of a drunken man, to cut across the path of the car, fails in the presence of the clear disproof of the drunkenness. Nor is his getting in the pathway of the car chargeable as negligence. The car tracks on Texas avenue, where the accident occurred, are not set apart from the rest of the street; in fact, nothing marks the pathway of the cars except the rails laid flush with the surface; the street is one thoroughfare, with pavement continuous from curb to curb, saving the double car tracks in the center flush with the surface. The street was as free to Crisman as to the car, apart from his obligation to yield the road to the mechanically propelled and more ponderous and unwieldy public vehicle. His riding near the track was not negligence, so long as he kept without the line of danger.

What caused him to deviate is not clear, but we have no sufficient reason to believe that he voluntarily put himself across the path of the car. We think that the most

plausible theory, the one that will come nearest to reconciling the widely varying statements of the witnesses, is that a buggy with a lady in it coming towards him caused him to deviate towards the track, and that the motorman seeing him do so sounded the gong violently, and that at this the horse became frightened and unmanageable, and went upon the track, and could not be induced to get off in time to avoid the collision. The witnesses pretty well agree that at the moment of the collision the horse was unmanageable and would not get out of the pathway of the car, despite the efforts of the rider with heels and arms to urge him to do so.

Coming to the discussion of the alleged negligence of the defendants, we put aside at once the allegations respecting the *locus in quo*, the speed of the car, the inattention of the motorman, and the absence of a fender.

Except the statement of the motorman that "the street was somewhat crowded at the time," we find nothing going to show anything special about the intersection of Texas avenue and Murphy street why the speed of the cars should be checked there any more than at any other crossing in the built-up portion of the city.

The car was not being run at negligent speed. The current had been turned off 180 feet back in passing another car going in the opposite direction on the other track alongside to the left of the motorman, and had not been returned; and the grade was ascending at the rate of 1 1-7 feet per 100 feet. What was the actual speed cannot be arrived at from the statements of the witnesses, which vary from 3 to 25 miles. Adopting the statement of the witness Levinson, based on an experiment made for the purpose of forming an estimate, the speed was about 8 miles an hour. We will say, however, that this witness is the superintendent of the defendant companies, and is evidently strongly enlisted on the side of the defendants, and that we adopt his statement simply for the want of anything more reliable to go by.

The evidence shows conclusively that the motorman was attentive, that he sounded the gong as a warning to Crisman riding alongside of the track, and that he sounded the gong promptly and violently as soon as Crisman deviated towards the track.

The evidence shows also that the ordinary fender has been found to do more harm than good, and is being discarded, and that there is being adopted in its place a contrivance such as the car in question was provided with, or something approximately like it.

Coming to the incompetency of the motorman, we find that he was a young man eighteen years and one month old, 5 feet

8 inches tall, and weighing between 125 and 130 pounds, who twenty days before had entered the service of the defendants—a raw hand; that after the accident he went into the car and sat down, unnerved, so that the conductor had to take charge of the car and back it from over the horse.

Relatively to what should be the age and weight of a man to qualify him to serve as motorman, four superintendents of the electric street railway systems of different cities were examined as witnesses in the case. Three of these testify positively to the importance of the age qualification, fixing the lower limit at twenty years; one testifies that there is no definite age requirement. They divide on the importance to be attached to weight, two saying that a motorman should weigh at least 150 pounds, and two that weight is immaterial.

It would hardly do, we think, for this court to undertake to prescribe the weight and height of motormen, under the penalty of negligence to the railway companies; but age is a different thing. The law takes age into consideration, and fixes at twenty-one, when a man shall be considered sufficiently mature to be intrusted with the management of his own affairs, and we find these superintendents, out of their experience, attributing to age great importance.

The intrusting of this car to a man so young and inexperienced was negligence on the part of the defendant companies, and the question must be whether between this incompetency of the motorman and the injury there was any causal connection.

Having found that the situation was not such as to require the checking of the car, also that the current had been turned off, also the motorman was not inattentive, we have to consider, in tracing this causal connection, what else a fully qualified motorman would probably have done that this young man did not do.

From his own statement we conclude that he did not have the slack out of his brake. He says: "When I saw him get closer to the track he was between 10 and 15 feet from the track, the outside rail. Then he commenced getting up closer, and I saw we would run into him, and tried to check the car. I was about 10 or 15 feet when I saw he was likely to cross there. I already had the current off, and commenced taking off the slack." Thus it appears that he "commenced taking off the slack" only when he "tried to stop the car." Therefore he had not taken it off up to the moment of actual emergency. True, he says he began taking off the slack as soon as he saw Crisman deviate, and that at that moment Crisman was between 10 and 15 feet away from the track; but this would place Crisman nearer to the 62 L. R. A.

curb than to the track, since the street was less than 20 feet wide from track to curb, and all the witnesses agree that Crisman was near the track, in fact, so close that the question is whether he was not within the line of danger, and the same motorman in his report to the defendant companies says that Crisman's horse came upon the track by a sudden movement,—“shied” upon it.

As Crisman rode near the track, slightly ahead of the car, the imminency of the danger was not such as to necessitate the checking of the car, but it was certainly such as to make it obviously prudent to resort to such precautions as turning off the current and winding the slack out of the brake in order to be as ready as possible for emergencies.

The motorman did the former,—whether specially with reference to Crisman is immaterial,—but he failed to do the latter, and his failure in that regard is another point on which, we think, negligence has to be imputed to the defendant companies, his employers, responsible for his conduct.

On the point of whether the current should have been reversed, we think the testimony preponderates against the advisability of that measure under the circumstances.

Notwithstanding that several witnesses say that the motorman was prompt, and that he did all that could be done to stop the car, we find that the car was not stopped as promptly as was possible. One of the superintendents referred to above says that a car should be stopped within 50 feet, and another that it should be stopped in from 20 to 50 feet. Now, the car traveled a distance of 64 to 79 feet before coming to a final stop. We arrive at these figures by adding together the following distances: 10 to 15 feet, distance Crisman was ahead of the car; 10 to 20 feet, distance from point of collision to Murphy street; 30 feet, width of Murphy street; 6 feet, width of far sidewalk; and 8 feet, distance attained by the front end of the car beyond the property line on the far side of Murphy street. Now the superintendents, in their said estimate of the space required for stopping a car, have reference to a car with brake loose and current on, and going full speed upon a level track; whereas in the instant case the current had been cut off 180 feet back, and the car was moving up a 1 1-7 per cent grade, and from the time of the collision had a prostrate horse under its front platform serving as a bumping post, and full opportunity had been afforded for taking the slack out of the brake. In the hands of a more competent motorman, then, the car would presumably have been stopped in less than 50 feet, whereas in the hands of this young man it ran to a distance of 64 to 79 feet. Either the young man was

not as prompt, or he was not as energetic, as a fully qualified and more competent motorman presumably would have been.

The question remains, however, whether, considering the speed of the car and the short space of 10 to 15 feet within which to stop it, the casualty could have been avoided even by the most efficient motorman. If it could not, the shortcomings of the motorman were not the cause of the accident, and the defendants are not responsible. Instances are cited in the record where, under circumstances well-nigh as desperate, when a fatal outcome seemed as inevitable, a serious result was averted by the efficiency of the motorman; and the mind hangs in doubt whether, had the slack been out of the brake, and that modicum of greater promptness, or of greater energy, been used which would have brought the car to a stop within a few feet less, or, in other words, which would have checked the impetus of the car by that much more, the fatal result might not have been avoided.—Crisman might not have been let off with a mere harmless bumping.

That doubt must be resolved, we think, against defendants. The presumption is that had the motorman been competent the slack would have been out of the brake, and this modicum of greater promptness or energy would have been used, and Crisman would have had that much better chance for his life; and, problematical as that chance was, defendants could not deprive him of it, and the presumption is that by employing this incompetent motorman they did so. The defendants, who for their own profit put in motion a dangerous agency by which the life of a human being, a citizen, a father, and a husband, has been taken, must be held to a strict accountability, and, so holding them, they are responsible for the death of Crisman.

The burden of proof, both as to negligence and as to causal connection, rests on the plaintiffs, but they have discharged same when they have shown that, by the fault of the defendants in employing an incompetent motorman, the deceased was deprived of a chance for his life—problematical though that chance was—which presumably he would have had if the motorman had been more competent.

The petition of the widow charges damages as follows: For burial expenses, etc., \$146; for being deprived of the support and maintenance of her husband (who was earning \$90 to \$120 per month at the time of his death), and for being deprived of his companionship, \$10,000. The minor sues for the pain, agony, and suffering endured by his father while he lingered between life and death; also for being deprived of his care, instruction, protection, etc.—\$10,000.

62 L. R. A.

The deceased was forty-nine years old, a strong, vigorous, healthy man, in perfect health at the time of his death. He was a mechanic and builder and contractor, and earned from \$4, to \$5 a day. During his life he provided comfortably for his family, but laid aside nothing, so that he left no estate. The widow is forty-two years old, and is now dependent upon her personal exertions for a livelihood, having no property. The minor is eighteen years old.

The jury allowed \$4,846 to Mrs. Mattie Crisman, and \$300 to the minor, Robert Percy Crisman.

The allowance to the minor was, we take it, for the pain and suffering of the deceased in the four hours that intervened between the accident and his death. Defendants contend that deceased became insensible instantaneously, and that consequently no damages can be recovered on this head. The facts are as follows: Crisman, by the impact of the car, was thrown upward, and he fell to the pavement. He was heard to exclaim, "Oh Lord!" After the accident he was found to be unconscious, with his skull fractured and his leg crushed. While on the ground he was heard to groan. He was taken at once to the Charity Hospital near by. It was found that the occipital bone had received a stellated fracture, and that the bone was pressing upon the cerebellum; also that the part of the upper right jawbone in which the teeth are imbedded was broken and loose. The operation of trepanning was performed, and the leg amputated below the knee. On account of the imperfect and difficult breathing, described as "stertorous," and in view of the fact that the patient was unconscious and motionless, no anæsthetic was administered. During the operation he vomited. After the operation his breathing improved, and he was able to move his head and hands, and he also sighed or moaned. He remained unconscious, however, until his death at 10 o'clock the same night, four hours after the accident. Dr. Randall Hunt, the surgeon in charge of the Charity Hospital, who attended to the case and performed the operation, gives it as his positive opinion that the sense of feeling in the wounded man was not dead, and that he endured pain during his unconsciousness. Dr. J. C. Eagan, called as an expert by defendant, seems to doubt the correctness of this opinion, but he does not commit himself to the contrary view. Being asked, "Would you say, Doctor, that a moan or sigh or groan under the circumstances related to you here would indicate suffering?" He answered, "According to my impression, it would; but it simply is an impression." Especially the vomiting while the operation was going on, Dr. Hunt would take to have been a reliable

sign of the persistence of sensation. It is not for us to follow these gentlemen into the reasons they give for their opinions, nor, we imagine, would the learned dissertation of Dr. Hunt on the subject of subconsciousness, however clear and interesting in itself, be of any service here; suffice for us to consider the preponderance of the evidence, and it is to the effect that the wounded man continued to endure pain.

Plaintiffs and appellees have filed in this court an answer praying for an increase of the amount allowed by the jury, especially to the minor. The estimation of the money value of the pain and suffering of a human being is a matter for which there can, in the nature of things, be no fixed rule. Courts

are not in the habit of allowing a very large amount in cases into which there enters no element of punishment or of example. Defendants, on the other hand, ask a reduction of the verdict. Under the circumstances of the case, we should not feel justified to change the verdict.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed.

Nicholls, Ch. J., and Monroe, J., dissent.

Petition for rehearing denied June 22, 1903.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Mancy M. DANIELS

v.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY.

Mary E. DANIELS, Exrx., etc., of Mancy M. Daniels, Deceased,

v.

SAME.

(188 Mass. 393.)

1. Failure to give the statutory signals upon approaching a crossing may be found from testimony that the persons who were in a position to have heard them had they been given did not hear them, although there is affirmative testimony that they were given.
2. A voluntary wilful act of suicide of a person rendered insane by a negligent injury, who knows the purpose and physical effect of his act, is such a new and independent agency as does not come within and complete a line of causation from the accident to the death so as to render the one guilty of the negligence responsible for the death.
3. A verdict should be rendered for defendant in an action to recover damages for negligently killing a person who, as a result of injuries received, becomes insane and kills himself, in the absence of anything to show that he acted under an uncontrollable impulse, or that he did not understand the physical nature of his act.

(May 22, 1903.)

NOTE.—As to effect of intervening cause on liability for negligence generally, see, in this series, notes to *Smith v. Kanawha County Ct.* 8 L. R. A. 82, and *Smithwick v. Hall & U. Co.* 12 L. R. A. 279; also *Pennsylvania R. Co. v. Hammill*, 24 L. R. A. 531; *Cincinnati, H. & D. R. Co. v. Kassen*, 16 L. R. A. 874; *Goodlander Mill Co. v. Standard Oil Co.* 27 L. R. A. 583; *Stone v. Boston & A. R. Co.* 41 L. R. A. 794; and *Southern R. Co. v. Webb*, 59 L. R. A. 109. 62 L. R. A.

EXCEPTIONS by defendant to rulings of the Superior Court for Norfolk County made during the trial of actions brought to recover damages for injuries to the person and property of Mancy M. Daniels, and for the injury occasioned by his death, which resulted in a verdict in favor of plaintiff in both cases. *Overruled in first case; sustained in second case.*

The facts are stated in the opinion.

Messrs. Choate & Hall, for defendant:

The evidence would not justify a finding that the bell was not rung.

Hubbard v. Boston & A. R. Co. 159 Mass. 320, 34 N. E. 459.

The direct cause of the death was not the act of the defendant. It was the result of physical violence directed by an intelligent impulse, and by a purposeful, though insane, will.

Moral obliquity in the suicide, as to his conduct, brings the result no nearer the act of the defendant, as the efficient cause of death.

Borradaile v. Hunter, 5 Mann. & G. 639; *Cooper v. Massachusetts Mut. L. Ins. Co.* 102 Mass. 227, 3 Am. Rep. 451; *Dean v. American Mut. L. Ins. Co.* 4 Allen, 96; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Raymond v. Haverhill*, 168 Mass. 384, 47 N. E. 101; *Streeter v. Western Union Mut. Life & Acci. Soc.* 65 Mich. 199, 31 N. W. 779; *Harris v. Travellers' Ins. Co.* 7 Am. Law Rev. 589.

Messrs. Gaston, Snow, & Saltonstall and Malcolm Donald, for plaintiff:

The mere fact that a witness fails to hear signals is not necessarily evidence of failure to give them. But, if a witness's attention is so directed that he would be likely to hear

signals, if given, his failure to hear them is proper evidence of their omission.

Menard v. Boston & M. R. Co. 150 Mass. 386, 23 N. E. 214; *Johanson v. Boston & M. R. Co.* 153 Mass. 57, 26 N. E. 426; *Hubbard v. Boston & A. R. Co.* 159 Mass. 320, 34 N. E. 459; *Davis v. New York, N. H. & H. R. Co.* 159 Mass. 532, 34 N. E. 1070.

Statements of Daniels alone were sufficient to support the finding that neither bell was rung, nor whistle sounded.

Reed v. Deerfield, 8 Allen, 522.

The statute would be infringed unless the signals were first given at or beyond a distance of 80 rods.

Duggan v. New England R. Co. 172 Mass. 337, 52 N. E. 519.

The defendant is at least liable for the natural and probable consequences of his failure to give the signals.

Ingalls v. Bills, 9 Met. 1, 43 Am. Dec. 346; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Lane v. Atlantic Works*, 111 Mass. 136; *Hill v. Winsor*, 118 Mass. 251; *McGarrahan v. New York, N. H. & H. R. Co.* 171 Mass. 211, 50 N. E. 610.

The insanity of a person injured in a collision at a railroad crossing, and his death resulting therefrom, may properly be found to be a natural and probable result of a failure on the railroad company's part to give the statutory signals.

Rooney v. New York, N. H. & H. R. Co. 173 Mass. 222, 53 N. E. 435.

It is only necessary that the general result should be natural and probable. It is not necessary that the precise form or connection of events by which that result is reached should be foreseen.

Hill v. Winsor, 118 Mass. 251.

Death, in some form, was a natural and probable result of failure to give signals.

McGarrahan v. New York, N. H. & H. R. Co. 171 Mass. 211, 50 N. E. 610; *Ginna v. Second Ave. R. Co.* 8 Hun, 494.

The process by which disease effected the result would be immaterial as long as no act of an individual, or no unusual disturbance of natural conditions, intervened from the outside.

Death by his own hands, by one *non compos*, is as much the result of disease as death by fever or consumption.

John Hancock Mut. L. Ins. Co. v. Moore, 34 Mich. 41.

The peculiar nature of the disease, or the unusual nature of its results, has never been considered ground for limiting liability so long as death or disease in some form was natural and probable.

Sedgw. Damages, 8th ed. § 112.

The fact that Daniels, by the use of his own hands, caused his death does not show

any interference in the causal chain of an independent cause. Where a person uses his muscles without rational volition, or instinctively, such motion is of no more consequence in affecting the train of legal causation than the movement of inanimate matter.

Accident Ins. Co. v. Crandal, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. Rep. 685; *Mutual L. Ins. Co. v. Terry*, 15 Wall. 580, 21 L. ed. 236; *Manhattan L. Ins. Co. v. Broughton*, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. Rep. 99; *Scott v. Shepherd*, 2 W. Bl. 892.

Recovery has been allowed for results no less difficult to foresee than was death by insanity in the present case.

McDonald v. Snelling, 14 Allen, 290, 92 Am. Dec. 768; *Powell v. Deveney*, 3 Cush. 300, 50 Am. Dec. 738; *Lane v. Atlantic Works*, 111 Mass. 136; *Hill v. Winsor*, 118 Mass. 251; *Harrison v. Berkley*, 1 Strobb. L. (S. C.) 525, 47 Am. Dec. 578.

There should be recovery for all natural results of the defendant's act, which occur through the processes of nature without intervention of outside acts or unusual disturbances of nature, providing the defendant's act can still be regarded as an effective force, as in the case of violations of other statutes.

Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354; *Newcomb v. Boston Protective Dept.* 146 Mass. 596, 4 Am. St. Rep. 354, 16 N. E. 555.

Knowlton, Ch. J., delivered the opinion of the court:

These actions are brought, one by Mancy M. Daniels, and the other by his executrix; the first to recover damages suffered in his lifetime, and the second to recover for his death resulting from a collision with an engine and train at a crossing of a highway on the defendant's railroad. The negligence of the defendant which is chiefly relied on, is the failure to give the cautionary signals required by the statute to be given at crossings of highways. The defendant, on its bill of exceptions, has argued only two questions: First, whether there was evidence which would warrant a finding that the signals were not given; and, secondly, whether the death of Daniels, which resulted from his strangling himself while he was probably insane, was caused by the defendant's negligence, within the meaning of the statute.

As to the first question, although there was testimony from numerous witnesses that the whistle was blown for the crossing at the time the collision occurred, there was also testimony from others, who were in positions where they might have heard the signals if they had been given, that they heard

nothing until the danger signals were given, just before the accident; and there was also testimony of the declarations of the deceased that he heard nothing until the train was right upon him, and that he was absolutely sure that there was no whistle until the danger signal was sounded. Although it did not appear that these last witnesses were giving much attention, we think they were so situated that their failure to hear or notice a signal was competent for the consideration of the jury. This was especially true of the deceased, who was approaching the crossing, and very near it. There was also evidence that the whistling post at which, according to some of the witnesses, the whistle was first blown, was less than 80 rods from the crossing. If the signal was first given there, it was a failure to comply with the statute. Pub. Stat. 1882, chap. 112, § 163; Stat. 1890, p. 142, chap. 173; *Duggan v. New England R. Co.* 172 Mass. 337, 52 N. E. 519. We are of opinion that this question was rightly submitted to the jury. *Menard v. Boston & M. R. Co.* 150 Mass. 386, 23 N. E. 214; *Johanson v. Boston & M. R. Co.* 153 Mass. 57, 26 N. E. 426.

The important question in the second case relates to the manner of Daniels' death, and to the law applicable to a death caused as his was. He received a blow on the head and other injuries at the time of the accident, which occurred on August 12, 1899, and he died on the 3d day of the next October. The evidence tended to show that his mind was clear for several weeks after the accident, but after that he showed symptoms of insomnia and restlessness, and began to suffer from severe attacks of headache, was melancholy, and at times delirious. The autopsy after his death showed circumscribed meningitis, which produced mental aberration. On October 3d he was left alone on his bed in a room from which the door opened into the dining room. This door was left open, and after a time it was found closed, and locked from the bedroom on the inside. His wife entered the room through a window, and he was discovered lying on his bed, with a napkin, which had been left on a tray used for bringing his food, twisted tightly around his neck, and held tightly in his hands, so as to produce strangulation. He was not then dead, but died soon afterwards. Experts testified that he was probably insane when he took his life. The question is whether his life was lost by the collision, within the meaning of the statute. The jury were well warranted in finding that his mental condition was caused by the collision. If his mental condition had remained normal, probably he would not have died in this way. We are thus brought to

the consideration of the question—which is often very difficult to decide—whether an essential condition precedent is the active, efficient, proximate cause of a subsequent event, or is only a producer of conditions which open the door to another cause which directly and actively produces the result. Was death in this case a remote consequence of the collision, or was it an effect actively produced by it? A similar question has often been considered under policies of life insurance which except from the terms of the contract cases of death by suicide or by the hand of the assured. The decisions upon this question are conflicting. All agree that death self-caused in an uncontrollable frenzy, without knowledge or appreciation of the physical nature of the act, would not be death by suicide, or by one's own hand, within the meaning of such a provision in a policy. Some judges make a distinction between death by one's own hand and death by suicide, but most judges consider the language in either form as meaning death by one's own act. Some courts hold that, if death is the result of volition by one who has a conscious purpose to end his life, and has intelligence to adapt means to ends, it is his own act, within the meaning of such a contract, even though he is so far insane as not to be morally responsible for his conduct. That is the doctrine of this court, as stated in *Dean v. American Mut. L. Ins. Co.* 4 Allen, 96, and in *Cooper v. Massachusetts Mut. L. Ins. Co.* 102 Mass. 227, 3 Am. Rep. 451, following *Borradaile v. Hunter*, 5 Mann. & G. 639, and *Olift v. Schwabe*, 3 C. B. 437. The same doctrine has been laid down as the true rule by several other American courts. On the other hand, the court of appeals of New York and the Supreme Court of the United States, and some other courts, hold that if one, by reason of his insanity, is unable to appreciate the nature and qualities of his own act in its relations to the moral world, so that he is not criminally responsible for it, he does not commit suicide, or cause death by his own hand, within the meaning of such a policy, if he deliberately and wilfully takes his own life. *Breasted v. Farmers' Loan & T. Co.* 8 N. Y. 299, 59 Am. Dec. 482; *Mutual L. Ins. Co. v. Terry*, 15 Wall. 580, 21 L. ed. 236; *Manhattan L. Ins. Co. v. Broughton*, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. Rep. 99. The question is not precisely the same in these cases as in the case now before us. The question in such policies is, What did the parties mean by their language? And some courts have invoked the principle that the language should be interpreted most strongly against the insurer who used it. In the present case the question is, What is meant by the language of the statute in reference to a death

that occurs a long time after the collision, from direct causes which come into existence and take form after the lapse of weeks or months, or possibly years, although they may be traced back to the collision as a first cause? In interpreting the present statute in reference to such facts, the question is not exactly whether the insane person who takes his life dies by his own hand or commits suicide. It is whether the act of volition—the wilful, deliberate purpose to take his life, when put in execution—is to be treated as an independent, direct, and proximate cause of the death, notwithstanding that he was so far insane as to be unable fully to comprehend the moral quality of his act. In a condition such as is here supposed, the injury has caused mental disease which has weakened the forces that hold one in check and restrain him from acts of violence, and that enable him to appreciate the reasons for not interfering with the natural laws of his being. Very likely the disease also causes him extreme suffering, and deprives him of the pleasures of life, and thus exposes him to great temptation, from which he would be free if in good health. In this weakened and wretched condition, lacking a sound mind to guide him morally, but still having powers which enable him to know what he thinks he wants to do and how to do it, by an act of volition he chooses to die, and thereupon takes his own life. It may be said that he is forced to the deed by his disordered faculties. Some contend that we are all slaves of destiny. Our subject brings us near to the vexed theological problem as to free will and predestination. Without attempting to pursue these inquiries too far, we are of opinion that the voluntary, wilful act of suicide of an insane person, whose insanity was caused by a railroad accident, and who knows the purpose and the physical effect of his act, is such a new and independent agency as does not come within and complete a line of causation from the accident to the death.

Suppose, under such conditions, one of an aggressive and irritable disposition should take the life of another person, when, if his mind had not been weakened by the disease, he would have held himself in control; would it be said that the life of the other was lost by the collision on the railroad? Insanity is often a permanent condition of mind, lasting many years, and it calls for care, and often for restraint, of the insane person. Would suicide or the homicide of another person, resulting from such conditions, after the expiration of many years, be held to be caused by the collision, within the meaning of this statute, if the insanity was the effect of a collision?

We are of opinion that the principal rea-

sons which induced the decisions in the first class of cases under insurance policies, to which we have referred, are still stronger to compel a decision that a defendant is not liable under this statute for a death such as we have supposed. Indeed, the Supreme Court of the United States, which holds that an insane person who takes his own life does not die by his own hand, within the meaning of the words in the insurance policies, has decided unanimously in *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 28 L. ed. 1070, that the representative of a person who was injured in a railroad accident, and took his own life while insane, about eight months afterwards, could not recover under a statute like that now before us by showing that his insanity was caused by the accident. We are satisfied with the conclusions reached in *Dean v. American Mut. L. Ins. Co.* 4 Allen, 96, and *Cooper v. Massachusetts Mut. L. Ins. Co.* 102 Mass. 227, 3 Am. Rep. 451; and under this statute, involving different but similar considerations, we are of opinion that the liability of a defendant for a death by suicide exists only when the death is the result of an uncontrollable impulse, or is accomplished in delirium or frenzy caused by the collision, and without conscious volition to produce death, having knowledge of the physical nature and consequences of the act. An act of suicide resulting from a moderately intelligent power of choice, even though the choice is determined by a disordered mind, should be deemed a new and independent, efficient cause of the death that immediately ensues. We are of opinion that the term "rational volition," used in the charge, was understood by the jury to mean volition attended by the powers of reason, to consider and judge of the act in all its relations,—moral as well as physical,—and that the charge was in this respect too favorable to the plaintiff.

The burden of proof was on the plaintiff to show that the death was caused by the collision. All the evidence tended to show that the deceased, with deliberate purpose, planned to take his own life; that he closed the door, and locked it, with a view to exclude others and prevent interruption; and that he then took the napkin, and used it effectively to strangle himself. All this points to an understanding of the physical nature and effect of his act, and to a wilful and intelligent purpose to accomplish it. That he was insane, so as to be free from moral responsibility, is not enough to make the defendant liable. We are unable to discover any evidence that he was acting without volition, under an uncontrollable impulse, or that he did not understand the physical nature of

his act. In the absence of any affirmative evidence for the plaintiff on this point, the jury should have been instructed to render a verdict for the defendant.

In the first case, the exceptions are overruled. In the second case, the exceptions are sustained. So ordered.

C. H. DRUDE

v.

Halsey W. CURTIS.

(183 Mass. 817.)

In case an infant avoids a contract by which he has purchased property from another infant, the purchase price of which has been spent by the latter, he cannot maintain trover as for a conversion of the property, since the defendant has at most been guilty only of a breach of an implied contract to return the purchase money, and this the law permits him, because of his infancy, to avoid.

(May 21, 1908.)

EXCEPTIONS by defendant to rulings of the Superior Court for Hampden County in favor of plaintiff in an action brought to recover damages for the alleged conversion of money. *Sustained.*

The facts are stated in the opinion.

Mr. Charles H. Beckwith, for defendant:

To maintain trover the plaintiff must have the right of property, including the right of possession, at the time of taking, or at the time of suing out the writ.

Wheeler v. Train, 3 Pick. 255.

A contract to which an infant is a party is not thereby rendered void, but only voidable at the election of the infant.

Owen v. Long, 112 Mass. 403; *Reed v. Batchelder*, 1 Met. 559; *Bradford v. French*, 110 Mass. 365; *McCarthy v. Henderson*, 138 Mass. 310.

At the time of suing out the writ the plaintiff did not have the right of property, nor the right of possession of the money.

Spooner v. Holmes, 102 Mass. 503, 3 Am. Rep. 491.

The subsequent avoidance of the contract under which it has been done cannot convert an act of the defendant into a tort.

Bartlett v. Cowles, 15 Gray, 445; *Bartlett v. Drake*, 100 Mass. 175, 97 Am. Dec. 92, 1 Am. Rep. 101; *Fitts v. Hall*, 9 N. H. 441; *Carr v. Clough*, 26 N. H. 280, 50 Am. Dec.

NOTE.—For other phases as to infants' rights and liabilities, see (as to necessity of returning consideration in order to disaffirm contract) *note* to *Englebert v. Pritchett*, 26 L. R. A. 177, and (as to liability for torts) *note* to *Lowery v. Cate*, 57 L. R. A. 678.
62 L. R. A.

345; *Nichol v. Steger*, 6 Lea, 393; *Dill v. Bowen*, 54 Ind. 204; *Corey v. Burton*, 32 Mich. 30; *Boody v. McKenney*, 23 Me. 517; *Mustard v. Wohlford*, 15 Gratt. 329, 76 Am. Dec. 209; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Gilson v. Spear*, 38 Vt. 311, 88 Am. Dec. 659; *Parsons*, Contr. *319, 321, 322; *Story*, Contr. 5th ed. § 107.

To hold the defendant liable in tort in this case is, in effect, merely depriving him of his privilege of avoiding his contractual obligation, and holding him on a contract.

Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; *Jennings v. Rundall*, 8 T. R. 335; *Green v. Greenbank*, 2 Marsh. 485; *Cooley*, Torts, 2d ed. p. 123; *Slayton v. Barry*, 175 Mass. 513, 49 L. R. A. 563, 56 N. E. 574; *Liverpool Adelphi Loan Assn. v. Fairhurst*, 9 Exch. 422; 2 Kent, Com. 241.

Messrs. Webster, Taft, & Tilley, for plaintiff:

If the defendant were an adult there is no doubt that the plaintiff could recover back the money paid by him to the defendant in some form of action.

Morse v. Ely, 154 Mass. 458, 28 N. E. 577; *White v. New Bedford Cotton Waste Corp.* 178 Mass. 20, 59 N. E. 642; *Gillis v. Goodwin*, 180 Mass. 140, 61 N. E. 813.

The neglect of the defendant to return to the plaintiff the money paid to him by the plaintiff was a conversion of that money.

Walker v. Davis, 1 Gray, 506.

When trover is the proper form of action it will lie against a minor.

Homer v. Thwing, 3 Pick. 492.

Hammond, J., delivered the opinion of the court:

Both parties being infants at the time of the contract, either could avoid it without a return of the consideration. But neither could avoid it in part. He must avoid it wholly, if at all. And if the infant, when avoiding the contract, has in his hands any of the specific fruits, the act of avoiding the contract by which he acquired such property will divest him of all right to retain it, and the other party may reclaim it. *Chandler v. Simmons*, 97 Mass. 508, 514, 93 Am. Dec. 117. The plaintiff, who was the buyer, sought first to exercise his right to avoid, and brought this action to recover the money; and, if the defendant also had not been an infant, he would have had no defense, upon the count in contract, because the law would have implied a contract upon his part to refund the money. But the difficulty with the plaintiff's case is that the defendant is meeting the plaintiff with a weapon like that used by him, to wit, avoidance of a contract on the ground of infancy. And while the infancy of the plaintiff is a shield to him, it does not prevent the defend-

ant from relying upon his own infancy in turn as a shield to him. So far as respects the right of the defendant to take advantage of his own infancy, it is immaterial whether the plaintiff be an infant or an adult. Can the plaintiff recover in this action the money paid by him to the defendant? The defendant spent it before the plaintiff avoided the contract. His plea of infancy is a complete defense to the counts in contract. So the court ruled, and we do not understand that the correctness of this ruling is contested by the plaintiff. If at the time the plaintiff elected to avoid the contract the defendant had in his possession the same money which he received from the plaintiff, then, since by reason of the avoidance, the defendant had no right further to hold it, the plaintiff perhaps might have maintained replevin, or, upon proper proceedings taken, have maintained trover as for a subsequent conversion.

The plaintiff contends that trover will lie even if, at the time he avoided the contract, the money had been spent. But one great difficulty upon the facts in this case is to find any conversion, any tortious dealing with the money. There was no tortious act on the part of the defendant in obtaining it. It was paid to him to be held and used by him as his own money, in accordance with the terms of a contract which is not claimed to have had in it any element of fraud. There was nothing tortious in that. Having received it as his own money, he spent it as such, and all this the plaintiff, not yet having avoided the contract, must be held to have expected and consented to. There was, therefore, nothing tortious in any act of the defendant, with reference to the money, before the contract was avoided. Nor has the defendant been guilty of any tortious act since, unless it be his failure to refund an equal sum to the plaintiff, but that failure at the most can be considered only as a breach of an implied contract, and this the law permits him to avoid. To hold that, while for this failure to pay over under these circumstances he cannot be held in contract, but still can be held in tort, is to convert that which arises out of a contract into a tort, and to take away the shield which the law throws around the infant for his protection. Upon this theory money lent to an infant might be recovered. The plaintiff finds himself where anyone is likely to be who places money into the hands of an infant with the right to spend it as his own money, and the right has been exercised. Upon this general subject see *Slayton v. Barry*, 175 Mass. 513, 49 L. R. A. 560, 56 N. E. 574, and cases cited; *Carr v. Olough*, 26 N. H. 280, 59 Am. Dec. 345.

62 L. R. A.

The plaintiff relies upon *Walker v. Davis*, 1 Gray, 506, as decisive in favor of the right to maintain this action, but an examination of the case will show that the ground upon which the decision was based in no way conflicts with the conclusion to which we have come. In that case, which was trover for the conversion of a cow, it appeared that the defendant, an infant, plied the plaintiff, who was an old man, with liquor until he became drunk, and then took advantage of the plaintiff's incompetent condition to trade for a cow. The defendant took the cow, and gave his note in payment. When the note became due, the plaintiff brought a suit upon it, in which the defendant prevailed upon the plea of infancy. The plaintiff then brought the suit in trover. The defense was that the plaintiff had waived the tort, and affirmed the contract, and also that, when the note fell due, the defendant had sold the cow, and parted with all control over her. The court held the action maintainable, disposing of the first ground of the defense by saying that, since the defendant also had avoided the contract, the plaintiff's attempted affirmance did not become operative, and, as to the second ground, that there had been a conversion, and consequently trover would lie. But the conversion relied upon was not the sale of the cow, but the taking at the time of the contract. The contract was voidable by the plaintiff upon the ground of fraud. Upon coming to his senses, the plaintiff might have rescinded the contract, and, without any demand, have brought trover for the cow upon the ground that she had been tortiously taken from him under a fraudulent contract (*Thurston v. Blanchard*, 22 Pick. 18, 33 Am. Dec. 700). And since, at the time of this suit, his right to rescind still existed, the remedy still existed. And the plea of infancy was no defense, because, in the language of Thomas, J.: "The defendant obtained the possession of . . . [the cow] by fraud, a fraud to which infancy would constitute no defense." It is thus seen that the action was sustained upon the ground that the original taking, being fraudulent, was tortious. No question seems to have been made as to whether infancy would have been a defense to such a fraud. The court assumed that it would not be a defense, and, having so assumed, held that the taking of the cow at the time of the contract was tortious. *Walker v. Davis* is therefore no authority for the contention that the subsequent spending of the money by the defendant in this case was tortious.

Receptions sustained.

MINNESOTA SUPREME COURT.

Nesie Margaret McKITTRICK, *Resp't.*,
v.

William F. CAHOON, *Appt.*

(.....Minn.....)

*1. Where, by an order in bastardy proceedings, the putative father of a natural child was required to pay a monthly stipend for its support, and, upon refusal, a final money judgment was obtained for the total amount due, the rights of the person entitled to recover under the order of filiation were merged in the judgment, and the debt evidenced thereby was not excepted from the operation of the bankruptcy act of 1898, § 17 (Act July 1, 1898 [30 Stat. at L. 550, 551, chap. 541, U. S. Comp. Stat. 1901, p. 3428]).

2. Whether such judgment would be excepted from the discharge in bankruptcy by the amendment to subdivision 2 of § 17, bankruptcy act of 1903 (Act Feb. 5, 1903, [32 Stat. at L. 798, chap. 487, § 5]),—*Quære*.

(May 29, 1903.)

A PPEAL by defendant from an order of the District Court for Redwood County refusing to satisfy and discharge a judgment recovered against him in a bastardy proceeding which was alleged to have become of no effect because defendant had been adjudged a bankrupt. *Reversed*.

The facts are stated in the opinion.

Messrs. Bowers & Howard, for appellant:

The judgment is a provable debt, and, hence, released by the discharge.

Brandenburg, Bankr. pp. 265, 279, 579, § 1; *Re VanOrden*, 96 Fed. 86; *Wetmore v. Wetmore*, 149 N. Y. 520, 33 L. R. A. 708, 44 N. E. 169.

Mr. E. E. Mathews, for respondent:

A liability to pay alimony to the wife would not be released by the discharge in bankruptcy.

Re Smith, 1 N. B. N. 471; *Re Anderson*, 21 N. Y. L. J. 1246.

Lovely, J., delivered the opinion of the court:

In 1878 defendant was adjudged to be the putative father of a natural child, and charged with its maintenance until fifteen years of age, to the extent of \$6 per month,

*Headnotes by *LOVELY, J.*

NOTE.—For effect of discharge in bankruptcy on judgment in action for criminal conversation, see, in this series, *Colwell v. Tinker*, 58 L. R. A. 765.

As to effect of discharge on liability for alimony, see *Barclay v. Barclay*, 51 L. R. A. 351, and *Fite v. Fite*, 53 L. R. A. 265. 62 L. R. A.

to be paid to the mother monthly in advance, under §§ 6, 7, chap. 17, Gen. Stat. 1866 (Gen. Stat. 1894, §§ 2044, 2045). No payments were ever made. In 1896 the mother assigned her rights under the order of filiation to plaintiff, and in 1897 the latter commenced an action to recover the money which should have been paid by defendant. Thereafter, and on April 28, 1898, judgment was entered and docketed in plaintiff's favor for \$2,273. On December 30, 1899, defendant was duly adjudged a bankrupt by the United States district court for Minnesota (the judgment having been scheduled), and he was, upon hearing, discharged from all debts and claims provable against his estate which existed on the 10th of March, 1899. After the discharge a motion was made in behalf of defendant, upon the facts stated, in the proper state court, to have the judgment satisfied and discharged of record, under chapter 262, p. 306, Laws 1899, which was denied. From this order, defendant appeals.

The learned trial court was of the opinion that this judgment, upon the grounds of public policy and just necessity, retained all the legal attributes of the original order for maintenance, and therefore was not provable in the bankruptcy court. Undoubtedly the authorities justify the view that an original order for the support of an illegitimate child will not be discharged in bankruptcy proceedings. There are likewise authorities that hold that orders for alimony would not be excepted from a discharge in bankruptcy. *Brandenburg*, Bankr. chap. 4, § 4, notes; *Re Baker*, 96 Fed. 954; *Re Hubbard*, 98 Fed. 710; *Hawes v. Cooksey*, 13 Ohio, 242; *Audubon v. Shufeldt*, 181 U. S. 575, 48 L. ed. 1009, 21 Sup. Ct. Rep. 735. These decisions are placed upon the ground that such claims are uncertain, and of the nature of police regulations, involving the authority of courts to enforce their orders for the protection of public welfare and good government; but the question here is of a different character, and must be controlled by the express terms of the bankruptcy act in force at the time of defendant's discharge. The only exceptions to relief from the obligations of claims as therein recognized were, first, taxes; second, judgments for fraud, false pretenses, wilful and malicious injuries to personal property; third, those not scheduled in time for allowance; and, fourth, results of fraud, embezzlement, misappropriation, or defalcation in office or in a fiduciary capacity. National Bankruptcy Act 1898, § 17 (Act July 1, 1898, [30 Stat. at L. 550, 551, chap. 541, U. S. Comp. Stat. 1901, p. 3428]). It seems very clear that the final judgment in this

case does not fall within either of these exceptions, and it is also equally clear that, by securing the judgment, plaintiff acquired valuable and substantial rights in having it docketed, which would make it a lien upon real estate,—the right to have supplemental proceedings or maintain a creditors' suit, with other privileges incident only to the highest obligation which the law recognizes;—but there are no processes, and there could be none, upon constitutional grounds, in this state, by which a judgment for money only could be enforced by imprisonment, even though the judgment is rendered for amounts due on an order of filiation, which fixes the nature of the obligation without reference to the character of the claim upon which it is founded. After the judgment, obviously, there cannot be two distinct claims; and sound policy has led to the adoption of the rule that, where a precedent liability is made the basis of a final money judgment, the rights of the parties are merged in what the law treats as the higher obligation. Freeman, Judgm. §§ 215-217. In the application of this principle to the question presented here, it must be held that, by obtaining the judgment, the plaintiff elected to stand thereon alone, with all the rights acquired thereby, and subject to all the burdens which insolvency and bankruptcy laws may impose. Therefore the plaintiff, by putting her floating claims into judgment, established a debt of a different nature in material respects, and of a character that

subjects it to bankruptcy supervision. Hence, it is within the authority of Congress alone to give her relief from the discharge it authorizes. *Wolcott v. Hodge*, 15 Gray, 547, 77 Am. Dec. 381; *Manning v. Keyes*, 9 R. I. 224, 11 Am. Rep. 249; *Comstock v. Grout*, 17 Vt. 512; *Re Benedict*, 37 Misc. 230, 75 N. Y. Supp. 165. The liability of the debtor is affected by his judgment, and, while the bankruptcy law might except a judgment rendered for maintenance, as it has for fraud in certain cases, it is sufficient for the disposition of this case to say that at the time of defendant's discharge it had not done so.

In 1903 Congress amended § 17 of the bankruptcy act by adding to subdivision 2, as it then read, a provision also excepting claims for "debts for alimony due or to become due for the maintenance of wife or child." Act February 5, 1903, (32 Stat. at L. 798, chap. 487, § 5). Whether this amendment would apply to a judgment based on the nature of plaintiff's original claims, we are not required to determine, for the discharge relied upon here was obtained before the amendment; and, while we recognize the high moral obligation and duty of the father to fulfil his natural duties to support his offspring which may have been recognized by Congress in this amendment, we are unable to agree with the learned trial court that the final judgment upon which plaintiff relies was not extinguished by the debtor's discharge in the bankruptcy court.

Order reversed and case remanded.

KANSAS SUPREME COURT.

Herbert F. HALL *et al.*, *Plffs. in Err.*,
v.

L. F. KELLER *et al.*

(64 Kan. 211.)

*A consignor of grain which was delivered to a railway company for shipment drew a draft on the consignees, and attached thereto bills of lading issued to him by the carrier. The draft was indorsed and delivered by the payees, together with the bills of lading, to a bank, which paid to them the amount of it. The drawees accepted and paid the draft. Held, that neither the bank nor the payees were liable to the consignees of the grain (the drawees) for a failure of title in the drawer of the draft to the property shipped.

(January 11, 1902.)

*Headnote by SMITH, J.

NOTE.—As to rights and liabilities of assignee of bill of lading with draft attached as against consignee, see also, in this series, *Finch v. Gregg*, 49 L. R. A. 679, and *note*; also *Tolerton & S. Co. v. Anglo-California Bank*, 50 L. R. A. 777.
62 L. R. A.

ERROR to the District Court for Marion County to review a judgment in favor of defendants in an action brought to recover damages for failure of title to property covered by bills of lading attached to drafts which had been paid by plaintiffs. *Affirmed.*

The facts are stated in the opinion.

Messrs. R. L. King, Thomas O. Kelley, and Karnes, New, Hall, & Krauthoff, for plaintiffs in error:

Consignees are entitled to recover the money paid on a draft drawn upon them by consignors, upon a failure of title in consignors to the goods.

Landa v. Lattin Bros. 19 Tex. Civ. App. 246, 46 S. W. 48; *Finch v. Gregg*, 126 N. C. 176, 49 L. R. A. 679, 35 S. E. 251.

Messrs. Keller & Dean for defendants in error.

Smith, J., delivered the opinion of the court:

This was an action brought by the firm of

Hall & Robinson against Keller & Dean and the First National Bank of Marion to recover the sum of \$666 and interest. The facts in the case may be stated briefly: Keller & Dean, a firm of lawyers in Marion, brought several actions for different clients against a farmer in Marion county, and levied writs of attachment on about 2,000 bushels of corn. The writs were served by one Jacob Konrath, a constable. While he had the corn in his possession it was agreed between the parties to the actions that it should be shipped to Kansas City, in order to obtain the highest market price. Konrath loaded the grain on cars of the Chicago, Rock Island, & Pacific Railway Company, and consigned it to the order of himself at Kansas City, and took a bill of lading for each car (four in number). On the following day he drew a sight draft on Hall & Robinson, grain dealers in Kansas City, as follows:

First National Bank of Marion,
Marion, Kan., Aug. 28th, 1890.

At sight pay to the order of Keller & Dean seven hundred sixteen & no/100 dollars, value received, and charge to the account of Jacob Konrath.

To Hall & Robinson,
Kansas City, Mo.

This draft was indorsed thus: "Pay to First National Bank of Marion, or order. Keller & Dean." The amount of the draft (\$716) was credited to Keller & Dean on the books of the bank. The draft, with bills of lading attached, was then forwarded by the First National Bank of Marion to the American National Bank at Kansas City, indorsed by the former for collection. Upon its arrival there, Hall & Robinson accepted it for the sum of \$666 only, notifying the drawer (Konrath). This change of amount was not objected to by the drawer or indorsers, and, for the purposes of this case, the draft, may be treated as having been drawn for \$666 in the first instance. The above amount was collected by the American National Bank from Hall & Robinson, and remitted to the First National Bank of Marion. On the day the corn was shipped, Konrath wrote a letter to plaintiffs in error, as follows:

Lehigh, Kans., Aug. 28th, 1890.
Hall & Robinson,

Kansas City, Mo.
Gentlemen:—

I have shipped you to-day four cars corn containing 2,108 bus. of corn. Have drawn on you \$716.00, which you will please honor
62 L. R. A.

when presented. Sell it for the best you can, and make return to me at Lehigh, Ka.

Yours truly
Jacob Konrath.

Corn is billed to my name. I indorse bill of lading.

The corn covered by bills of lading never reached Kansas City. It was replevied, and taken from the possession of the carrier by another bank under a paramount lien. It appears that the bills of lading were indorsed in blank by Jacob Konrath, the shipper. There was a judgment entered against the plaintiffs below for costs, and they have prosecuted error here.

The determining question in the case is whether Keller & Dean and the First National Bank of Marion, under the facts stated, became liable to the plaintiffs in error for a failure of title in the property shipped. There are two decisions called to our attention which hold that a bank, by its act of cashing a draft payable to its order, with bills of lading attached, becomes the owner of the property, and undertakes to carry out the contract made by the drawer (the shipper) with the drawee (the consignee). *Landa v. Lattin Bros.* 19 Tex. Civ. App. 246, 46 S. W. 48; *Finch v. Gregg*, 126 N. C. 176, 49 L. R. A. 679, 35 S. E. 251. In both of these cases grain covered by the bills of lading attached to the drafts which the banks cashed was of inferior quality, and the banks were held liable to the consignees and acceptors of the drafts, after the same had been paid, for the difference in value between the good quality of grain which the consignor agreed to ship and the bad quality actually received. We are not favorably impressed with the logic of the opinions in these cases. We think their weakness lies in the fact that the banks are treated as purchasers of the grain. This could not be true, for the property shipped had already been sold to the consignees, the acceptors of the drafts, and the legal effect of the acceptance of such negotiable paper in the hands of an indorsee for value at the time seems to have been overlooked. The right to the price only was, in our judgment, transferred to the bank in the present case, and it held possession of the corn as security for the money it had advanced. *Tolerton & S. Co. v. Anglo-California Bank*, 112 Iowa, 706, 50 L. R. A. 777, 84 N. W. 930. See also *Halsey v. Warden*, 25 Kan. 128. The doctrine of the Texas and North Carolina cases is shown in the Iowa case cited to be unsound in principle. The court said: "The two cases cited [referring to those above mentioned] stand alone in holding the pur-

chaser of a draft with the bill of lading attached liable on a warranty made by the assignor, and the line of reasoning pursued to reach this conclusion is so at variance with well-established elementary principles of law that we decline to accept the rule they announce." In the case from which we have quoted the rule of the law of commercial paper is applied to the effect that after the holder of a negotiable draft with bill of lading attached has secured an acceptance of such draft by the drawee and consignee, he cannot be affected by any equities existing between such consignee and the seller of the goods. *Arpin v. Owens*, 140 Mass. 144, 3 N. E. 25. In an exhaustive note to the case of *Finch v. Gregg*, 49 L. R. A., at pages 679-683, the annotator cites and comments on a large number of well-considered cases which uphold the doctrine of the Iowa decision above referred to, and in conclusion says: "From these cases, all of which hold that after a draft attached to a bill of lading is accepted the consignee becomes absolutely liable on the acceptance, and that, after payment thereon is made, he cannot recover it back, notwithstanding any failure of consideration between him and the drawer, it would seem that the decisions in the main case, and in *Landa v. Lattin Bros.* 19 Tex. Civ. App. 246, 46 S. W. 48, were based on a wrong principle, and that, if the right principle had been considered, the decisions must have been different." To fix a liability upon the bank or upon Keller & Dean under the circumstances of the present case would not only violate well-settled rules of the law governing commercial paper, but would also tend to decrease the immense volume of business which is carried on by shippers of stock, grain, and other commodities by restricting that freedom with which banks advance money to the drawers of such drafts with bills of lading attached. If banks in whose favor such bills are drawn are made liable for damage on account of the defective quality of the property shipped and covered by the bill of lading, or for failure of title in the drawer of the draft, a serious impediment would be placed in the way of shippers who need a part or all of the price of the commodity sold before its arrival in the market to which it is consigned. To hold with the plaintiff in error would, to use the language of the author of the note in *Finch v. Gregg*, 49 L. R. A. 679, "undoubtedly cause a revolution in commercial circles."

The judgment of the court below will be affirmed.

All the Justices concur.
62 L. R. A.

T. W. HARRISON, *Plff. in Err.*,
v.

Harvey HENDERSON, Admr., etc., of Samantha Johnson, Deceased.

(.....Kan.....)

- *1. An accord and satisfaction is the adjustment of a disagreement as to what is due from one party to another, and the payment of the amount so agreed upon.
2. The mere payment by a debtor of an amount denominated "a balance" upon an account rendered, and its retention by the creditor, do not constitute an accord and satisfaction.
3. To constitute such payment an accord and satisfaction, it must have been offered as full satisfaction of a claim, and accompanied by such declarations or under such circumstances as would amount to a condition that, if accepted by the creditor, it would be in full satisfaction of the debt.

(June 6, 1903.)

ERROR to the District Court for Shawnee County to review a judgment in favor of plaintiff in an action brought to recover a balance alleged to be due on account. *Affirmed.*

Statement by CUNNINGHAM, J.:

Henderson was a resident of Pittsburg, Pennsylvania, and was appointed administrator of the estate of Samantha Johnson, deceased, by the court there. As such administrator, he had for collection two notes secured by mortgages in Topeka. He employed Harrison, who is an attorney residing in Topeka, for the purpose of collecting these notes by foreclosure. The account growing out of that relationship continued from May, 1894, until March, 1898, during which time the administrator remitted various sums of money to apply on fees and expenses, and Harrison made collections, so that altogether there came to his hands \$1,210. He expended various sums in payment of taxes, etc., and on March 10, 1898, made a statement to Henderson of the account embracing these expenditures and charges for attorneys' fees, in the total sum, as then claimed by him, of \$739.20, and on that date, as shown by this account, struck a balance of \$470.30, and remitted the same

*Headnotes by CUNNINGHAM, J.

NOTE.—For other cases in this series as to accord and satisfaction by part payment, see *Fuller v. Kemp*, 20 L. R. A. 785, and note; *Tanner v. Merrill*, 31 L. R. A. 171; *Clayton v. Clark*, 37 L. R. A. 771; and *Chicora Fertilizer Co. v. Duman*, 50 L. R. A. 401.

by draft. This draft was drawn to Harrison's order, and indorsed by him, "Pay Harvey Henderson, Administrator estate of Samantha Johnson, dec'd. bal.," and sent to Henderson, accompanied by a letter in which he said: "I enclose you statement in the Samantha Johnson estate matters and draft on N. Y. for balance of \$470.30 on that matter." This draft Henderson collected, but, refusing to consider it as a payment in full, he, in September, 1899, brought this action upon account for monies had and received, giving therein credit for the expenditures,—\$125 as attorneys' fees and the amount of the remittance,—and prayed judgment for a balance of \$366. Harrison answered, setting up the facts relative to the remittance as hereinbefore mentioned, and pleaded the same as an accord and satisfaction. Plaintiff replied, admitting the receipt of the statement, but denied the correctness of the account as pleaded by the defendant. The matter was referred by consent to Hon. J. D. McFarland to report upon the facts and the law. Upon the hearing before the referee, the entire matter as to the correctness of the charges made by the defendant Harrison for his services as attorney was gone into, and evidence heard pro and con. The referee reported that the charges as made by him were excessive, and that he owed to the plaintiff the sum of \$235, with interest from September 9, 1898, and, as a conclusion of law, that "the retention and collection of the draft for \$470.30 sent by the defendant to the plaintiff March 10th, 1898, together with the letter and statement therewith, was not under the facts of this case an accord and satisfaction, or the settlement of the matters between plaintiff and defendant mentioned in said statement, and does not bar the plaintiff from recovering any sum that otherwise would be due him on account of said matters," and, further, that he recover said sum of \$235, found due. This report of the referee was confirmed by the district court over the objections of the defendant, and judgment rendered thereon against defendant, who is now here seeking a reversal of the same.

Messrs. T. W. Harrison, R. B. Welch, and D. T. Gregg, for plaintiff in error:

In case of a liquidated and settled claim the tender of less than the amount in satisfaction of a claim does not preclude the holder from maintaining an action for the remainder of the claim. But in case of an open, unliquidated account, where a party makes an offer of a certain sum in satisfaction or in full of a balance, if the other party receives the money he takes it con-

plied with the condition the first party has attached to it, and is bound by it.

McDaniels v. Lapham, 21 Vt. 235; *Keck v. Hotel Owners' Mut. F. Ins. Co.* 89 Iowa, 200, 56 N. W. 438; *Nossoiy v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715; *Fuller v. Kemp*, 138 N. Y. 231, 20 L. R. A. 785, 33 N. E. 1034; *Reynolds v. Empire Lumber Co.* 85 Hun, 470, 33 N. Y. Supp. 111; *Hills v. Somner*, 53 Hun, 392, 6 N. Y. Supp. 469; *Potter v. Douglass*, 44 Conn. 544.

The law favors the adjustment of such controversy without judicial intervention, and will not permit a creditor to accept and retain money which has been tendered in full, and then successfully litigate with his debtor for the recovery of a larger sum.

Preston v. Grant, 34 Vt. 201; *Towslee v. Healey*, 39 Vt. 522; *Boston Rubber Co. v. Peerless Wringer Co.* 58 Vt. 551, 5 Atl. 407; *McDaniels v. Lapham*, 21 Vt. 222; *Bull v. Bull*, 43 Conn. 455; *Potter v. Douglass*, 44 Conn. 544; *Reed v. Boardman*, 20 Pick. 441; *Donohue v. Woodbury*, 6 Cush. 148, 52 Am. Dec. 777; *Hilliard v. Noyes*, 58 N. H. 312; *Brick v. Plymouth County*, 63 Iowa, 462, 19 N. W. 304; *Hinkle v. Minneapolis & St. L. R. Co.* 31 Minn. 434, 18 N. W. 275; *McGlynn v. Billings*, 16 Vt. 330; *Cole v. Champlain Transp. Co.* 26 Vt. 87; *McDaniels v. Bank of Rutland*, 29 Vt. 230, 70 Am. Dec. 406; *Schuyler v. Ross*, 37 N. Y. S. R. 805, 13 N. Y. Supp. 944; *Deutmann v. Kilpatrick*, 46 Mo. App. 624; 1 Am. & Eng. Enc. Law, p. 422; *Washington Natural Gas Co. v. Johnson*, 123 Pa. 593, 16 Atl. 799; *Christman v. Martin*, 7 Pa. Super. Ct. 573. **Messrs. A. F. Williams and Eugene Hagan** for defendant in error.

Cunningham, J., delivered the opinion of the court:

There are two questions raised by the plaintiff in error: (1) One upon the facts, it being claimed that the report of the referee and judgment of the district court upon the facts is not binding upon this court, and that, as all of the evidence introduced before the referee is in the record here, we may look into it as though we were trying the case *de novo*, and that upon doing so we will come to a conclusion other and different than did the referee and trial court. Granting that the findings of the referee and their approval by the district court are not binding here, we have looked into the evidence enough to enable us to conclude that the findings are fully warranted thereby, and are such as meet with our approval. (2) The main contention in the case is that there was an accord upon, and a satisfaction of, the demands arising between the parties in this case. That, inasmuch as the account submitted on the 10th day of March, 1898,

struck what was denominated therein as a "balance," and as the indorsement upon the draft indicated that it was for such balance, and as the letter accompanying the same contained the suggestion that a balance was therein remitted, as a matter of law Henderson could not accept such draft under these circumstances and afterwards claim a further payment.

An accord is an agreement, an adjustment, a settlement of former difficulty, and presupposes a difference, a disagreement, as to what is right. A satisfaction, in its legal significance in this connection, is a performance of the terms of the accord. If such terms required a payment of a sum of money, then that such payment has been made.

In this case there is no evidence of any disagreement between the parties prior to the sending of the account and remittance accompanying it. Plaintiff in error contends, however, that, because such remittance was denominated "a balance," its acceptance constituted an accord and satisfaction, and cites a number of authorities where courts have held that a remittance made as a balance, and the acceptance of the same, amounted to an accord and satisfaction. These cases have all been carefully examined, and in every one there appears to have been a prior disagreement, a contention as to what amount was due, so that a remittance, being denominated a balance, carried with it to the creditor, as a fair conclusion, that it was intended by the debtor to be in full of all demands. Without the requirement being made by the debtor that, if the creditor accepts and retains the proffered amount, he must do so in full satisfaction of his demand, or without accompanying and surrounding circumstances fairly indicating that such was the purpose and object of the debtor in making the remittance, a creditor cannot be said to have so accepted a payment. To constitute an accord and satisfaction in law, dependent upon the offer of the payment of money, it is necessary that the money should be offered in full satisfaction of the demand or claim of the creditor, and be accompanied by such acts or declarations as amount to a condition that, if the money is accepted, it is to be in full satisfaction, and be of such a character as that the creditor is bound to so understand such offer.

In *Kingsville Preserving Co. v. Frank*, 87 Ill. App. 586, it is held: "To constitute an accord and satisfaction of a claim unliquidated and in dispute, it is necessary that the money should be offered in satisfaction of the claim and the offer accompanied with such acts and declarations as amount to a condition that, if the money is

accepted, it is to be in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such condition."

In *Pottlitzer v. Wesson*, 8 Ind. App. 472, 35 N. E. 1030, a debtor sent his check in payment of an account. It was held that this did not necessarily imply that if the creditors accepted the check they must have understood that their accepting it was in full of their claim, hence there was no accord and satisfaction thereby shown.

In *Perkins v. Headley*, 49 Mo. App. 556, it was held: "Where a controversy as to the amount of the indebtedness exists between a creditor and his debtor, and the debtor tenders to the creditor the amount which he claims is due, on condition that the acceptance of it should discharge the entire demand, the acceptance will constitute an accord and satisfaction as a matter of law, since one who accepts a conditional tender assents to the condition." But it was held in this case "that the mere fact that the plaintiff received from the defendants less than the amount of his claim, in silence, and with knowledge that the defendants claimed to be indebted to him only to the extent of the payment made, did not conclusively and as matter of law establish an accord and satisfaction."

In *Beckman v. Birchard*, 48 Neb. 805, 67 N. W. 784, where a payment of money was made as a balance due, and the claim made that this was an accord and satisfaction, it was held: "A creditor who accepts money tendered by the debtor unconditionally does not by that act estop himself from maintaining an action to recover any further sum that may be due."

In *Kruger v. Geer*, 26 Misc. 772, 56 N. Y. Supp. 1015, an attorney wrote to his client: "Inclosed you will find a statement of account, my receipted bill for professional services since our last statement, and a check for \$166.86, being the balance due you." No other indication being found that this was intended as full settlement, the court held "that the fact that plaintiff retained the check and receipted statement, where the check contained no condition that it should be received in full payment, is insufficient to show an accord and satisfaction."

It was ruled in *Brigham v. Dana*, 29 Vt. 1: "A sum of money paid and received will not operate as a full settlement, although the payer so intended it, and would not have paid it if he had not understood that such would be its effect, but in reference to which he made no such express condition, if the payee did not so understand it, and

would not have received it upon such an understanding." See also 1 Cyc. Law & Proc. 332.

An accord and satisfaction is the result of an agreement between the parties, and, like all other agreements, must be consummated by a meeting of the minds of the parties, accompanied by a sufficient consideration. If the creditor is to be held to abate his claim against the debtor, it must be shown that he understood that he was doing so when he received the claimed consideration therefor. A simple tender of a balance, as shown by an account tendered by the debtor, does not carry with it an implication or conclusion that by such tender the debtor paid, or that the creditor agreed to receive, the same in full of the amount due, where there had been no prior disagreement or discussion as to what was actually due. Surely it cannot be claimed that such was the condition in the case at bar. It was shown in the evidence that the administrator had no knowledge of fees properly chargeable by attorneys in this state for services rendered, or that he even knew of the character and extent of the services which had been rendered. The sender of the check did not require its acceptance in full of all demands upon him as a condition precedent to its acceptance. The circumstances better warrant the conclusion that the sender was saying, "In my judgment these fees

charged are correct, and a proper remuneration for the services which I have rendered, and, in accordance with this view, the amount sent you is the balance that is due. If, however, after you have investigated, you do not so conclude, we will hereafter have an adjustment of any difference that may then arise," rather than, "I will give you no opportunity whatever to inquire as to the correctness of the charges I have made, and, if you accept the draft, it must foreclose all question." The former view is most just to the plaintiff in error, and it is the position that an honorable and fair-minded attorney would take. Under our statute, he at best was only entitled to a lien upon the moneys which had come into his hands, by virtue of his employment, to secure his properly charged fees. It was his duty to at once remit all such moneys, less only such properly charged fees,—if, indeed, we may make this concession. He could not be permitted to charge extortionate fees, remit the balance as per his conclusion, and estop his client thereby. We are fully persuaded in this case there was no accord and satisfaction, and that the defendant in error is entitled to recover the amount found due by the referee.

The judgment of the District Court will be affirmed.

All the Justices concur.

WASHINGTON SUPREME COURT.

WEST COAST MANUFACTURING & INVESTMENT COMPANY, *Appt.*,

v.

WEST COAST IMPROVEMENT COMPANY, *Respnt.*

(25 Wash. 627.)

1. An appeal and supersedeas bond in the sum of \$250 is sufficient, in case of an appeal from a judgment dismissing the action with \$10 costs, under a statute requiring the penalty of an appeal bond to be

not less than \$200, and, "In order to effect a stay of proceedings where the appeal is from a final judgment for the recovery of money, it shall be in a penalty double the amount of damages and costs recovered in such judgment."

2. An allegation of defendant's claim as to the extent of its ownership is immaterial, in an action for breach of a plainly written covenant of warranty in a deed of real estate, and is properly stricken out of the complaint.

3. A general covenant of warranty in

NOTE.—How far is tide land within protection of covenants in deed?

WEST COAST MANUFACTURING & INVESTMENT CO. V. WEST COAST IMPROVEMENT CO., in so far as it deals with the effect of a covenant of warranty upon tide land which is plainly covered by the deed, but the title to which is notoriously in the state, presents a question upon which very few decisions throw any light. The Maine court has held that "flats are a peculiar property," and "covenants in a deed conveying them are restricted to their peculiarity." A judgment declaring erections thereon a nuisance will not evict the grantee of the flats themselves, and until eviction, there can be no

breach of the covenant of warranty in his grant. *Montgomery v. Reed*, 69 Me. 510.

In *Cooper v. Bloodgood*, 32 N. J. Eq. 209, the query is suggested, whether or not a riparian owner who, in conveying his property, includes the land between high and low water mark, to which he has no title, will, in the absence of an express warranty to that effect, be held by the usual covenants to have warranted against the notorious, paramount, and sovereign title of the state to such land under water.

That the state takes possession of and uses land below the line of low tide does not constitute a breach of a general covenant of warranty of title by the grantor of lots situated on the shore, although the conveyance was

a deed of a tract of land will extend to tide lands visibly within the limits of the grant, the paramount title to which at the time of the grant is in the state, and the insertion of the words "together with the littoral, riparian, and shore rights" and "the tenements, hereditaments, and appurtenances thereunto belonging," does not refer to such rights merely as pertain to the upland.

4. The insertion in a deed of a tract of land which includes within its limits tide lands belonging to the state, of the clause, "and also the estate, right, title, and interest at law and in equity therein and thereto," does not restrict the covenant of warranty to the right, title, and interest which the grantor actually has.
5. The state is within the terms of a warranty of the title to real estate against "all persons whatsoever."
6. An eviction constituting a breach of warranty of title to real estate is effected by the assertion of paramount title by the state, which the covenantee is compelled to purchase to save improvements which he has placed on the land.
7. The statute of limitations does not begin to run against an action for breach of a covenant to warrant and defend the title to real estate until an eviction occurs

(August 27, 1901.)

APPPEAL by plaintiff from a judgment of the Superior Court for King County in favor of defendant in an action brought to recover damages for breach of warranty in a deed of real estate. *Reversed.*

The facts are stated in the opinion.

Mr. James Kiefer, for appellant:

Although the outstanding paramount title may rest in the state or in the United States, the grantor who warrants

his title generally is liable upon his covenants of warranty.

McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456; *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360; *Herrington v. Clark*, 56 Kan. 644, 44 Pac. 624; *Kansas P. R. Co. v. Dunmeyer*, 19 Kan. 539; 8 Am. & Eng. Enc. Law, 2d ed. pp. 110, 111, 116. *Meservey v. Snell*, 94 Iowa, 222, 62 N. W. 767.

Knowledge by the grantee of an existing encumbrance upon, or defect in, the title about to be conveyed by the grantor does not take away his right of recovery for a breach of warranty by reason of such encumbrance or defect.

Demars v. Koehler, 62 N. J. L. 203, 41 Atl. 720; *Smith v. Lloyd*, 29 Mich. 382; *Godwin v. Maxwell*, 106 Ga. 194, 32 S. E. 114; *Weiss v. Binnian*, 178 Ill. 241, 52 N. E. 969; *Teague v. Whaley*, 20 Ind. App. 26, 50 N. E. 41; *Yancey v. Tatlock*, 93 Iowa, 386, 61 N. W. 997; *Copeland v. McDory*, 100 Ala. 553, 13 So. 545; *Shaw v. Bisbee*, 83 Me. 400, 22 Atl. 361.

The action was brought in due season after the payment of money to extinguish the encumbrance.

Post v. Campau, 42 Mich. 90, 3 N. W. 272.

The covenant of warranty contained in the deed in question is a covenant for quiet enjoyment.

Rawle, Covenants for Title, § 114; *Atrens v. Nale*, 25 Ill. 198; *Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385; *Reed v. Hatch*, 55 N. H. 336; *Peck v. Houghtaling*, 35 Mich. 127.

The purchase of paramount title, if it be

made before the admission of the territory as a state, and at a time when shore owners were given certain privileges beyond the shore line, and by usage might extend manufacturing establishments to navigable depth, for which purpose the property was purchased. *Feurer v. Stewart*, 83 Fed. 793.

Land under tide water owned by the state is within the terms of an agreement of partition by which the parties, in dividing a tract of which the tide land is parcel, agreed that, if either of the parties should be dispossessed of any portion of the tract conveyed to it, or should be put to any cost or expense in defending its title or in extinguishing any outstanding title or claim, the other party should bear its proportion of the loss or expense. *United New Jersey R. & Canal Co. v. Long Dock Co.* 38 N. J. Eq. 142.

And it has been held in South Carolina that the fact that the title to the bed is in the state does not entitle the purchaser to a rebate from the purchase price. *Shands v. Triplet*, 5 Rich. Eq. 76.

Upon a similar principle, the Minnesota court has held that, since the title to the soil under the water below the low-water mark in our navigable lakes is in the state, the deed of the owner of the abutting shore, purporting to convey only the soil under the water below the 62 L. R. A.

low-water mark, is inoperative. *Lake Superior Land Co. v. Emerson*, 38 Minn. 406, 38 N. W. 200.

The owner mortgaged land adjacent to tide land, including an improvement which extended over on the tide land, and afterwards filed an application to purchase the tide land. Upon the foreclosure of the mortgage there was a deficiency judgment upon which execution was issued against mortgagor's interest in the tide land. Subsequently this interest was assigned to a third party, who procured a conveyance in fee from the state of the tide lands, and, in an action by him to remove the cloud from his title created by the execution, the court granted a decree restraining the mortgagee from the collection of its judgment out of such land. It was held that such decree was a bar to a suit by the mortgagee to have the assignee's title declared invalid. *Union Sav. & Loan Assn. v. Byrne*, 52 C. C. A. 465, 114 Fed. 831.

Under a grant of a right of way for a railroad, describing the land as extending from the harbor on the west to the land of another on the east, and referring to a map of the railroad as located, which continues the road westerly across the harbor of the same width as on the grantor's land, and across which the railroad company had constructed a bridge under

paramount title, amounts in law to an eviction.

Rawle, Covenants for Title, §§ 119, 142-146; *Whitney v. Dinamore*, 6 Cush. 124; *Brown v. Dickerson*, 12 Pa. 372; *Loomis v. Bedel*, 11 N. H. 74.

Messrs. Piles, Donworth, & Howe, for respondent:

Where the bond is both an appeal and a supersedeas bond, the \$200 fixed as the penal sum of an appeal bond must be added to the sum fixed by the statute as the penal sum of a supersedeas bond, and it inevitably follows that a bond conditioned both as an appeal and supersedeas must be in the penal sum of at least \$400.

Galloway v. Tjossem, 22 Wash. 103, 60 Pac. 129; *Beezley v. Sessions*, 22 Wash. 125, 60 Pac. 130; *Pierce v. Willeby*, 20 Wash. 129, 54 Pac. 999; *Sumner v. Rogers*, 21 Wash. 361, 58 Pac. 214.

The only reasonable construction to be given to the deed, in light of the facts, is that respondent warranted its title to the upland, and warranted against any littoral, riparian, or shore rights on the tide-land area existing in any other person or corporation, and also passed to appellant, its grantee, all of respondent's estate, right, title, and interest in and to the shore.

Feurer v. Stewart, 83 Fed. 793; *Barre v. Fleming*, 29 W. Va. 134, 1 S. E. 731; *Ake v. Mason*, 101 Pa. 17; *Holmes v. Danforth*, 83 Me. 139, 21 Atl. 845; *Kutz v. MoCune*, 22 Wis. 628, 99 Am. Dec. 85; *Montgomery v. Reed*, 69 Me. 510; *James v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300; *Rawle, Covenants for Title*, 5th ed. § 85; *McBride v. Pierce County*, 44 Fed. 17; *Re Foa*, 52 N. Y. 536,

11 Am. Rep. 751; *United States v. Foa*, 94 U. S. 315, 24 L. ed. 192.

Even at the time of the execution of the deed on August 13, 1890, the tide lands in controversy must have been owned by the state, and, as a matter of law, of which both parties are chargeable with notice, the title of the tide lands could not have left the state at that time or at any earlier date.

Eisenbach v. Hatfield, 2 Wash. 236, 12 L. R. A. 632, 26 Pac. 539.

White, J., delivered the opinion of the court:

Respondent moves to dismiss this appeal for the reason that no appeal bond has been executed or filed as required by the statute. The judgment appealed from was entered pursuant to an order sustaining the respondent's demurrer to appellant's complaint, appellant having elected to stand on its complaint, and the action having been accordingly dismissed on the merits. The judgment is that the plaintiff take nothing by the action, and that the defendant recover of the plaintiff its costs and disbursements to be taxed. From the recitals in the judgment it may be conceded that it is a final judgment on the merits. The record shows that the amount of the costs and disbursements taxed is \$10. The judgment of dismissal, and the amount of costs taxed, are set forth in the recitals of the bond. The penalty of the bond is in the sum of \$250. The condition of the bond is to the effect that the appellant will pay all costs and damages that may be awarded against it on the appeal or on the dismissal thereof, not exceeding \$200, and will pay and satisfy and per-

legislative authority, it was held that the right of way extended across the flats lying between high and low water mark. *Lockwood v. New York & N. H. R. Co.* 37 Conn. 387.

A grant to persons in possession of upland of land under the adjoining water, with the proviso that, if at any time hereafter it shall appear that the grantees at the date of the conveyance were not seised of an estate in fee simple of the premises adjoining, then and in every such case the grant should be void, creates a condition subsequent, so that a re-entry is necessary to divest the title. *Towle v. Remsen*, 70 N. Y. 303.

A grantee cannot rely upon a supposed title in the state to a dock to give him a greater right therein than he obtains under his grant, wherein he had acknowledged the dock to be private property owned by his grantor. *Hardy v. McCullough*, 28 Gratt. 251.

From the peculiar nature of the tide land, and the fact that in most cases it can only be used in connection with the upland, so that a deed of upland which includes it may in many cases be regarded as merely a release of the right of the grantor to use it, the question whether failure of title constitutes a breach of warranty would seem to depend largely on the intention of the parties. If the vendor ex-

pressly assumes to convey the tide land, and receives pay for it, he should refund the money if the title fails; whereas, if the purchaser pays what he considers the land worth to him in view of the uncertainty of the use to which he will be permitted to put it, he should not, after taking the risk, be permitted to shift the loss upon the vendor. Furthermore, it would seem that, in all cases where the title to the soil under the water is notoriously in the state, the purchaser must be presumed, as matter of law, to have bargained for the title in the condition which he knows it to be, and that, after he has fallen in his speculation, he cannot require the vendor to recoup him for his loss. In Washington there has been some uncertainty as to the title to the seashore, and it may be that many of the deeds there were given on the assumption that the vendor had a right to grant title to the tide land. And that the assertion of title in the state by the Constitution was a surprise to the vendor as well as to the vendee. Under such circumstances, the vendor, having received the full price for his land under the belief that he had a right to sell it, should, in justice and fairness, be required to return so much of the purchase money as represents the land to which the title failed.

form the judgment appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render or make, or order to be rendered or made by the superior court from which the appeal is taken. The respondent contends that, inasmuch as the bond is both an appeal and supersedeas bond, the penalty, under § 6506, Ballinger's Anno. Codes & Statutes, should be in the sum of at least \$400. Under § 6506, *supra*, the penalty of an appeal bond shall not be less than \$200, and, in order to effect a stay of proceedings, where the appeal is from a final judgment for the recovery of money, it shall be in a penalty double the amount of the damages and costs recovered in such judgment; in other cases it shall not be less than \$200, and sufficient to save the respondent harmless from damages by reason of the appeal, as the judge of the superior court shall prescribe. While the judgment appealed from was a judgment for costs, it was as much a judgment for money as if it had been for a principal sum and costs. The statute is clear, and there is no room for construction. It means just what it says, *viz.*, that all final judgments for money may be superseded on appeal by a bond for double the amount of such judgment. Here there is a judgment for \$10, and a bond in the penal sum of \$250. A bond for \$220 would have been sufficient, and a literal compliance with the statute. The fact that it is more than the exact sum cannot militate against the appellant. The purpose of a supersedeas bond is to protect the respondent in the collection of his judgment and in the enforcement of the relief awarded him by the judgment. All the respondent could obtain by this judgment was the sum of \$10. Upon the payment of this amount, the respondent was bound to fully satisfy and discharge the judgment upon the records of the court. The bond in this case is more than double the amount of the money judgment appealed, and \$200 additional, as required by law. Under the conditions of the bond, the respondent was fully secured in the amount recovered by it in the judgment, as well as for costs and damages up to \$200 on appeal. The motion to dismiss the appeal is therefore denied.

The complaint in this action, omitting formal allegations, is substantially as follows: "Second. That on or about the 22d day of October, 1889, the plaintiff purchased from the defendant a certain tract of land, situated in Ballard, King county, Washington, and paid part of the purchase money expressed in the deed hereinafter mentioned, and thereafter, on the 13th day of August, 1890, upon payment by the plaintiff of the balance of the cash consideration for said purchase, the defendant, by its officers there-

unto duly authorized, made, executed, and delivered to the plaintiff its certain deed to said premises, in the words and figures following, to wit: 'This indenture, made the 13th day of August, 1890, between the West Coast Improvement Company, a corporation duly incorporated, organized, and existing under and by virtue of the laws of the state of Washington, the party of the first part, and the West Coast Manufacturing & Investment Company, of Ballard, Washington, also a corporation, the party of the second part, witnesseth: That the said party of the first part, for and in consideration of seven hundred and fifty dollars, to it paid by the said party of the second part, does hereby grant, bargain, sell, and convey to said party of the second part, and to its successors and assigns, forever, the following described tracts or parcels of real estate, lying and being in the county of King, state of Washington, and particularly bounded and described as follows, to wit: Beginning at the corner of sections 11, 12, 13, and 14, township 25 north, range 3 east; thence north on the line between sections 11 and 12, 62.7 feet to the southerly margin of Shilshole avenue; thence north, 66 deg. 18' west, along said marginal line, 252 feet, to the easternmost corner of the tract described as follows: From its easternmost corner run thence S., 23 deg. 42' west, 330 feet; thence N., 66 deg. 18' west, 250 feet; thence N., 23 deg. 42' E., 330 feet, to the southerly line of Shilshole avenue; thence S., 66 deg. 18' E., along said marginal line, 250 feet, to the place of beginning,—together with all the littoral, riparian, and shore rights thereunto belonging or in any wise appertaining,'—together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and also all the estate, right, title, and interest at law and in equity therein or thereto, to have and to hold the said premises to the said party of the second part, and to his successors and assigns, forever. And the said party of the first part does covenant with the said party of the second part and its legal representatives, forever, that the said premises are free from all encumbrances; and the said party of the first part will, and its successors and assigns shall, warrant and defend the same to the said party of the second part, its successors and assigns, forever, against the lawful claims and demands of all persons whatsoever. . . . Third. That at the time of making said contract, to wit, in October, 1889, the defendant had recently platted and laid out a town site in the vicinity of and adjacent to the lands hereinbefore described, and had just placed the same upon the market, and had platted said town site to deep

water, and claimed to own and held itself out as the owner of all the lands to deep water; and the actual consideration for said conveyance, in addition to the payment of seven hundred and fifty dollars in cash, was that the plaintiff should erect and put in operation in a short time a shingle mill and shingle manufacturing plant upon said premises for the purpose of aiding and promoting the sale of the lands of the defendant so platted and laid out into a town site. Fourth. That upon the making of said contract of sale and the payment of the first of said purchase money defendant put the plaintiff into possession of said premises, and plaintiff erected thereon valuable improvements, to wit, a shingle mill and shingle manufacturing plant, and put the same into operation, and expended in that behalf a sum exceeding \$10,000, and established thereon a large and profitable business. Fifth. That afterwards, to wit, on or about the 10th day of December, 1894, the state of Washington, by its board of state land commissioners, thereunto duly authorized by the laws of said state, laid claim to the title to the westerly part of said tract of land described in said deed, to wit, to seventy-seven thousand five hundred seventy-one and five-tenths (77,571.5) square feet of the premises conveyed by the said deed, and maintained and asserted the title of the state of Washington to the same as tide lands belonging to said state, and platted the same for sale as tide lands, and thereafter gave the plaintiff the option of purchasing said lands from the state of Washington at a certain price placed thereon by the said state of Washington, or of vacating and relinquishing said premises. Sixth. That the title of said state of Washington to said lands was perfect and unassailable, and a title paramount to that conveyed by the defendant to the plaintiff; and all of plaintiff's valuable improvements, exceeding in value the sum of \$20,000, and its business established and carried on said premises, were all situated on the tide lands of the state of Washington as shown by the plat hereunto annexed, and made a part hereof, and marked 'exhibit A,' and, in order to protect and save the same, plaintiff was obliged to pay, and did pay, to the state of Washington for said seventy-seven thousand five hundred seventy-one and five-tenths (77,571.5) square feet on said premises so conveyed by the defendant to the plaintiff the sum of one thousand five hundred twenty-two and $\frac{72}{100}$ dollars (\$1,522.72) in lawful money, and acquired the title of the state thereto, and received a conveyance therefor from said state of Washington. Wherefore plaintiff demands judgment against the defendant for the sum of one thousand five hun-

dred twenty-two and $\frac{72}{100}$ dollars (\$1,522.72), and interest thereon from July 1, 1895, and costs of suit." The plat referred to in the complaint shows the upland portion of the tract to be a narrow strip of land, triangular in form, extending across the entire width of the tract, about 8 feet wide on one side of the tract and 31 feet wide on the other side of the tract, lying between the line of Shilshole avenue on the east side and the meander line on the west side. The westerly part of said tract is tide lands. The harbor line, at the shortest distance, lies 151 feet from the westerly boundary of the tract conveyed, and between it and the inner harbor line is block 6 of Ballard tide lands, while other tide lands lie on the north and south sides of the tract specifically conveyed. On motion of the respondent the words, "and claimed to own and held itself out as the owner of all the lands to deep water," in the third paragraph of the complaint, were stricken on the ground that the same was an irrelevant and immaterial allegation. This is assigned as error. This action is brought on an alleged breach of warranty contained in a deed executed August 13, 1890. The latter stricken by the court refers to a claim made by the respondent in the year 1889. If this was an action for deceit, misrepresentation, or fraud, the allegation might be material. This action, however, is for the breach of a plainly written covenant. There is no ambiguity in the language of the deed. The intention of the parties must be derived from the deed itself. For these reasons we think the matter alleged was wholly immaterial, and it was properly stricken.

A demurrer was interposed on the grounds that the complaint did not state facts sufficient to constitute a cause of action, and that the action was not commenced within the time limited by law, and that several causes of action had been improperly united. This demurrer was sustained. The ruling of the court in this respect, as well as the judgment of dismissal on the refusal of the appellant to plead further, are assigned as error, and will be considered together. They raise squarely the broad question whether a warranty such as was given in this case covers tide lands, the paramount title of which was in the state at the time the deed was executed. The respondent contends that it does not, "because it appears that at the time of the original arrangement for purchase, and also at the time the deed was made, the portion of the premises for which appellant afterwards paid the state was openly, plainly, visibly, and notoriously tide land, of which the state was the owner; and, further construing the deed in the light of the physical facts which

existed at the time as shown by the diagram referred to in the complaint, there was no intention on the part of the respondent, in using the general language embraced in the deed, to covenant against the rights of the state in the tide-land portion of the premises; that the description of the premises in the deed sufficiently makes it known; that, so far as tide lands are concerned, it is only the littoral, riparian, and shore rights that are conveyed, and not the soil." The original contract, upon which the deed is founded, is not set forth in the pleadings. The presumption is, if this was material, that the deed is in compliance with the contract. The general rule for the construction of covenants is that the intention of the parties, when it can be ascertained from the instrument, must govern, and to come at this all the parts of it must be considered together. The real meaning of the parties must be gathered from the instrument itself, and it is only when the meaning of the words used is doubtful that surrounding circumstances are to be considered, and parol proof is not admissible to explain the covenants in a deed where there is no ambiguity. *Clark v. Devoe*, 124 N. Y. 120, 28 N. E. 275; *Easterby v. Heilbron*, 1 McMull. L. 462. "The cardinal point is, What was the intention of the parties, as derived from the deed itself? When that is discovered, it ought to be carried into effect, if it can be done consistently with the rules of law. If the words and provisions are doubtful, they are to be taken most strongly against the grantor. If they are susceptible of different constructions, the court may take into consideration the circumstances attending the transaction, the particular situation of the parties, and the state of the thing granted at the time of making the grant, for the purpose of ascertaining the probable intent." *Woodworth, J.*, in *Whallon v. Kauffman*, 19 Johns. 97. "The words of the covenant itself are the primary source from which this intention is to be drawn. These are the symbols appointed by the parties to denote their purpose, and they are generally the best and surest guide to its discovery. Hence, when the covenantor has drawn a covenant in general and unqualified form, it must be presumed that he so intended it, and it will be so construed unless such presumption is utterly irreconcilable and incompatible with a limited covenant in the same deed." 8 Am. & Eng. Enc. Law, 2d ed. 75, and cases cited. This is the rule where the deed contains a covenant in general and unqualified form, together with limited covenants; and we see no reason why the same rule should not prevail when circumstances outside of the instrument are invoked to limit the general covenant contained in the

instrument. The words and provisions of the covenants in the deed are not doubtful, and they are, on the face of the deed, susceptible of but one construction. In such a case the intent of the parties must be ascertained from the deed itself, without regard to the circumstances attending the transaction and the state of the thing granted. The deed, in terms, by metes and bounds, purports to convey to the appellant a tract of land 330 feet long by 250 feet wide; in all, 82,250 square feet. After the description of the tract conveyed in the granting clause, come these words: "Together with all the littoral, riparian, and shore rights thereunto belonging or in any wise appertaining; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining; and also all the estate, right, title, and interest at law and in equity therein or thereto." We think that the littoral, riparian, and shore rights and tenements, hereditaments, and appurtenances here mentioned refer to those rights, etc., as they appertained to the tract described by metes and bounds, and not to the mere upland in the tract. The words, "and also the estate, right, title, and interest at law and in equity therein or thereto," also refer to the entire tract as described, and their insertion in the deed does not in any way limit or control the estate granted and conveyed by the words previously used in the granting clause, so as to restrict the grantee to the right, title, and interest only that the grantor actually had. These words were added rather for fullness and certainty, and not with a view to any limitation of the tract conveyed. *Hubbard v. Apthorp*, 3 Cush. 419. The word "premises," used in the covenanting clause in the deed, refers to the entire premises conveyed, upland as well as tide land. *Loomis v. Bedel*, 11 N. H. 74; *Bayley v. McCoy*, 8 Or. 259.

There can be no question but that the covenant of warranty in the deed set out in the complaint referred to the entire tract described by metes and bounds. The covenant of warranty in the deed operates merely as an assurance of the title which the deed purports to convey. It does not pass any estate, or enlarge or restrict the estate conveyed. "The obligation in a general warranty of title is not that the covenantor is the true owner, or that he is seised in fee, with right to convey, but that he will defend and protect the covenantee against the rightful claims of all persons thereafter asserted." *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 366. Parol evidence is not admissible to control the covenants in a deed. Why, then, should the knowledge or proof of physical facts be given this effect?

"Knowledge or notice, however full, of an encumbrance, or of a paramount title, does not impair the right of recovery upon covenants of warranty. The covenants are taken for protection and indemnity against known and unknown encumbrances or defects of title." *Copeland v. McAdory*, 100 Ala. 553, 13 So. 545. "It is a well-settled rule that knowledge by the grantee, at the time of the conveyance, of the existence of an encumbrance on the land, or of a defect in the grantor's title, does not control the force and effect of the express covenants in the deed, or affect the question of breach. If the grantor wishes to exclude known defects or encumbrances from the operation of the covenants, he should do so by incorporating the intended limitation in the covenants themselves. Failing to do so, he must be bound by the express words of the covenants, and cannot be permitted to destroy the force of their language by parol. Besides, it does not follow from the fact that the parties had knowledge of a particular encumbrance on the land, or defect in the title, that they intended to exclude it from the protection of the covenants. Men often take warranties knowing of defects in the title. The general rule above stated has been qualified in some of the United States. It has been held that a highway which is open and in use, so that the grantee must be charged with notice of its existence, is excepted from the protection of the covenants in a deed. And, again, it has been held that the covenants do not extend to apparent easements which openly affect the physical condition of the land, or, what amounts to the same thing, of which the grantee has knowledge. But these exceptions are contrary to the vast preponderance of authority, according to which the appropriate covenants in a deed, in the absence of statutory provision to the contrary, extend to public and private ways, and to other easements, whether or not they affect the apparent physical condition of the land, or are otherwise known to the grantee." 8 Am. & Eng. Enc. Law, 2d ed. 86-88. We have examined the long list of authorities cited to support the above text, and have no hesitation in saying that the author's conclusions are fully borne out by the authorities. But one case has been cited by respondent in opposition to the view here expressed, and that is the case of *Feurer v. Stewart*, 83 Fed. 793. The court in that case says: "When an estate is conveyed by a deed describing it so that the parties must understand therefrom that the estate is subservient to a superior title, which cannot be extinguished nor acquired, the grantee takes it *cum onere*, and no right of action can accrue in his favor upon the covenants in the deed, unless in the 62 L. R. A.

covenant the grantor specifically agrees to stand liable for losses resulting from the assertion of such superior title. If not mentioned in the covenant, it will be presumed that the parties have made allowance for a known defect of title in fixing the purchase price, and the grantee, having only paid for what he gets, cannot afterwards be heard to complain that he has been damaged by a broken contract on the part of the grantor. This case is distinguishable, by its peculiar facts and circumstances, from all precedents to which my attention has been directed; but the above propositions are applicable here, and the same are, in a measure, supported by the following authorities: *Co. Litt. Butler & Hargrave's Notes*, 1st Am., from 19th London, ed. 384a; 2 Sugden, Vendors, 8th Am. ed. 230; *Montgomery v. Reed*, 69 Me. 510-516; *Holmes v. Danforth*, 83 Me. 139, 21 Atl. 845; *Ake v. Mason*, 101 Pa. 17; *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85; *Barre v. Fleming*, 29 W. Va. 314, 1 S. E. 731. The words of the covenant seem to indicate an intention in the minds of the parties to restrict the covenant to correspond to the known situation of the premises, so that the liability of the vendor shall not be greater than would be reasonable for her to assume. The covenant is not to defend against all lawful claims, but against all persons lawfully claiming or to claim. Now, the commonwealth is not a person, and its claim of title is not mentioned specifically, nor is it within the general terms of the covenant, if the words are to be considered as having been selected to accurately express the intention of the parties. *Rawle, Covenants for Title*, 5th ed. p. 171; *McBride v. Pierce County*, 44 Fed. 17; *Re Fox*, 52 N. Y. 535, 11 Am. Rep. 751; *United States v. Fox*, 94 U. S. 315-321, 24 L. ed. 192, 193." From this quotation it seems that the learned judge extends the exception to the rule that a covenantor is bound by the express words of his covenant so as to include, not only an easement, but the principal subject-matter. He also holds, contrary to any authority we have been able to discover, that, where the grantee knows of a superior title which cannot be extinguished or acquired, the grantor must expressly covenant to stand liable for losses resulting from the assertion of such superior title, or he will not be bound. The rule, as we understand it to be, is, as laid down in the text already cited from 8 Am. & Eng. Enc. Law, that, where one covenants to warrant generally, he is bound to answer for all defects, and, if he desires to avoid any particular defect, he must do so by a limitation in the instrument itself. Says Brewer, J., in *Barlow v. Delaney*, 40 Fed. 97: "The very purpose of the covenant is protection

against defects, and to hold that one can be protected only against unknown defects would be to rob the covenant of more than one half its value, besides destroying the force of its language. If, from the force of a covenant, it is desired to eliminate known defects, or to limit the covenant in any way, it is easy to say so. General in its language, it reaches to all defects within its terms, known or unknown." With the exception of the case of *Feurer v. Stewart*, 83 Fed. 793, the cases cited by the respondent are all cases of easement or servitude. The controversies in these cases arise over some physical easement or servitude only partially affecting the subject-matter of the grant, and the question is one of liability of the grantor for the depreciation of the estate to that extent. Here is plain failure of title to 77,571.5 square feet out of 82,250 square feet,—nearly all the land conveyed; and we do not think the grantor should be relieved from the plain provisions of his contract, to protect the grantee against the rightful claims of all persons, under the rule laid down by those courts excepting visible easements and servitudes from the covenant of general warranty or the warranty against encumbrances. Where the title to the land itself absolutely fails, and the grantee takes nothing by his deed but a mere fraction of the land,—as in this case,—we are at a loss to see how he can be said to take the land *cum onere*, for in fact he takes nothing. We have examined the authorities cited by the respondent in his brief, and on which the decision in *Feurer v. Stewart*, 83 Fed. 793, is based, and they all relate to easements or servitudes, and in such cases it is said the grantee takes the land *cum onere*. The case of *Montgomery v. Reed*, 69 Me. 510, was where there was a conveyance of tide flats, the title to which passed by the deed. The court held that the owner of the flats held them subject to the rule that, until he built upon or inclosed them, the public had a right to use them for the purpose of navigation while they were covered by the sea, and the right of the public to use them was not an encumbrance within the usual covenant against encumbrances. The case of *Holmes v. Danforth*, 83 Me. 139, 21 Atl. 845, was where land was conveyed by deed with covenant of warranty against encumbrances. The land was bounded by the center of a public road, and so described in the deed, so that from the instrument itself, without resort to oral testimony or extraneous evidence, knowledge of the fact was brought home to the grantee; and it was held that there was no breach of the covenant against encumbrances by reason of the road, and that the grantee took the land *cum onere*. In the case of *Ake v. Mason*, 101 Pa. 17, 62 L. R. A.

where a plan for laying out a street had been confirmed by the proper court, and was a public record, of which the purchaser was bound to take notice, a vendee of land could not recover damages from his vendor upon the opening of the street, on a covenant of general warranty and against encumbrances, for the portion of the land occupied by the street. In the case of *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85, where at the time of the purchase a part of the land was overflowed by a mill pond created by a dam on land not belonging to the defendant, which dam had been maintained long enough to create a prescriptive right in the owner of it to flow the land in question, it was held that, as the overflowed land was obviously, at the time of purchase, subject to the servitude or easement of the overflow of water from the dam, there was no breach of the covenant against encumbrances. In the case of *Barre v. Fleming*, 29 W. Va. 314, 1 S. E. 731, it was held that the riparian proprietor of lands bounded by the Ohio river in the state of West Virginia owns the fee in the lands to low-water mark, subject to the easement of the public for navigation in that portion lying between high and low water mark; and that, when land lying on the Ohio river is conveyed by deed with general warranty, and calling for low-water mark on said river as one of its boundaries, the warranty is not broken by reason of the fact that the public owns an easement therein. In none of the cases cited to sustain the ruling of the court in *Feurer v. Stewart*, *supra*, did the title to the principal thing fail, as in the case at bar, and they were all cases involving the question of visible easements or servitudes over or annexed to land, of which the grantee knew or was bound to take notice.

The additional case of *Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300, cited by the respondent, is also a case involving a visible servitude,—a window light,—in which it was held that the vendee of an adjoining tract, under the circumstances detailed in the case, took the land with the servitude annexed, and the enjoyment thereof by the owner of the adjoining lot constituted no breach of a covenant of special warranty. But it is claimed that, inasmuch as the covenant of warranty is against "all persons whatsoever," it is not a covenant against the state; that the state is not a person, and, as the state is not mentioned specifically, it is not within the covenant. It is true that in some cases it has been held that the term "person" does not, in ordinary legal signification, embrace a state or government. There are many cases, however, to the contrary. *Martin v. State*, 24 Tex. 62; *State v. Herold*, 9 Kan. 194; *Honduras v.*

Soto, 112 N. Y. 310, 2 L. R. A. 642, 19 N. E. 845. The following cases expressly hold that, although the outstanding paramount title may rest in the state or the United States, the grantor who warrants his title generally against all persons is liable upon his covenants of warranty: *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360; *Herrington v. Clark*, 56 Kan. 644, 44 Pac. 624; *Kansas P. R. Co. v. Dunmeyer*, 19 Kan. 539; *Meservey v. Snell*, 94 Iowa, 222, 62 N. W. 767. The covenant would certainly include a person claiming as grantee of the state, and for that reason we cannot see why it does not include the state itself. Where the paramount title is in the state, and the covenantee buys in the same under circumstances such as are detailed in the complaint, this will be considered such an eviction as to constitute a breach of the covenant of warranty or for quiet enjoyment. *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360; Rawle, *Covenants for Title*, 5th ed. §§ 142, 143, 146; *Loomis v. Bedel*, 11 N. H. 75. The covenant against encumbrances is generally a covenant in *presenti*, and is broken, if at all, at the time of conveyance. The covenant of warranty is a covenant in *futuro*, runs with land, and is broken at the

time of the eviction. The covenant for warranty and that for quiet enjoyment are, in the main, identical. It has been said that the covenant for quiet enjoyment is to defend the possession, while the covenant of warranty is to defend, not merely the possession, but also the land, and the estate in it. The deed set forth in the complaint contains a covenant to warrant and defend generally. The eviction set forth is under the superior title of the state. The action was commenced in September, 1899. The eviction took place in December, 1894, when the state claimed possession, and gave to the purchaser the option of vacating that portion claimed by the state or purchasing its title. The six-years' statute of limitation had not then run. There has been no improper joinder of actions. The question of the measure of damages is not now before us. The court below should have overruled the demurrer.

The judgment is reversed, and this action is remanded, with instructions to the court to overrule the demurrer; the appellant to recover the costs of this appeal.

Reavis, Ch. J., and Anders, Fullerton, and Dunbar, JJ., concur.

VIRGINIA SUPREME COURT OF APPEALS.

City of NORFOLK, *Plff. in Err.*,
v.

Joseph E. FLYNN.

(.....Va.....)

1. An ordinance requiring the inspection of milk sold within the limits of the city, and providing for the licensing of vendors, is not void as affecting persons beyond the limits of the municipality, where it only touches those who bring or send their milk into the city for sale.
2. An ordinance requiring the payment of a license fee by milk vendors to pay the salary and expenses of the milk inspector does not violate the statute forbidding the municipality to impose any tax, fine, or penalty on persons selling their own farm or domestic products in the city.

(June 11, 1903.)

ERROR to the Circuit Court of the City of Norfolk to review a judgment reversing

NOTE.—For other cases in this series as to ordinances to protect milk supply, see *State v. Dupaquier*, 26 L. R. A. 162; *Deems v. Baltimore*, 26 L. R. A. 541; *State v. Broadbelt*, 45 L. R. A. 433; *State v. Nelson*, 34 L. R. A. 318; *State v. Schlenker*, 51 L. R. A. 348; and *State v. Crescent Creamery Co.* 54 L. R. A. 466.
62 L. R. A.

a judgment of a police justice convicting defendant of violating a city ordinance. *Reversed.*

The facts are stated in the opinion.

Mr. Walter H. Taylor, for plaintiff in error:

The charge or fee imposed in the milk ordinance is not a tax, fine, or other penalty. It is a fee, charge, or compensation in return for service rendered. It is not for revenue purposes. Its sole purpose is to keep up and pay the expenses of milk inspection.

Morgan's L. & T. R. & S. Co. v. Louisiana Bd. of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114.

Even if there were no express power granted by the charter, still the city would have the authority to enact such an ordinance under the general police power inherent in every municipal government.

Richmond, F. & P. R. Co. v. Richmond, 28 Gratt. 99, 98 U. S. 528, 24 L. ed. 736.

The ordinance is not extraterritorial. It merely requires one desiring to sell milk in the city to comply with certain conditions.

State v. Nelson, 66 Minn. 166, 34 L. R. A. 318, 68 N. W. 1066.

Where an imposition is laid, in connection

with inspection and merely for the purpose of covering the costs thereof, it is an inspection fee, and not a tax.

Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114.

The city has the right to inspect the cows, or demand a fee of Norfolk county milk dealers, when those dealers sell in the city of Norfolk.

State v. Nelson, 66 Minn. 166, 34 L. R. A. 318, 68 N. W. 1066.

Messrs. **Burroughs & Brother**, for defendant in error:

The charge of 50 cents on each cow in the dairy is a tax for revenue.

State, Benson, Prosecutor, v. Hoboken, 33 N. J. L. 280; *New York v. Second Ave. R. Co.* 32 N. Y. 261; *St. Paul v. Traeger*, 25 Minn. 248, 33 Am. Rep. 462; *Re Wan Yin*, 10 Sawy. 532, 22 Fed. 701.

An ordinance is extraterritorial which undertakes to regulate and control persons and things beyond city limits, unless expressly allowed so to do by its charter.

Whiting v. West Point, 88 Vt. 905, 15 L. R. A. 860, 14 S. E. 698; *Chicago Packing & Provision Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545; *Langhorne v. Robinson*, 20 Gratt. 661.

The power to exact a license fee as a mode of enforcing its ordinances is not granted the city by its charter.

Gray v. Wilmington, 2 Marv. (Del.) 257, 43 Atl. 94.

No city or town shall impose or collect any tax, fine, or other penalty upon any person selling their farm and domestic products within its limits, and outside of, and not within, its regular market houses.

Brown v. Com. 98 Va. 366, 36 S. E. 485.

Keith, P., delivered the opinion of the court:

The police justice of the city of Norfolk issued a warrant against Joseph E. Flynn for violation of an ordinance creating the office of milk inspector, defining his duties, and regulating the sale of milk in the city of Norfolk. The police justice entered a judgment against Flynn, from which an appeal was taken to the circuit court of the city of Norfolk, where it was reversed, and the case is now before us upon a writ of error to the judgment of that court.

The ordinance in question prohibits the sale of impure, diluted, or unwholesome milk, prescribes a test of what constitutes pure milk, creates the office of milk inspector, prescribes his duties, requires him to make frequent inspection and analysis of the milk sold in the city, and directs him to report all violations of the ordinance to the board of health.

62 L. R. A.

By § 344, chap. 43, of the Norfolk City Code, it is provided that "every person who conveys milk in carriages or otherwise for the purpose of selling the same, and those who sell or offer it for sale in a store, booth, stand, or market place in the city of Norfolk, shall register annually in the books of said inspector, on the 1st day of May of each year, or within thirty days thereafter, and be licensed by said inspector to sell milk within the limits of the city for one year. Before said license is granted the applicant shall be required to pay 50 cents per cow, if he keeps cows, and \$2 for each stand or depot, if he has a stand or depot, for the sale of milk. The amount so collected shall be used exclusively for the purpose of paying the salary and expenses of said inspector. And whoever neglects so to register, or violates any of the provisions of this section, shall be punished for each offense by a fine of not less than \$5 nor more than \$20. The inspector shall pay over monthly to the treasurer of the city all sums collected by him."

Defendant contends that this section is invalid because, first, no ordinance of the city of Norfolk can have the force of law beyond the corporate limits of the city; and, secondly, because it is in violation of an act approved March 3, 1896 (Acts 1895-96, p. 685, chap. 625), which is as follows: "It shall be unlawful for any city or town of this state, or any agent or officer of any such city or town, to impose or collect any tax, fine, or other penalty upon any person selling their farm and domestic products within the limits of any such town or city outside of and not within the regular market houses and sheds of such cities and towns."

The police power of the state, so far as it is necessary to protect the health of its inhabitants, has been delegated to the city of Norfolk. The general nature, character, and extent of the police power has been so recently investigated by this court that we deem it unnecessary to do more than refer to the cases. *Farmville v. Walker* (Va.) 61 L. R. A. 125, 43 S. E. 558; *Danville v. Hatcher*, 9 Va. Law Rep. 331, 44 S. E. 723.

It is manifest upon the face of the ordinance in question that it was passed in the exercise of the police power of the city, and that its sole object was to secure to the people of Norfolk pure and unadulterated milk. It is matter of common knowledge that milk is a necessary food of the sick and of the infirm, of the old and of the young; that through the agency of impure milk, the germs of many diseases are disseminated; and, even where there is the absence of any deleterious impurity or the germs of specific diseases, adulterated or diluted milk is not wholesome and nutritious, and its sale

in its least injurious aspect is a fraud upon the community. Against such practices it is the duty of the constituted authorities to protect the communities under their control. The ordinance in question is not extraterritorial in its effect. It is not intended to operate beyond the limits of the city of Norfolk. It only touches those who come within the limits of the city to dispose of their milk.

This subject was considered in the case of *State v. Nelson*, 66 Minn. 166, 34 L. R. A. 318, 68 N. W. 1086. In that case the objection was made "that the provisions of the ordinance are not within the limits prescribed for it by the statute, for the reason that it is attempted to make its operation extraterritorial, in that it provides for the inspection of dairies and dairy herds outside the city limits. There is no merit in this point.

"The manifest purpose of the statute under which this ordinance was passed was to enable the city council to adopt such reasonable notice regulations as would prevent the sale of unwholesome milk within the city, and not merely to prevent the keeping of unhealthy dairy herds within the city limits. It is a matter of common knowledge that much of the milk sold in a city is produced in dairies situated outside the city limits. Any police regulations that did not provide means for insuring the wholesomeness of milk thus brought into the city for sale and consumption would furnish very inadequate protection to the lives and health of the citizens. It is also a matter of common knowledge, as well as of proof in this case, that the wholesomeness of milk cannot always be determined by an examination of the milk itself. To determine whether it does or does not contain the germs of any contagious or infectious disease, it is necessary to inspect the animals which produce it. The inspection of dairies or dairy herds outside the city limits, provided for by this ordinance, applies only to those whose milk product it is proposed to sell in the city. The provisions of the ordinance in that regard go only so far as it is reasonably necessary to prevent the milk of diseased cows being sold within the city. This inspection is wholly voluntary on the part of the owner of the dairy or dairy herd. If he does not choose to submit to such inspection, the result merely is that he or the one to whom he furnishes milk cannot obtain a license to sell milk within the city. The ordinance has no extraterritorial operation, and there has been no attempt to give it any such effect. The only subject upon which it operates is the sale of milk within the city."

We do not think there is any merit in the first contention.
62 L. R. A.

The city of Norfolk has no power to impose any tax, fine, or penalty on persons selling their own farm and domestic products in contravention of the act of assembly of March, 1896, already quoted. The ordinance of the city under consideration does not, in our judgment, levy a tax or impose a fine or penalty within the purview of that act. We are of opinion that it was not the purpose of the legislature in that act to impose any restriction upon the city in the exercise of the police power delegated to it for the protection of the health of its citizens; and, unless plainly required so to do, we should be indisposed to adopt a construction which would render the city powerless to protect the health of its citizens from the sale of impure or adulterated milk. The means adopted seem to us to be reasonable. It was necessary to the end in view that there should be an inspector, that he should have the power to take samples of the milk and have them analyzed, and his duties involved expenses which it was proper that those engaged in the sale of milk should bear. A license from the inspector was evidence to the community that they could with safety purchase milk from the dealer to whom it was issued. He who is licensed should not complain, because he derives a direct and important benefit from it, for which he is required to pay a reasonable compensation. The dealer discovered in improper practices in the effort to foist upon the community milk unfit for use has no right to complain if he has been detected in such practices. What the dealers are required to pay by the ordinance is not for purposes of revenue, and is not a tax, but is an inspection fee, designed as a compensation for the service rendered.

The Supreme Court of the United States is jealous to guard against any encroachment by the states upon the power of the Federal government to regulate commerce, yet it has been held that fees for the sanitary examination of vessels under the quarantine laws of the states, though they may in some degree tend to regulate commerce with foreign nations and among the states, are a valid exercise of the police power.

In *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114, the court, after discussing the quarantine laws of the state of Louisiana and their various charges for services rendered incident thereto, in answer to the claim that the sums thus exacted were in effect a tonnage tax, forbidden by the Constitution of the United States, and exclusively within the power of Congress to regulate, said: "In the present case we are of opinion that the fee complained of is not a tonnage tax; that, in fact, it is not a tax

within the true meaning of that word as used in the Constitution, but is a compensation for a service rendered, as part of the quarantine system of all countries, to the vessel, which receives the certificate that declares it free from further quarantine requirements."

Paraphrasing the language of the court in that case, the city of Norfolk says to the dealer: "If you appear free from objection, you are relieved by the officer's certificate of all responsibility on that subject. For this examination you must pay. The danger comes from you, and, though it may turn out in your case there is no danger, yet, as you belong to a class from which this kind of injury comes, you must pay for the examination which distinguishes you from others of that class."

We are of opinion that the ordinance under investigation does not, and was not designed to, act beyond the limits of the city of Norfolk, but operates only upon those who undertake to sell milk within the jurisdiction of the city.

We are of opinion that it is a reasonable exercise of the police power, and that the charges which it imposes are in no sense a tax, penalty, or fine, but for fees for services rendered; and it is therefore not repugnant to the act of assembly relied upon by defendant in error.

The judgment of the Circuit Court must be reversed, and this court will enter such judgment as the Circuit Court should have entered.

Cardwell, J., absent.

NEW JERSEY COURT OF ERRORS AND APPEALS.

METROPOLITAN LIFE INSURANCE
COMPANY, *Plff. in Err.*,

v.

Bridget DIMICK.

(.....N. J.....)

- *1. Where a policy of life insurance makes the answers and statements contained in the application warranties, and constitutes them a part of the contract, an untrue statement concerning a matter of fact that is, or ought to be, within the personal knowledge of the applicant constitutes a breach of the warranty, and renders the policy void.
2. A paid-up policy calling for unconditional payment of a certain sum to the executors, administrators, or assigns of the insured at his death, with reservation to the insurer of the right to pay the money to any person who has incurred expense on behalf of the insured,—*Held*, to constitute "insurance in force upon his life," within the meaning of an application calling for information upon that point.
3. Appended to the policy in suit was what purported to be a copy of the application upon which it was issued, but the copy was not referred to in the body of the policy. There being a variance between the original application and the copy,—*Held*, that the original application must control.
4. A policy of life insurance made the answers and statements contained in the application a part of the contract, and

declared them warranties. One part of the application declared that the answers and statements contained in it, together with those made to the medical examiner and contained in a separate part, should be the basis of the contract of insurance, and become part of the contract. *Held*, that the statement to the medical examiner, signed by the applicant, is to be deemed a part of the application referred to in the policy, and made a part thereof.

5. The application contained a declaration and warranty "that the answers and statements contained in it, and those made to the medical examiner, are full and true, and are correctly recorded, and that no information or statement not therein contained, received, or acquired at any time by any person shall be binding upon the company, or shall modify or alter the declarations and warranties therein contained; that the persons who wrote in the answers and statements were and are our agents for the purpose, and not the agents of the company, and that the company is not to be taken to be responsible for its preparation, or for anything therein contained or omitted therefrom; that any false, incorrect, or untrue answer, or any suppression or concealment of facts in any of the answers, shall render the policy null and void." *Held*: Assuming, but not deciding, that with respect to the insurance solicitor and medical examiner, employees of the company who wrote the answers, the stipulation was inefficacious to constitute them agents of the applicant, yet the clauses quoted constituted a plain limitation upon the authority of the company's agents, of which the applicant was required to take notice, and by which he was bound.

*Headnotes by PITNEY, J.

NOTE.—For a case in this series holding that a stipulation in a life-insurance policy that the medical examiner shall be the agent of the insured, and not of the insurer, is against public policy, and that, therefore, such agreement will not prevent proof that the answers written by

such examiner were not those given by the applicant, see *Sternaman v. Metropolitan L. Ins. Co.* 57 L. R. A. 318.

As to effect of agent's knowledge of falsity of answers in application generally, see cases in footnote thereto.

6. In such a case, untrue answers entered by the solicitor and by the medical examiner, and signed by the applicant, constitute a breach of warranty, and render the policy void, provided the answers are of such a character as by the contract are made warranties.

7. The common law of New York is not otherwise.—at least so far as answers written by the insurance solicitor are concerned, the answers being such as the applicant himself was at liberty to insert.

(June 22, 1903.)

ERROR to the Supreme Court to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of life insurance. *Reversed.*

The facts are stated in the opinion.

Messrs. Conover English and Robert H. McCarter, for plaintiff in error:

Admitting evidence as to what the agent or physician knew, to overcome the positive statements in the application, was erroneous.

Catoir v. American L. Ins. & T. Co. 33 N. J. L. 487; *Deweese v. Manhattan Ins. Co.* 35 N. J. L. 367; *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568, 29 Am. Rep. 271; *Carsen v. Jersey City Ins. Co.* 43 N. J. L. 300, 39 Am. Rep. 584; *Bennett v. St. Paul F. & M. Ins. Co.* 55 N. J. L. 377, 27 Atl. 641; *Ellison v. Gray*, 55 N. J. Eq. 581, 37 Atl. 1018; *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. ed. 617; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; *Hubbard v. Mutual Reserve Fund Life Asso.* 80 Fed. 681; *Maier v. Fidelity Mut. Life Asso.* 24 C. C. A. 239, 47 U. S. App. 322, 78 Fed. 566; *Shawmut Mut. F. Ins. Co. v. Stevens*, 9 Allen, 332; *Goddard v. Monitor Mut. F. Ins. Co.* 108 Mass. 56, 11 Am. Rep. 307; *Monitor Mut. F. Ins. Co. v. Buffum*, 115 Mass. 343; *Batchelder v. Queen Ins. Co.* 135 Mass. 449; *Davis v. Aetna Mut. F. Ins. Co.* 67 N. H. 335, 39 Atl. 902; *Thomas v. Commercial Union Assur. Co.* 162 Mass. 29, 37 N. E. 672; *Liverpool, L. & G. Ins. Co. v. T. M. Richardson Lumber Co.* 11 Okla. 585, 69 Pac. 938; *O'Rourke v. John Hancock Mut. L. Ins. Co.* 23 R. I. 457, 57 L. R. A. 496, 50 Atl. 834; *Leonard v. State Mut. Life Assur. (R. I.)* 51 Atl. 1049; *Delaware Ins. Co. v. Harris*, 26 Tex. Civ. App. 537, 64 S. W. 867; *Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 47, 20 Am. Rep. 451; *Wilber v. Williamsburgh City F. Ins. Co.* 122 N. Y. 439, 25 N. E. 926; *Allen v. German American Ins. Co.* 123 N. Y. 6, 25 N. E. 309; *Glutting v. Metropolitan L. Ins. Co.* 50 N. J. L. 287, 13 Atl. 4.

It is not necessary that a writing should

have been made by the witness himself, nor that it should be an original writing, provided that, after inspecting it, he can speak to the facts from his own recollection.

1 Greenl. Ev. § 436; *Topham v. M'Gregor*, 1 Car. & K. 320; *Starkie*, Ev. 10th ed. p. 179; 4 Phillipps, Ev. Cowen & Hill's Notes, part 2, p. 733; 8 Enc. Pl. & Fr. p. 138; *Horne v. McKenzie*, 6 Clark & F. 628; *Burton v. Plummer*, 2 Ad. & El. 341; *Queen v. Langton*, L. R. 2 Q. B. Div. 296; *Underhill*, Ev. § 338; 2 Phillipps, Ev. 3d ed. p. 413.

The distinction between a paper offered as evidence and a paper to be used simply to refresh one's recollection must be kept in mind.

1 Greenl. Ev. § 436; *Henry v. Lee*, 2 Chitty, 124; *Doe ex dem. Church v. Perkins*, 3 T. R. 749; *Bigelow v. Hall*, 91 N. Y. 145; *Culver v. Scott & H. Lumber Co.* 53 Minn. 360, 55 N. W. 552; *Morrison v. Chapin*, 97 Mass. 72; *Huff v. Bennett*, 6 N. Y. 337; *Com. v. Ford*, 130 Mass. 64, 39 Am. Rep. 426; *Stephen's Digest of Ev. Chase's ed.* 1885, p. 237; *Howard v. McDonough*, 77 N. Y. 592; *Coffin v. Vincent*, 12 Cush. 98; *Com. v. Jeffs*, 132 Mass. 5; *Myers v. Weger*, 62 N. J. L. 432, 42 Atl. 280; *State, Rumsey, Prosecutor, v. New York & N. J. Teleph. Co.* 49 N. J. L. 322, 8 Atl. 290; *North Hudson County R. Co. v. May*, 48 N. J. L. 401, 5 Atl. 276; 23 Cent. L. J. 53; *Riordan v. Guggerty*, 74 Iowa, 688, 39 N. W. 107; *Card v. Foot*, 56 Conn. 369, 15 Atl. 371.

There is no rule definitely limiting the time within which the memorandum proposed to be used as a refresher must have been made.

1 Greenl. Ev. § 438; 8 Enc. Pl. & Pr. 137, 143; *Wise v. Phoenix F. Ins. Co.* 101 N. Y. 637, 4 N. E. 634.

An application becomes part of the *res gestæ*, and entirely relevant in connection with the policy upon which it is based.

Henn v. Metropolitan L. Ins. Co. 67 N. J. L. 310, 51 Atl. 689.

Messrs. John P. Stockton and Warren Dixon for defendant in error.

Pitney, J., delivered the opinion of the court:

This is an action upon a policy of insurance issued December 4, 1899, by the defendant below (now plaintiff in error) upon the life of John W. Dimick, payable in case of his death to his wife, Bridget, who was the plaintiff below. The insured died January 24, 1900. After a trial and verdict upon pleadings held insufficient for the purpose of raising the real estate (*Dimick v. Metropolitan L. Ins. Co.* 67 N. J. L. 367, 51 Atl. 692), a new trial was had upon amended pleadings, and resulted in a verdict in favor of the plaintiff rendered pursuant

to the direction of the trial judge. A writ of error brings the consequent judgment here for review, and with it is returned a bill of exceptions sealed upon the direction of a verdict.

The declaration embodies a copy of the policy of insurance with its conditions, and avers, generally, the performance of all conditions, pursuant to § 126 of the practice act (Gen. Stat. p. 2554). The defendant pleaded the general issue, and in a special plea set up a breach of conditions precedent, because of false answers alleged to have been given by the insured in response to certain inquiries contained in the application for the insurance, which application, by the terms of the policy, is made a part of it; among others, the false answer "none" in reply to the question, "State amount of insurance you now carry on your life;" the false answer "none" in reply to the question, "Is there any other insurance in force on your life?" and the false answer "No" in reply to the question, "Have you ever been an inmate of an asylum or hospital; if so, when and for what?"

The policy sets forth that the engagements of the defendant company are undertaken "in consideration of the answers and statements contained in the printed and written application for this policy, all of which answers and statements are hereby made warranties and are hereby made part of this contract;" that the contract is "subject to the conditions set forth on the reverse side hereof, all of which are hereby made part of this contract, and are accepted by the insured and assured as part thereof as fully as if herein recited." Among the conditions thus indorsed are the following, viz.: "Third. If any answer or statement in the application herein referred to is not true . . . this policy shall be void, and all premiums paid shall be forfeited to the company, except as provided below" (none of the exceptions has any bearing upon this case). "Sixth. Proofs of death shall be made in the manner and to the extent required by blanks furnished by the company, and shall contain answers to each question propounded to the claimants.

. . . The proofs of death shall be evidence of the facts therein stated in behalf of, but not against, the company." "Ninth. The contract between the parties hereto is completely set forth in this policy and the application therefor taken together, and none of its terms can be varied or modified, nor any forfeiture waived or premiums in arrears received except by agreement in writing signed by either the president, vice president, secretary, or actuary, whose authority for this purpose will not be dele-

gated; no other person has or will be given authority."

The application referred to in the policy was made prior to the date of the latter, and passed into the possession of the company. It was made upon printed forms, and consists of three parts, designated respectively "A," "B," and "C." Part A is entitled "Application to the Metropolitan Life Insurance Co.," is dated November 19, 1899, and signed by the insured and the beneficiary. It contains a statement of the name and residence of John W. Dimick, the amount and kind of insurance applied for, the date and place of his birth, his present occupation, etc. The information is in the form of written replies to printed questions. Among the questions is this: "E. State amount of insurance you now carry on your life, with name of company or association by whom granted, and the year of issue. (Enumerate each.)" To this the answer was "None." Then follow two questions, bracketed together, and lettered "F." The first is: "If insured in this company, in ordinary, industrial or intermediate, give policy numbers." To this there was no reply. The second question is: "Is there any other insurance in force on your life?" to which the answer is "None." At the foot of this part of the application is the following declaration, above the signatures of the beneficiary and insured: "It is hereby declared, agreed, and warranted by the undersigned that the answers and statements contained in the foregoing application and those made to the medical examiner, together with this declaration, shall be the basis and become part of the contract of insurance with the Metropolitan Life Insurance Company; that they are full and true and are correctly recorded, and that no information or statement not contained in this application, and in the statements made to the medical examiner, received or acquired at any time by any person, shall be binding upon the company or shall modify or alter the declarations and warranties made therein; that the persons who wrote in the answers and statements were and are our agents for the purpose, and not the agents of the company; and that the company is not to be taken to be responsible for its preparation or for anything contained therein or omitted therefrom; that any false, incorrect, or untrue answer, any suppression or concealment of facts in any of the answers, any violation of the covenants, conditions, or restrictions of the policy, any neglect to pay the premium on or before the date it becomes due, shall render the policy null and void, and forfeit all payment made thereon." Part B is entitled: "Statement made to the medical examiner by John W. Dimick in

connection with application on reverse side of this sheet. To be fully completed by the examiner before the applicant affixes his signature. The medical examiner will impress upon the applicant the importance of full and truthful answers to every interrogatory." Then follow numerous questions that are intended to develop the history of the applicant in all matters pertaining to his health; he is asked specifically whether he has ever had certain enumerated diseases; whether he is ruptured; to give full particulars of any illness he may have had since childhood; to state when he was last confined to the house by illness, etc. One of the questions is this: "Have you ever been an inmate of an asylum or hospital? If so, when and for what?" and the answer is "No." At the foot is printed the following: "I hereby declare that the application to the Metropolitan Life Insurance Company for an insurance on my life was signed by me, and that I renew and confirm my agreements therein as to the answers given above to the medical examiner, and I hereby declare that said answers are correctly recorded." It is dated November 23, 1899, and signed by John W. Dimick, but not by the beneficiary. Part C is entitled as follows: "Medical examination and report (no part of the declaration of the applicant.)"

At the trial there was introduced in evidence a paid-up policy for \$219 upon the life of John W. Dimick, issued by the Prudential Insurance Company, February 22, 1897, which was in force at the time the present application was made. That it was in force at John W. Dimick's death was admitted by the plaintiff in the written proofs of death signed by her and submitted to the defendant company in compliance with the condition indorsed upon the policy in suit. It was also in evidence that in the year 1893 John W. Dimick was for two weeks an inmate of a hospital at Englewood, in which town he resided, undergoing treatment for injuries received in a runaway accident, and that he was conscious during the whole of the time that he spent in the hospital. Notwithstanding this evidence the learned trial justice (in view of certain rebuttal testimony introduced by the plaintiff, which will be mentioned below) directed a verdict for the plaintiff, on the ground that no breach of warranty was shown.

We are inclined to agree with the contention made in behalf of the plaintiff (now defendant in error) that the negative reply to the question "State amount of insurance you now carry on your life," etc., is not applicable to the paid-up policy in the Prudential Insurance Company. If the question

had stood alone it would have permitted, and perhaps required, the word "carry" to be construed in its colloquial sense, as equivalent to "possess" or "hold;" a meaning probably derived, however, from the custom of holding property that has been paid for with borrowed money (Century Dict. verb trans. *Carry*, pl. 14), and so hardly applicable to a paid-up policy that has ceased to be a burden to the insured. But the question did not stand alone; it was immediately followed by the two questions printed under the letter "F," viz.: "If insured in this company give policy numbers," and "Is there any other insurance in force on your life?" Certainly the second of these questions would not have been required if the former question was intended to apply to all insurance in force. Therefore, in aid of the validity of the contract, it is fair to ascribe to the word "carry" a limited sense, as applicable only to such policies of insurance as constituted a burden by requiring the continued payment of premiums.

With respect to the answer of the applicant that there was no other insurance in force on his life, counsel for the plaintiff first contends that the paid-up policy is not within the meaning of "insurance," because it constitutes simply an unconditional agreement to pay a certain sum of money upon the death of John W. Dimick to his executors, administrators, or assigns, irrespective of the question of insurable interest, or any question of indemnity against loss. This point, we think, is quite untenable. The paid-up policy was in the form ordinarily known as an "insurance policy;" John W. Dimick is therein designated as the "insured," and is frequently referred to under that designation. Moreover, the policy reserves to the company the right to "pay the sum of money insured hereby to any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense in any way on behalf of the insured for his or her burial, or for any other purpose."

The next contention of the plaintiff is this: That while, in the original application, a negative reply is given to the second inquiry bracketed under the letter F, and no reply is given to the first inquiry, yet there is attached to the policy itself what purports to be a copy of the application, and in the copy the negative reply is appended to the first question, and the second question appears as if unanswered. It is insisted that, inasmuch as this copy of the application was furnished to the insured by the company, and represented by it to be a true copy, it is for all purposes of the

policy to be treated as the application referred to in the contract, so that the question of breach of warranty must be determined by reference to the copy of the application that is attached to the policy, and not by reference to the original application. But this contention is overthrown by reference to the plain terms of the policy itself, and to what is attached thereto. The body of the policy in no wise refers to the copy of the application thereunto attached. The policy does say that it is "subject to all the conditions set forth on the reverse side hereof, each and all of which are hereby made part of this contract." The body of the policy fills the first page of a four-page document. Upon the second page, which is literally the "reverse side" of the policy, there are printed in bold type the conditions already quoted, and sundry other conditions now immaterial, and these are headed: "Conditions referred to on the face of this policy as a part of this contract." On the third page is found what is declared at the head to be "Copy of application referred to in this policy." The change of phraseology is significant, and is, we think, when taken together with the statements contained in the body of the policy, conclusive against the contention of the plaintiff. It is the original application, not the copy, that is made a part of the contract. The copy was furnished, doubtless, for the information and convenience of the insured, and was intended to be an accurate copy, but it is not certified to be such, and in the event of a variance the original application must govern. If it was essential for the insured to have an accurate copy, he was at liberty to retain one at the time of making the application, or he might have examined the copy attached to the policy in order to detect and correct errors.

The final contention of the plaintiff upon this branch of the case is rested upon the uncontradicted testimony of one Freedman, to the effect that at the time the policy was written he was soliciting insurance for the defendant company; that he negotiated the policy in question; that he made out the application; that at that time he knew there was a paid-up policy in the Prudential Company upon John W. Dimick's life, but did not consider a paid-up policy as being a policy; that, before Dimick signed the application now in question, Mrs. Dimick told Freedman about the Prudential policy; and that he told her there was not enough protection in it, and that she ought to have more insurance upon her husband's life.

With respect to the false answer contained in part B, in answer to the question whether the applicant had ever been an inmate of an asylum or hospital, the first contention

of the plaintiff is that the answers contained in part B are not warranties, because they are not made such by the contract of insurance. This contention is disposed of by an examination of the contract itself. The policy makes the answers and statements contained in the application a part of the contract, and expressly treats them as warranties. Part A of the application declares that the answers and statements in part A contained, and also those made to the medical examiner, together with this declaration, shall be the basis and become part of the contract of insurance, and that no information or statement not contained in this application and in the statements made to the medical examiner shall be binding upon the company. Part B contains the declaration, signed by the applicant: "That I renew and confirm my agreements therein [that is, in part A contained] as to the answers given above to the medical examiner, and I hereby declare that said answers are correctly recorded." And part C, the medical examination, contains in its title line the statement that it is "no part of the declaration of the applicant." From all this it conclusively appears that part B is a part of the application, and the answers and statements therein contained are made warranties by the contract.

The sole remaining contention of plaintiff with respect to the breach of warranty contained in part B is based upon the testimony of the medical examiner to the effect that he examined the applicant at the request of the company; that he had no personal knowledge that Dimick had been in the hospital; that he had no recollection of having asked him whether he had been in the hospital, and that his impression was that he failed to ask Dimick that question, and as he (the examiner) had no knowledge that Dimick had ever been in a hospital, he therefore wrote a negative reply to the question.

It will thus be seen that, upon our interpretation of this policy of insurance (and the same interpretation was adopted by the trial judge), the answer to the question concerning other insurance in force, and the answer to the question concerning hospital treatment, were alike made warranties by the letter of the contract. But that fact is not necessarily controlling, if they are not warranties within its fair meaning and spirit. With respect to questions that relate to matters which the insurer must know are not within the personal knowledge of the applicant, and with respect to those that call, not for definite statements of fact, but for statements of belief or opinion (as, for instance, whether the applicant has ever had a certain obscure disease), the letter of the contract is to be controlled by its spir-

it and purpose, and the answers will be deemed warranties only of the bona fide belief and opinion of the applicant. *Henn v. Metropolitan L. Ins. Co.* 67 N. J. L. 310, 51 Atl. 689; *Anders v. Supreme Lodge, K. of H.* 51 N. J. L. 175, 17 Atl. 119. See also, for cases illustrative of the distinction, the following: *Metropolitan L. Ins. Co. v. Mo-Tague*. 49 N. J. L. 587, 592, 60 Am. Rep. 661, 9 Atl. 766; *Glutting v. Metropolitan L. Ins. Co.* 50 N. J. L. 287, 13 Atl. 4; *Lippincott v. Supreme Council, Royal Arcanum*, 64 N. J. L. 309, 45 Atl. 774; *Finn v. Metropolitan L. Ins. Co.* 67 N. J. L. 17, 50 Atl. 589. But this distinction will not avail the present plaintiff. The inquiries under consideration related to matters that, within the contemplation of the contract, were or ought to have been within the personal knowledge of the applicant. Both related to definite matters of fact. By the undisputed evidence, the recorded answers were in both instances untrue to the knowledge of the applicant.

The contentions of the plaintiff are, therefore, reduced to this: That the consequences of these manifest breaches of warranty are to be evaded by showing that the untrue answers were inserted by agents of the company through error of judgment, negligence, or stupidity. And the facts were attempted to be proved, not by any writing, authentic or otherwise, but by the testimony of witnesses as to what transpired verbally before the contract was reduced to writing and signed by the parties. The learned trial justice adopted the view that, as Freedman was in fact the agent of the defendant company for the purpose of soliciting the insurance, the recitals contained in the application, to the effect "that the persons who wrote in the answers and statements were and are our agents [that is, agents of the applicant and beneficiary for the purpose], and not the agents of the company, and that the company is not to be responsible for its preparation or for anything contained therein or omitted therefrom," etc., could not be taken advantage of by the defendant; that the defendant could not enjoy the benefits of the agency and repudiate the acts of the agent; and that, since Freedman knew of the existence of the Prudential policy, and with that knowledge purposely and honestly, and on his own understanding of the situation, wrote the negative reply to the inquiry respecting other insurance in force, the company was bound thereby for reasons of public policy.

As to the negative reply to the question whether the applicant had been an inmate of a hospital, the trial justice treated the medical examiner as the agent of the company, and held that he had waived that

question. But he did not waive it; he wrote in an answer that was precisely contrary to the fact. And so the false answer in the medical examination must stand upon the same basis with that contained in part A, unless a distinction can be found between the functions of the medical examiner and the functions of the insurance solicitor with respect to the preparation of the application. It may simplify the discussion of the question of law thus presented to assume at the outset (without conceding the proposition) that, if the insurance solicitor and the medical examiner were in truth in the employ of the company and acting in its interest in all matters relating to the negotiations of the contract, including the preparation of the application, the express declaration of the applicant that for certain purposes they should be deemed his agents, and not the agents of the company, is an entire nullity; and that, notwithstanding this declaration, they remained for all purposes the agents of the company, and not of the applicant. Even so, the company was certainly at liberty to limit the powers and authority of its own agents, and third parties dealing with the agents, with express notice of the limitations thus imposed, cannot bind the principal by any act done by the agents in excess of the bounds of their authority. *Catoir v. American L. Ins. & T. Co.* 33 N. J. L. 487; *Metropolitan L. Ins. Co. v. McGrath*, 52 N. J. L. 358, 19 Atl. 386; *McClave v. Mutual Reserve Fund Life Asso.* 55 N. J. L. 187, 26 Atl. 78; *Dicelling-House Ins. Co. v. Snyder*, 59 N. J. L. 18, 34 Atl. 931. Such limitation, and such express notice, are set forth plainly upon the face of this application. The applicant was thereby plainly given to understand that, if he desired to use that instrument as the basis of a contract of insurance with this company, he must himself assume sole responsibility for the truth and correctness of the replies made to the questions therein contained; that Freedman and the medical examiner, though they were agents of the insurance company, were without power to bind the company by any modification or alteration of the declarations made therein, such power being expressly denied to them; and that any false, incorrect, or untrue answer, or any suppression or concealment of facts in any of the answers, would render the policy null and void. If persons seeking insurance, and insurance companies, are to be left free to enter into such contracts as they please with reference to life insurance, it is difficult to find any ground on which we can ignore the force of such stipulations. If a similar question were raised concerning a contract relating to any other subject-matter, not the slightest doubt would be enter-

tained with respect to the answer that should be given. But by reason of the extreme hardship that seems to result in certain instances from avoiding contracts of insurance for reasons such as are here presented, courts have sometimes sought to escape from the force and effect of the plain letter of the instrument by an appeal to a supposed public policy. We are not aware of any public policy that prohibits such stipulations. Insurance companies have the right to say that they will not insure lives until they are made aware of the past history and present financial standing of the applicant by a written declaration signed by himself and made upon his own responsibility. If it is considered essential to inquire as to the amount of insurance outstanding upon his life, they have a right to insist upon a correct reply to such an inquiry as a condition precedent to the issuance of a policy. One who is largely insured may for that reason be more strongly tempted to end his own life, in case of being overcome by disasters in business. One largely insured may be more liable to assassination at the hands of those who are to receive the benefit upon his demise. And so with respect to the inquiry whether the applicant had ever been an inmate of an asylum or hospital. It may often be the case that this fact itself has no bearing upon the expectancy of life of the applicant. In the present case it appears that Dimick's treatment in the hospital was for the results of a not very serious accident, and that this accident had nothing to do with producing his death. But it is matter of common knowledge that, while a patient is confined in a hospital, he is subjected to rigid scrutiny by physicians and nurses, and that in some cases a record is kept of his general physical condition. Such a record might disclose important matters respecting the constitution of the patient, although not connected with the disease or injury for which he underwent treatment. It is therefore not unreasonable for insurance companies to require a full disclosure from applicants concerning any hospital treatment that they have undergone in the past, in order that a full investigation of every thing relating to the expectancy of life may be conducted.

It is sufficient, however, to say that the parties to this contract have themselves treated these replies as material for the purpose of the contract. We are aware of no rule of law that prevents them from doing so. If there be any public policy to the contrary, it is for the legislature, and not for the courts, to declare it. With respect to fire policies, our legislature has thought fit to enact (Gen. Stat. p. 1766, §§ 121, 122, 62 L. R. A.

etc.) that property in this state shall not be insured excepting under a standard form of policy. No similar provision exists with respect to life insurance.

There is a principle of public policy that we find imbedded in the common law, and that furnishes the underlying reason for the rule of evidence that written contracts are not to be varied or altered by parol testimony. It was well expressed by the late Chief Justice Beasley, when he said (*Devees v. Manhattan Ins. Co.* 35 N. J. L. 366, at page 375): "That the common good requires that it shall be conclusively presumed in an action at law, in the absence of deceit, that the parties have committed their real understanding to writing. Hence it necessarily follows that all evidence merely oral is rejected, whose effect is to vary or contradict such expressed understanding. Such rejection arises from the consideration that oral testimony is unreliable in comparison with that which is written. It is idle to say that the estoppel, if permitted to operate, will prevent a fraud or inequitable result. Most parol evidence contradictory of a written instrument has the same tendency; but such evidence is rejected, not because, if true, it ought not to be received, but because the written instrument is the safer criterion of what was the real intention of the contracting parties." It may be added that, while fraud or deceit, proved by word of mouth merely, may render void a written contract, and leave the parties where they stood, it will not in a court of law be accepted as making for the parties a different engagement from that which they have deliberately expressed in writing. Nor can a material part of an entire contract be avoided, leaving the residue of the stipulations to stand.

In this state the elementary principle now declared has been uniformly applied to contracts of fire insurance. In *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568, 29 Am. Rep. 271, where the insurance was obtained through an agent of the company, who inspected the premises at the time of taking the proposal and knew the manner in which they were used, the trial judge left to the jury the determination of the question whether the parties themselves did not knowingly use the term "boarding house" for the purpose of describing what was in truth a country tavern. This court held that such evidence was not admissible to vary the terms of the written contract, and that it could not be received to raise an estoppel *in pais*, and thereby conclude the insurer from setting up the defense that the policy was void by reason of a breach of the conditions upon which it was written. In *Carson v. Jersey City*

Ins. Co. 43 N. J. L. 300, 39 Am. Rep. 584, the supreme court held that a stipulation in a policy that "no agent of this company is authorized in any respect to change the terms and conditions of this policy, and they shall neither be changed nor waived except in writing, signed by the president or secretary," did not apply to a condition that was to be performed after the loss had occurred, such as the furnishing of proofs of loss, and that a condition of this character might be waived by parol; but the decision recognized that the stipulation did apply to those conditions and provisions in the policy which relate to the formation and continuance of the contract and are essential to its binding force while it is running. In *Bennett v. St. Paul F. & M. Ins. Co.* 55 N. J. L. 377, 27 Atl. 641, the policy declared that it should be void if the assured at the time had any other insurance upon the premises. The defendant pleaded that there was such other insurance. The plaintiff replied that, at the time the policy was made and the premium paid, the defendant knew of the existence of other insurance, and with this knowledge issued the policy sued on. Upon demurrer to the replication, the supreme court gave judgment for the defendant. And in *Ellison v. Gray*, 55 N. J. Eq. 581, 37 Atl. 1018, the attempt was made to obviate the force of a stipulation contained in a policy, requiring a renewal premium to be paid before the expiration of the term of the original insurance, on the ground of a verbal representation made by an employee of the insurer, in the presence and without the dissent of the general agent, to the effect "that the contract would hold just the same as though it had been paid for prior to the expiration of the contract." This court held the insurers bound by the terms of the policy, upon the authority of the *Devees* and *Martin Cases*.

These cases related to policies of fire insurance; but the fundamental principle applies to all contracts in writing. The Supreme Court of the United States at one time expressed a somewhat contrary view. *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. ed. 617. But even that case does not go to the extent that would sustain the present action, for there it did not appear that any limitation of the agent's authority was brought to the notice of the applicant for insurance, and the opinion expressly bases the decision on that ground. This case was cited, and its reasoning overthrown, by Mr. Justice Depue in the *Martin Case*. And the later decisions in the Federal Supreme Court are in accord with the rule as established in this state. *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 62 L. R. A.

29 L. ed. 934, 6 Sup. Ct. Rep. 837, where the court distinguished the *Wilkinson Case* on the ground just mentioned; *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133. The almost universal enforcement, in other jurisdictions, of the rule that we have adhered to in this state, will become apparent by reference to the numerous cases, from the English reports and from state reports, which are cited and exhaustively reviewed in the learned opinion of Mr. Justice Shiras in the case last cited.

But counsel for the plaintiff insists that the contract here in suit was made in the state of New York, and was to be there performed, and that its validity and construction must therefore be determined according to the law of that state. 1 Chitty, Contr. pp. 128 *et seq.* The trial, however, seems to have proceeded upon the theory that the law of this state should control. As to the place of making, the proofs render it at least doubtful whether the contract was made in New York, and so the direction of a verdict for the plaintiff cannot be sustained on that ground. Dimick and his wife resided at Englewood, in this state, and he there followed his trade as a carpenter. The application was there made out, signed, and delivered to defendant's agent. There is no specific proof to show where the policy itself was actually delivered, outside of its own recitals. In the absence of anything to show that Dimick or his wife departed from their home to receive it, the presumption would be that it came to their hands where they resided. The recital, in the body of the policy, that it was signed and delivered at the office of the company in the city of New York, is perhaps evidential to the contrary, but is certainly not controlling. The place of performance is likewise obscure. The contract was of the form known as an endowment policy, and in it the company agreed to pay the sum therein specified to the insured, at its home office in the city of New York, upon surrender of the policy at the expiration of twenty years from its date, and did further agree, in case the insured should die prior to that date, to pay said sum to Bridget Dimick, if living, otherwise to the legal representatives of the insured, upon the receipt by the company at its home office, and its approval, of the proofs of death, and upon the surrender of the policy. It therefore is not clearly expressed that, in the event of the death of the insured, payment was to be made to the beneficiary at the home office. As both she and her husband lived in this state at the time the policy was written and at the time of his death, and as a debtor under ordinary circum-

stances is obliged to seek out the creditor for the purpose of making payment, in the absence of a stipulation to the contrary, it becomes a matter of doubtful construction, upon the terms of the contract, whether it was to be performed in this state, or in the state of New York, in the event that has transpired. Upon this question we at present express no opinion.

But since the plaintiff has raised the question of the law of New York, and since we have reached the conclusion that a *venire de novo* is necessary, we think it proper to express our views upon the question. By force of our revised act concerning evidence (P. L. 1900, p. 370, § 26), "the reports of the judicial decisions of other states and countries may be judicially noticed by the courts of this state as evidence of the common law of such states, and the usual printed books of such reports shall be plenary evidence of such decisions." We have found ourselves much embarrassed in this inquiry by reason of the great contrariety of the views that have found expression in the reports of our sister state upon the topic, owing, doubtless, in large part to the fact that in their system the legal and equitable jurisdictions are consolidated, and the appropriate remedies, perhaps, sometimes confounded. We commence, however, with the reasonable presumption that so fundamental and salutary a rule as that which requires that a written contract shall speak for itself, and that engagements which the parties have deliberately chosen to embody in that form are not to be varied or controlled by the verbal declarations made at and before the execution of the contract, resting, as this rule does, upon fundamental principles of general public policy, is not to be considered as nonexistent in a given jurisdiction until clear evidence to that effect is adduced from its reported decisions. Indeed, the New York reports furnish abundant evidence that, with respect to contracts in general, the rule is fully recognized and enforced. Do they show that it is not recognized, or not enforced, with respect to contracts of insurance, under circumstances such as here presented? The precise question is, whether a false answer in writing to a material inquiry contained in an application for insurance is there held out to be a breach of the warranty, although the application, and the policy alike, makes these answers warranties; and whether this is so held in an action at law, brought not for the purpose of reforming or setting aside the agreement, but for the purpose of a recovery upon it according to its terms; the sole ground for sustaining the action, in spite of the apparent breach of warranty, being this, that the truth was

L. R. A.

known to and was ignored by an agent of the insurer, who acted in the preparation of the application; the application itself in effect declaring that the applicant shall be responsible, and solely responsible, for the truth of the answers therein made, and for their correct recording, and that the agent of the company, if permitted by the applicant to write down the answers, has no authority to bind the company by entering an incorrect answer. For the latest authoritative decision in New York we are referred to *Sternaman v. Metropolitan L. Ins. Co.* 170 N. Y. 13, 57 L. R. A. 318, 62 N. E. 763, a case decided a little over one year ago. This appears to have been an action at law brought to recover upon a contract similar to the one now in suit. The defendant set up a breach of warranty, consisting of a false answer to one of the questions contained in part B of the application, which was signed by the applicant and witnessed by the medical examiner. Upon the trial, plaintiff's counsel offered to prove that the answers in this part of the application were filled in by the physician in his own handwriting; that the insured stated to him his medical history, including an account of numerous illnesses, more or less important, from which he had suffered, and described the treatment he had undergone, and that the medical examiner said they were not of enough importance to be inserted in the application. The evidence thus proffered was excluded as incompetent, immaterial, and in violation of the contract, on the ground that the plaintiff could not by parol vary the terms of the application and contract. The court of appeals reversed the judgment, Judge Vann delivering the opinion of the majority, and Judge Gray a dissenting opinion, with the concurrence of Chief Justice Parker. Although the reasoning of the judges covered the whole topic that we have discussed, the precise question decided was quite narrow. It will be observed at once that it related to an answer contained in part B of the application, and has no bearing upon part A, out of which a part of the present controversy arises. Vann, J., in his opinion, states expressly: "The parties to the policy in question could agree that the person who filled out part A of the application was the agent of the insured, and not of the company. There is a difference in the nature of the work of filling out the blank to be signed by the insured, and that of filling out the blank furnished for the use of the medical examiner. The former is the work of the insured, and may be done as well by one person as by another. He may do it himself, or appoint an agent to do it for him. It is quite different, however, with the work of the medical examiner, be-

cause that requires professional skill and experience, and the insurer permits it to be done only by its own appointee. The insured can neither do that work himself, nor appoint a physician to do it, because the insurer very properly insists upon making the selection itself." That decision is not controlling upon the present case, because of the distinction that the court itself pointed out. But, again, the *Sternaman Case* was decided after the making of the contract now in suit, and the rule there enunciated may be said not to have entered into the contemplation of the present contracting parties. We have therefore examined the earlier New York cases, among others the following: *Chase v. Hamilton Ins. Co.* (1859) 20 N. Y. 52; *Rohrbach v. Germania F. Ins. Co.* (1875) 62 N. Y. 47, 20 Am. Rep. 451; *Alexander v. Germania F. Ins. Co.* (1876) 66 N. Y. 464, 23 Am. Rep. 76; *Van Schoick v. Niagara F. Ins. Co.* (1877) 68 N. Y. 434; *Sprague v. Holland Purchase Ins. Co.* (1877) 69 N. Y. 128; *Whited v. Germania F. Ins. Co.* (1879) 76 N. Y. 415, 32 Am. Rep. 330; *Flynn v. Equitable L. Ins. Co.* (1879) 78 N. Y. 568, 34 Am. Rep. 561; *Grattan v. Metropolitan L. Ins. Co.* (1880) 80 N. Y. 281, 36 Am. Rep. 617; another of the same name (1883) 92 N. Y. 274, 44 Am. Rep. 372; *Fowler v. Metropolitan L. Ins. Co.* (1889) 116 N. Y. 389, 5 L. R. A. 805, 22 N. E. 576; *O'Brien v. Home Ben. Soc.* (1889) 117 N. Y. 310, 22 N. E. 954; *Berry v. American Cent. Ins. Co.* (1892) 132 N. Y. 49, 30 N. E. 254; *Cross v. National F. Ins. Co.* (1892) 132 N. Y. 133, 30 N. E. 390; *Quinlan v. Providence Washington Ins. Co.* (1892) 133 N. Y. 356, 31 N. E. 31; *Baumgartel v. Prov-*

idence Washington Ins. Co. (1893) 136 N. Y. 547, 32 N. E. 990; *McNally v. Phoenix Ins. Co.* (1893) 137 N. Y. 389, 33 N. E. 475; *Moore v. Hanover F. Ins. Co.* (1894) 141 N. Y. 219, 36 N. E. 191; *Forward v. Continental Ins. Co.* (1894) 142 N. Y. 382, 25 L. R. A. 637, 37 N. E. 615; *Wood v. American F. Ins. Co.* (1896) 149 N. Y. 382, 44 N. E. 80; *Robbins v. Springfield F. & M. Ins. Co.* (1896) 149 N. Y. 477, 44 N. E. 159. These cases show that the court of appeals of New York has not adhered with entire consistency to any definite rule. In most cases, however, where the insured acted with express notice of limitations upon the authority of the insurer's agent, he was not permitted to bind the insured by the acts of the agent done outside of such limitations. None of the cases is strictly in point with the present. The one most nearly so is the *Sternaman Case*, already distinguished. Our review satisfies us that by the common law of the state of New York the plaintiff in an action at law upon a life-insurance policy may not avoid the effect of a warranty contained in the application, on the ground that an agent of the company knew the facts and incorrectly entered them in the application, where the instrument itself contains an express limitation upon the powers of the agent, such as is contained in the application before us. At least, this is true so far as answers written by the insurance solicitor are concerned, the answers being such as the applicant himself was at liberty to insert.

The judgment of the Supreme Court should be reversed, and a venire de novo awarded.

NEW YORK COURT OF APPEALS.

William TAYLOR, *Respt.*,
v.
THE COMMERCIAL BANK, *Appt.*

(174 N. Y. 181.)

1. A bank cashier is not acting within the scope of his authority in giving information as to the value of notes executed by customers of the bank, so as to render it liable in case the statements prove to be untrue.
2. A bank is not made liable for the fraud of its cashier in inducing a third person to give credit to one of its customers.

NOTE.—For similar cases in this series as to liability of bank for false statements by cashier as to financial condition of depositors, see *Hindman v. First Nat. Bank* (C. C. App. 6th C.) 48 L. R. A. 210, 57 L. R. A. 108, and *Lieberman v. First Nat. Bank* (Del.) 48 L. R. A. 514.
62 L. R. A.

- ers by false representations as to his responsibility, by the facts that the customer was then largely indebted to the bank, and its representative was soon after made receiver of his property to aid the bank in collecting its claim against him, where the receivership resulted in no benefit to the bank, and it received no advantage from the credit given.
3. That a person might possibly have profited by the fraudulent representations of his agent, made outside the scope of his authority, does not render him responsible for them if he in fact did not do so.
4. No duty rests on the cashier of a bank to disclose the situation of the account of a customer with the bank upon receiving an inquiry from a third person as to the responsibility of the customer.

(*Bartlett, O'Brien, and Vann, JJ., dissent.*)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, reversing a judgment of a Trial Term for Monroe County in defendant's favor in an action brought to recover damages for alleged fraudulent representations made to plaintiff by defendant. *Reversed.*

The facts are stated in the opinion.

Mr. Walter S. Hubbell, for appellant:

The fraudulent representations alleged to have been made by the defendant's cashier were not the representations of the bank, nor can the bank be held liable by reason of such statements.

Kerr. Fraud, p. 116: Story, Agency, § 115; Morse, Banks & Banking, 3d ed. § 167, p. 351; *Mapes v. Second Nat. Bank*, 80 Pa. 163.

Mr. Charles J. Bissell, for respondent:

There was evidence sufficient to warrant a finding by the jury that the representations made to the plaintiff by the defendant's cashier, upon the faith of which the goods were sold and delivered to Lighthouse, were made in the course of the cashier's employment, while acting within the scope of his authority and for the benefit of his principal.

A corporation is liable in an action of tort against it at the suit of a party injured, even where express malice is a necessary element to the cause of action.

Reed v. Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 30 L. ed. 1146, 7 Sup. Ct. Rep. 1286; *Salt Lake City v. Hollister*, 118 U. S. 256, 30 L. ed. 176, 6 Sup. Ct. Rep. 1055; *Nowack v. Metropolitan Street R. Co.* 166 N. Y. 433, 54 L. R. A. 592, 60 N. E. 32; *Mulligan v. New York & R. B. R. Co.* 129 N. Y. 506, 14 L. R. A. 791, 29 N. E. 952; *Palmeri v. Manhattan R. Co.* 133 N. Y. 261, 16 L. R. A. 136, 30 N. E. 1001.

The cashier of a bank is its general executive officer.

Zane, Banks & Banking, pp. 151, 152; *Bridenbecker v. Lovell*, 32 Barb. 9; *City Bank v. Perkins*, 29 N. Y. 554, 86 Am. Dec. 332; *Pope v. Bank of Albion*, 59 Barb. 226; *Barnes v. Ontario Bank*, 19 N. Y. 152; *Farmers' & M. Bank v. Butchers' & D. Bank*, 16 N. Y. 125, 69 Am. Dec. 678.

A bank is liable for injuries resulting from the fraudulent representations of its cashier, where either the bank actually profited as a result of the fraudulent representations, or there is evidence that the representations were made in the interests of the bank and to enable it to profit therefrom, and where it might have profited therefrom.

American Nat. Bank v. Hammond, 25 Colo. 367, 55 Pac. 1090; *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259; *Mac-*

kay v. Commercial Bank, L. R. 5 P. C. 394; *Swift v. Winterbotham*, L. R. 8 Q. B. 244; *Fishkill Sav. Inst. v. National Bank*, 80 N. Y. 162, 36 Am. Rep. 595.

It is not necessary that the bank should actually profit by the fraudulent act of its agent; it is enough that it might have profited by such act.

Holden v. New York & E. Bank, 72 N. Y. 286.

Suppose the cashier of a bank, having authority to collect or secure a debt due the bank, should charge a debtor of the bank with fraud, and upon his own motion procure an order of arrest in an action brought in the name of the bank to collect the debt. An action would lie against the bank, at the suit of the debtor, for false imprisonment, or malicious prosecution, as the case might be.

Fortune v. Trainer, 47 N. Y. S. R. 58, 19 N. Y. Supp. 598; *Hamel v. Brooklyn & N. Y. Ferry Co.* 1 Silv. Sup. Ct. 584, 6 N. Y. Supp. 102; *Palmeri v. Manhattan R. Co.* 133 N. Y. 261, 16 L. R. A. 136, 30 N. E. 1001; *Lynch v. Metropolitan Elev. R. Co.* 90 N. Y. 77, 43 Am. Rep. 141.

Martin, J., delivered the opinion of the court:

The defendant is a domestic corporation organized under the laws of this state, and the purpose of this action was to recover damages alleged to have been sustained by the plaintiff on account of false and fraudulent representations by which he was induced to sell goods on credit to one Lighthouse, who was financially irresponsible.

Upon the trial, at the close of the evidence, a motion for a nonsuit was made by the defendant upon the grounds that the representations made were not the representations of the bank: that the bank received nothing from the transaction, and consequently it was not liable for any representations made by its cashier. This motion was granted. The plaintiff appealed to the appellate division, where, by a divided court, the judgment was reversed and a new trial granted.

The only question involved is whether there was evidence to justify the submission to the jury of the question of the defendant's liability. At the time of the alleged representations, Lighthouse was engaged in the manufacture of mail bags under a contract with the United States government. He was, and for several years had been, a customer of the defendant, and was then its debtor to the amount of about \$15,000, secured by notes made by him and indorsed by John L. Acker. Lighthouse had been recently burned out, and the jury would have been justified

in finding that he was practically insolvent, although his business had been very profitable, netting him annually from \$6,000 to \$10,000. As appears from a statement in the possession of the defendant's cashier, Acker was the owner of real estate to the value of about \$31,700, which was encumbered for \$17,450, leaving an equity of about \$14,250, and was an indorser upon the paper of Lighthouse to the amount of about \$15,000. All of these facts were known to the cashier of the defendant. Lighthouse applied to the plaintiff to purchase a quantity of merchandise, of the value of about \$5,000, in payment for which he proposed to give a note made by himself and indorsed by Acker, and referred the plaintiff to the defendant for information as to their responsibility. The plaintiff subsequently called at the office of the defendant, saw its cashier, and stated that he had been referred to him to ascertain the responsibility of Lighthouse and Acker; and the cashier thereupon told him that the contract which Lighthouse had with the government was all right; to take the note,—it would be good, and he would get his pay. The plaintiff testified that upon these representations he sold the merchandise and took in payment therefor a note made by Lighthouse and indorsed by Acker. There is no pretense that the statement as to the contract which Lighthouse had with the government was untrue, and the statement that he would get his pay was not a statement of an existing fact, but, at most, of something in the future, and hence not actionable. *Lexow v. Julian*, 21 Hun, 577, Affirmed in 86 N. Y. 638; *Gallagher v. Brunel*, 6 Cow. 347; *Farrington v. Bullard*, 40 Barb. 512, 516; *Treacy v. Heckler*, 61 How. Pr. 69, 70; *Sawyer v. Prickett*, 19 Wall. 146, 163, 22 L. ed. 105. Therefore the only ground upon which a recovery could be had, even against the cashier, is that the statement that the note would be good was material; that it was made with a knowledge of its falsity, and with intent that it should be acted upon, and was not a mere expression of opinion. In other words, the plaintiff was bound to prove, as to this statement, representation, falsity, scienter, deception, and resultant injury to the plaintiff. *Arthur v. Griswold*, 55 N. Y. 400; *Brckett v. Griswold*, 112 N. Y. 454, 20 N. E. 376.

If we assume (which we do not decide) that the representations were sufficient to render the cashier personally liable, still the serious question in this case is whether the bank is liable for the statements made by its cashier. Obviously, when the representations were made, the cashier was not engaged in the transaction of the business of the bank. It is equally clear, as we shall

see later, that it is no part of the duty of a bank cashier to make representations as to the responsibility of its customers or others. In this case Lighthouse referred the plaintiff to the bank to inquire as to his responsibility. The plaintiff called upon the cashier; made the inquiry, and was told by him the business in which Lighthouse was engaged; that he had a contract with the government, which was all right and had been renewed; that the note would be good, and he would get his pay.

The duties of a cashier are strictly executive. He is properly the executive agent of the board of directors, as such to carry out what it devises as to the management of the business of the bank. There are certain functions which by long and universal usage have come to be recognized as belonging to the office of cashier. They are declared to be inherent in the office or position as a matter of law, and, unless restricted or enlarged, they, and they only, can be performed by him by virtue of his appointment. Under the circumstances of this case, it is plain that it could not be properly held that the defendant's cashier was acting within the scope of his employment in making the representations complained of. *Crawford v. Boston Store Mercantile Co.* 67 Mo. App. 39; *Horrigan v. First Nat. Bank*, 9 Baxt. 137; *First Nat. Bank v. Marshall & I. Bank*, 28 C. C. A. 42, 54 U. S. App. 510, 83 Fed. 725; *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181; *Mapes v. Second Nat. Bank*, 80 Pa. 163.

In the *Crawford Case* it was held that a cashier has no apparent or implied authority, by virtue of the position he holds, to make any representation on behalf of the bank as to the solvency of one of its debtors, and therefore that the bank will not, in the absence of evidence of authorization, be bound or estopped by such representation made by him in reply to an inquiry on the subject.

In the *Horrigan Case* it is held that answering questions as to the solvency of parties is no part of the business of a cashier of a bank, not fairly included within the scope of such business, but may be, and probably is, an incident of such position, but not an incident to it; and in such a case no liability attaches to the bank.

In *First Nat. Bank v. Marshall & I. Bank* it was held that the cashier of a bank does not act as its agent or representative in answering an inquiry addressed to him by another bank as to the business standing of a third person, and the bank is not bound or estopped by statements so made by him,—his act being one not relating to the business

of the bank, but simply one of customary courtesy, rendered without consideration,—and that the failure of the officers of the bank, in answering a general inquiry from another bank as to the character and standing of a customer, to disclose the fact that the customer was indebted to their bank, and that it held liens on certain of his property, will not estop it to assert such liens as against a mortgage subsequently taken by the inquiring bank.

In the *American Surety Case* it was held that the making of a statement as to the honesty and fidelity of an employee of a bank, for the benefit of the employee, and to enable the latter to obtain a bond insuring his fidelity, was no part of the ordinary business of a bank president.

In *First Nat. Bank v. Ocean Nat. Bank*, it was held that in the absence of proof that special authority had been delegated by its board of directors, or had been exercised with their sanction or knowledge, or evidence that it had been the habit and practice of the corporation to receive property for safekeeping, it was not responsible for property so received by its cashier.

In the *Mapes Case* a suit by the bank against indorsers of a note discounted for the accommodation of the drawer, where the affidavit of defense was that, at and before the time that defendants indorsed the note, they had inquired of the cashier and one of the directors of the bank whether it would be safe for them to indorse, and that these officers informed them that they considered the drawer perfectly good, and they would be safe in indorsing; that the officers knew the representations to be false; and that they made them to deceive the defendants, who would not have indorsed but for the representations,—it was held to be insufficient, and that such declarations, although wilfully false, made by the officers, not in the course of their duties as officers or agents of the bank, could not affect the bank.

Whether any particular act does or does not fall within the general power of a cashier is said to be a question of law, for the court, and not of fact, for the jury, although a question of fact may arise when it is claimed that the acts or conduct of the board of directors have amounted to a public holding out of the cashier as its agent to perform other and unusual acts for the bank. *Farmers' & M. Bank v. Troy City Bank*, 1 Dougl. (Mich.) 457; *Peninsular Bank v. Hanmer*, 14 Mich. 208; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1008; 1 Morse, Banks & Banking, 4th ed. § 153, note; Huffcut, Agency. 156. It is true, a bank may, by the adoption of a method of transacting its business which includes other than the ordinary powers

vested in a cashier, confer upon him such additional powers as are necessary for the transaction of the business in the manner thus adopted.

There was no evidence in this case which would have justified a finding that the defendant's cashier had any authority to perform any duties other than those which inhered in the office. Nor was there any evidence whatsoever that any unusual method had been adopted by the bank for the transaction of its business, which would include any authority upon the part of the cashier to bind the bank by representations as to the responsibility of its customers.

In September, 1894, more than a year after the representations are alleged to have been made, Lighthouse's business having proved unsuccessful by reason of the lack of orders from the government, he transferred his property and business to Thomas Swanton and John L. Acker under an arrangement by which the business was to be conducted by them in a manner specified. All deposits were to be made in the defendant bank, and the profits of the business and proceeds of the property were to be applied to pay the bank and the debt of the plaintiff; and, as testified to by the plaintiff's son, they were to share *pro rata*. When these obligations were discharged, the business was to be restored to Lighthouse, or to any person designated by him, after compensation to Swanton and Acker for the services rendered by them. Swanton was teller of the bank, and Acker was indorser upon the notes held by the plaintiff and the bank. The business conducted by them was not successful. No profits were realized, chiefly because orders from the government ceased; and the business and property, when ultimately disposed of, realized nothing to apply upon the indebtedness of either the bank or of the plaintiff, so that the bank received nothing which rendered it liable for the means by which it was obtained, or estopped it from denying the cashier's authority.

The respondent contends that the defendant was liable for the fraud of its cashier, upon the principle that, where a party receives and retains the fruits or product of a fraud, it imposes a liability therefor, although such person may be innocent of personal participation in the wrong. It is an established principle of law that where a person acts for another, who accepts the fruits of his efforts, the latter must be deemed to have adopted the methods employed, as he may not, even though innocent, receive the benefits and at the same time disclaim responsibility for the fraud by means of which they arose. *Garner v. Mangum*, 93 N. Y. 642; *Krumm v. Beach*, 96 N. Y. 398;

Fairchild v. McMahon, 139 N. Y. 290, 34 N. E. 779. Obviously, that principle has no application to the case at bar, as it is practically undisputed that the bank received nothing from the property of Lighthouse. Nor did it receive any advantage by reason of the sale to Lighthouse of the goods in question.

It is further urged that the liability of a principal for the unauthorized fraud of another includes a case where, although the principal did not profit, he might possibly have profited by the wrongful and unauthorized act. We have found no authority sustaining any such doctrine. A remark of Lord Coleridge in *Swift v. Jewsbury*, L. R. 9 Q. B. 301, 312, seems to be relied upon. In that case the decision of *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259, was under consideration, and it was there said: "I apprehend that there can be no doubt that a different set of principles altogether arises where an agent of a joint-stock company, in conducting the business of the joint-stock company, does something of which the joint-stock company takes advantage, and by which they profit, or by which they may profit, and it turns out that the act which is so done by their agent is a fraudulent act. Justice points out, and authority supports justice in maintaining, that, where a corporation takes advantage of the fraud of their agent, they cannot afterwards repudiate the agency and say that the act which has been done by the agent is not an act for which they are liable." We find in this case and in the other cases relied upon by the respondent no decision or enunciated principle which supports his contention. But on the contrary, we find that the cases cited merely sustain the conceded principle that one who receives and retains the fruits of fraud becomes liable therefor. The language of Lord Coleridge is to be considered in the light of the case he had under consideration, and the words "by which they profit, or by which they may profit," are to be interpreted in view of the questions involved and of their context. Obviously, they were employed upon the assumption that advantage had been taken of the transaction, induced by the fraud of the agent. In that case the agent acted within the scope of his general authority in writing the letter, which was the fraud complained of. Moreover, the words, "by which they profit, or by which they may profit," refer only to a condition where the principal has actually taken advantage of the unauthorized act of the agent. If the principle contended for by the plaintiff were broadly sustained, why would it not apply to him as well as to the defendant. The arrangement having been that the benefits of a continu-

ance of the Lighthouse business were to be shared *pro rata* by the plaintiff and defendant? This suggestion illustrates the fallacy of the claim that a party who might profit by a fraudulent transaction would be liable therefor, although he neither adopted it nor took any advantage under it. Moreover, the decision in the *Swift Case* rested entirely upon another ground, which includes no principal applicable to the case at bar.

It was said by the learned judge delivering the opinion of the court below that the evidence was sufficient to support a finding by the jury that when the cashier made such representations he was acting for or on behalf of the bank, and made them for the purpose of enabling Lighthouse to obtain the plaintiff's property, to the end that Lighthouse might thereby continue in business, and realize therefrom sufficient to enable him to discharge his obligations to the bank, or some part thereof. We regard this claim, at most, as merely conjectural, and, under the evidence, as too nebulous to form the basis of a judicial determination. If there is any competent evidence in the record sufficient to have justified a jury in finding that the cashier was acting for or on behalf of the defendant in making such representations, or that they were made for the purpose stated, we have been unable to discover it. While there was proof of declarations and admissions of the defendant's cashier and teller as to past transactions, and as to matters not relating to any business of the bank, and which consequently did not bind it, there was no competent proof of any facts which would have supported a finding of the jury to that effect. The admissions of an agent are not competent evidence against his principal unless they are expressly authorized, or relate to and are made in connection with some act done in the course of his agency, so as to form a part of the *res gestæ*. *Anderson v. Rome, W. & O. R. Co.* 54 N. Y. 334; *Manhattan L. Ins. Co. v. Forty-second Street & G. Street Ferry R. Co.* 139 N. Y. 146, 34 N. E. 776.

Nor can the admissions or declarations of an agent be evidence against his principal, either to establish the fact of his agency, or the nature or extent of his authority. Neither can he create authority in himself to do a particular act by its performance, or by asserting his authority to do it. *Stringham v. St. Nicholas Ins. Co.* 4 Abb. App. Dec. 315; *Hatch v. Squires*, 11 Mich. 185; *Hoice Mach. Co. v. Clark*, 15 Kan. 492; *Brigham v. Peters*, 1 Gray, 139; *Mitchum v. Dunlap*, 98 Mo. 418, 11 S. W. 989; *Butler v. Chicago, R. & Q. R. Co.* 87 Iowa, 206, 54 N. W. 208; *Mechem, Agency*, § 100.

Even without eliminating from our consid-

eration the incompetent testimony of the acts and declarations of the employees of the bank when not engaged in the transaction of the business of the latter, there is practically no evidence which would justify a jury in finding that the cashier was acting for or on behalf of the defendant in making the representations which are the subject of this action. It is true that, when the cashier made such representations, Lighthouse was indebted to the bank for more than \$15,000; yet, as we have already seen, no duty was imposed upon the cashier, as such, to communicate to a person inquiring as to the responsibility of a customer the actual situation of his account at the bank. Nor is it within the line of the duty of a cashier to disclose the condition of the accounts of the customers of a bank whenever inquiry is made as to their responsibility.

A careful study of the evidence discloses that there were no facts, circumstances, or proof that would justify the conclusion that the defendant's cashier was in any way engaged in the business of the bank in making any of the representations proved, or that his purpose in making them was that attributed to him by the court below. It is possible that under the evidence the court may have suspected that such was the purpose, but a mere conjecture, suspicion, or surmise is not sufficient to authorize a finding to that effect. *Loidlaw v. Sage*, 158 N. Y. 73, 94, 44 L. R. A. 216, 52 N. E. 679.

It follows that the trial court properly nonsuited the plaintiff, and hence *the judgment of the Appellate Division must be reversed*, and that of the trial court affirmed, with costs.

Parker, Ch. J., and Cullen and Werner, JJ., concur.

Bartlett, J., dissenting:

As a minority of the court are unable to agree with the disposition to be made of this case, it is deemed proper to state briefly the position of the dissenting judges, as the rule of law about to be established is of far-reaching importance in the business world.

The precise question presented by this appeal has not been decided by this court, as stated by counsel on the argument. The great commercial interests of this state require a rule calculated to protect the public in their dealings with banks through their officers, and the decisions of courts in jurisdictions where the point now presented is of minor importance are not entitled to controlling weight.

The sole question is whether Pond, the cashier of the defendant, was acting officially and in the line of his authority, as representing the bank, when he made the repre-

sentations to the plaintiff concerning the financial responsibility of Lighthouse and Acker.

There is no difference of opinion in the court concerning the following proposition: If A, being a depositor in a bank, and desiring B to give him credit, sends him to the bank for information as to his financial responsibility, and the cashier represents A to be worthy of credit, the cashier must be deemed to have acted in his individual capacity, and his action would in no way bind the bank; that is to say, the relation of A to the bank, being solely that of depositor, would not justify the cashier in speaking officially. It is for the reason that the facts in this case disclose a very different relation between the bank and the depositor that we are unable to agree with the majority of the court.

The controlling and undisputed facts are as follows: The representations of the cashier which induced the plaintiff to extend credit to Lighthouse were made in April, 1893. For some years prior to that date Lighthouse had been engaged in the business of manufacturing mail bags from leather and canvas under contract with the United States government. The plaintiff was a dealer in leather, and prior to 1893 had sold several bills to Lighthouse without making inquiry as to his financial standing, and they were regularly paid. In the month of January, 1893, the factory of Lighthouse was partially destroyed by fire, ruining all his stock of leather and damaging his machinery and other plant to a considerable extent. In the following April, when Lighthouse solicited plaintiff to sell him an invoice of leather valued at about \$5,000, the latter asked for a reference as to his financial responsibility, and was directed to call upon the Commercial Bank of Rochester. The plaintiff did so, and relying upon the representations made by the bank's cashier, delivered the leather to Lighthouse. Swanton, at the time of the trial the cashier of the defendant, and in April, 1893, its teller, testified, as defendant's witness, under cross-examination, that in the years 1891 and 1892 Lighthouse was indebted to the bank in the sum of \$25,000; that shortly prior to January, 1893, the amount was \$22,000, and at the time of the representations made by Pond, the cashier, to the plaintiff, was between \$17,000 and \$18,000. It also appears that Lighthouse had no financial responsibility, except such profits as he might realize in the performance of his contract with the government. Acker, the surety on Lighthouse's contract with the government, and the indorser on plaintiff's note, testified that while he owned real estate, which, according to the statement made to the bank,

showed an equity of some \$14,000, it was encumbered by mortgages, which were subsequently foreclosed by the bank, and resulted in a judgment against him in every case for a deficiency. The sequel proved that Acker was absolutely without financial responsibility. Lighthouse, during all the transactions involved in this case, was a depositor of the defendant bank. The plaintiff, when he made the sale based on the representations of the defendant's cashier, took Lighthouse's note for \$5,000, indorsed by Acker, dated May 4, 1893, and falling due the following August, when it was protested, and no part thereof paid, except the sum of \$1,000. It is also to be borne in mind that Acker was an indorser on all of Lighthouse's paper in the hands of the bank.

In view of these facts, it would seem as if honesty and fair dealing required the bank, when called upon by the plaintiff, at the instance of Lighthouse, to either refuse to make any statement in regard to the latter's financial responsibility, or to disclose to the plaintiff the fact that it had been for a long time discounting Lighthouse's paper, with Acker as an indorser, held a large amount of it at the time when the question was asked, and that Lighthouse had been heavily indebted to the bank for several years. It is said that, while this course of conduct might be required in fair dealing between two individuals, the rule would not apply if the reference as to the financial responsibility was made to a banking corporation. We are unable to see any difference between the two cases. A bank, in our modern business life, comes into daily contact with the citizen in numberless ways, and, as an intangible legal entity can only act through its officers, there would seem to be no reason why it and the individual should not be held, under the circumstances disclosed in this case, to the same measure of good faith and business integrity. It was greatly to the interest of the bank that the credit of Lighthouse should be maintained, and yet it seems very certain that, if the plaintiff had been advised as to the true relations existing between the bank and Lighthouse and his indorser, Acker, and also of the business embarrassment under which Lighthouse was laboring, no credit would have been extended to him. The real situation existing at the time these representations were made is rendered apparent by the fact that the note for \$5,000 given in reliance upon the representations made in April went to protest the following August.

In the view we take of this case, the facts to which reference has been made control the disposition of the question before the court; but it adds greater emphasis to them 62 L. R. A.

when the remaining facts, which need not be discussed in detail, show that the protest of plaintiff's note in August, 1893, was the beginning of the end, and both maker and indorser thereof passed on into hopeless bankruptcy, their creditors losing substantially everything.

The prevailing opinion suggests doubt as to the sufficiency of the false representations, as matter of law, and assumes, but does not decide, that they would render the cashier liable. It is a significant fact that appellant's counsel did not make this point. We regard the representations, taken as a whole, as amply sufficient to charge the defendant.

At the close of all the evidence the learned trial judge granted defendant's motion for a nonsuit.

In writing this dissenting memorandum, we have spoken positively as to the effect of what we deem to be the controlling facts in this case, but the point really presented for our consideration is, Was there sufficient evidence to submit to the jury the question whether these facts showed that the cashier was acting for the bank when he made the representations upon which the plaintiff relied? The learned appellate division was of the opinion that there were such facts, and granted a new trial. A very instructive case, having a direct bearing upon the situation here presented, is *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259. In that case the cashier of the bank delivered a written guaranty to the plaintiff to the effect that J. D.'s check on the bank in plaintiff's favor, in payment of goods supplied, should be paid on receipt of the government money, in priority to any other payment, except to the bank, and made false statements as to the credit of J. D. It appears that J. D. was indebted to the bank at the time in the amount of £12,000; that this fact was not disclosed to the plaintiff, who, relying upon the representations, extended credit to J. D., and accepted his check on the bank, which the latter refused to honor, but applied the government money upon the indebtedness due it from J. D. The plaintiff sued the bank for fraudulent representations, and it was held liable. In *Swift v. Jewsbury*, L. R. 9 Q. B. 301, Chief Justice Coleridge, at page 312, comments favorably upon the *Barwick Case*. The case of *American Nat. Bank v. Hammond*, 25 Colo. 367, 55 Pac. 1090, is also very much in point.

We are of opinion that the judgment of the appellate division should be affirmed.

O'Brien and Vann, JJ., concur with **Bartlett, J.**

Motion for rehearing denied.

OHIO SUPREME COURT.

William H. A. READ, Assignee, etc., of Cary
D. Lindsay, *Plff. in Err.*,
v.

TOLEDO LOAN COMPANY *et al.*

(68 Ohio St. 280.)

*1. A mortgage executed agreeably to the provisions of § 4106, Rev. Stat. Ohio 1892, and attested and acknowledged as therein provided, is not invalid, and cannot be impeached, in the absence of fraud and undue advantage, merely because the witnesses who attest the signature of the mortgagor and the notary public taking his acknowledgment are stockholders of, but not otherwise interested in, the corporation named in said mortgage as grantee.

2. In taking and certifying an acknowledgment as provided in said § 4106, the act of the notary public or other officer taking and certifying the same is a ministerial, and not a judicial, act.

(May 19, 1903.)

ERROR to the Circuit Court for Lucas County to review a judgment affirming a judgment of the court of Common Pleas which in turn affirmed a judgment of the Probate Court establishing a mortgage as a valid lien upon property which petitioner asked leave to sell to pay debts. *Affirmed.*

Statement by **Orew, J.:**

This action was originally commenced in the probate court of Lucas county, Ohio, by William H. A. Read, as assignee for the benefit of creditors of Cary D. Lindsay, by the filing of a petition in said court, asking for an order to sell certain of the assigned real estate to pay debts. To this proceeding the defendant in error, the Toledo Loan Company and others were made parties defendant. The Toledo Loan Company filed its answer and cross-petition, asserting a claim and lien against the property asked to be sold, to the extent of \$4,800, by virtue of a certain mortgage held by it, and which it alleged had been duly executed and delivered to it by Cary D. Lindsay, the assignor. To this claim of the Toledo Loan Company, the assignee, plaintiff in error, replied, admitting the execution and delivery by his assignor to said loan company of said "pretended mortgage," but denied the validity of said instrument as a mortgage, on the ground and for the reasons, as alleged in

his reply, that the same was defectively executed, and had not been sufficiently and properly acknowledged or witnessed according to law, in that the witnesses to said instrument, and the notary public who took the acknowledgment thereof, were each stockholders in said the Toledo Loan Company, grantee in said instrument. The instrument in controversy was found and held by the probate court to be a valid mortgage, and the claim and lien of the loan company thereunder was sustained. Upon appeal by the assignee to the court of common pleas, a like finding and judgment was made and entered by that court. Thereupon the case was taken, on error by the assignee, to the circuit court of Lucas county, where the judgment of said court of common pleas was affirmed. To reverse this judgment of affirmation, the present proceeding in error is prosecuted.

Mr. William H. A. Read, in propria persona, for plaintiff in error:

An acknowledgment of the execution of an instrument, taken by a party to it, is void, and does not authorize it to be recorded, and the record of it imparts no notice to subsequent purchasers or encumbrancers.

Green v. Abraham, 43 Ark. 420; *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955; *Brereton v. Bennett*, 15 Colo. 254, 25 Pac. 310; *Hogans v. Carruth*, 18 Fla. 587; *Kothe v. Krag-Reynolds Co.* 20 Ind. App. 293, 50 N. E. 595; *Hubble v. Wright*, 23 Ind. 322; *Hammers v. Doyle*, 61 Ill. 307; *West v. Krebaum*, 88 Ill. 263; *City Bank v. Radtke*, 87 Iowa, 363, 54 N. W. 435; *Wilson v. Traer*, 20 Iowa, 231; *Dail v. Moore*, 51 Mo. 589; *Stevens v. Hampton*, 46 Mo. 404; *Hainey v. Alberry*, 73 Mo. 427; *Beaman v. Whitney*, 20 Me. 413; *Groesbeck v. Serley*, 13 Mich. 329; *Holden v. Brimage*, 72 Miss. 228, 18 So. 383; *Jones v. Porter*, 59 Miss. 628; *Horbach v. Tyrrell*, 48 Neb. 514, 37 L. R. A. 434, 67 N. W. 485; *Child v. Baker*, 24 Neb. 188, 38 N. W. 725; *Long v. Creus*, 113 N. C. 256, 18 S. E. 499; *Armstrong v. Combs*, 4 N. Y. Anno. Cas. 158; *Baxter v. Howell*, 7 Tex. Civ. App. 198, 26 S. W. 453; *Rothschild v. Daugher*, 85 Tex. 332, 16 L. R. A. 719, 20 S. W. 142; *Davis v. Brazley*, 75 Va. 491; *Bouden v. Parrish*, 86 Va. 67, 9 S. E. 616; *Nicholson v. Gloucester Charity School*, 93 Va. 101, 24 S. E. 899; *Clinch River Veneer Co. v. Kurth*, 90 Va. 737, 19 S. E. 878; *Tavener v. Barrett*, 21 W. Va. 657; *Withers v. Baird*, 7 Watts, 227, 32 Am. Dec. 754.

The statute which requires that conveyances of land shall be attested by two wit-

*Headnotes by the COURT.

NOTE.—As to validity of acknowledgment taken by officer of corporation which is one of the parties, see cases in *note* to *Havenmeyer v. Dahn*, 33 L. R. A. 337; also *Cooper v. Hamilton Perpetual Bldg. & L. Asso.* 33 L. R. A. 338, 62 L. R. A.

nesses intends an attestation by witnesses who at the time are disinterested.

Winsted Sav. Bank & Bldg. Asso. v. Spencer, 28 Conn. 195; *Carter v. Champion*, 8 Conn. 549, 21 Am. Dec. 695.

An acknowledgment of an instrument taken by a notary public, who is a stockholder in one of the parties to the instrument, is void.

Smith v. Clark, 100 Iowa, 605, 69 N. W. 1011; *Miles v. Kelley*, 16 Tex. Civ. App. 147, 40 S. W. 599; *Brown v. Moore*, 38 Tex. 645.

An acknowledgment is void when taken by an officer who is a party to the instrument, or who is beneficially interested in the same, directly or indirectly.

Ogden Bldg. & L. Asso. v. Mensch, 99 Ill. App. 67; *Donovan v. St. Anthony & D. Elevator Co.* 8 N. D. 585, 46 L. R. A. 721, 80 N. W. 772; *Wilson v. Griess*, 64 Neb. 792, 90 N. W. 866.

Messrs. King & Tracy, for defendants in error:

The mortgage is not defective and invalid because the witnesses thereto and the notary before whom same was acknowledged were, at the time of the execution of the instrument, stockholders in the loan company.

Doe ex dem. Johnson v. Turner, 7 Ohio pt. 2, p. 216; *Amick v. Woodworth*, 58 Ohio St. 86, 50 N. E. 437.

A notary public in Ohio is only a ministerial officer.

Flournoy v. Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468; *Truman v. Lore*, 14 Ohio St. 144; *Williamson v. Carskadden*, 36 Ohio St. 664.

In determining the capacity of the notary to act, the courts distinguish between judicial and ministerial acts.

National Bank v. Conway, 1 Hughes, 37, Fed. Cas. No. 10,037; *Harkins v. Forsyth*, 11 Leigh, 294; *Carper v. M'Dowell*, 5 Gratt. 212; *Horsley v. Garth*, 2 Gratt. 471, 44 Am. Dec. 393; *Taliaferro v. Pryor*, 12 Gratt. 277; *Johnston v. Slater*, 11 Gratt. 321; *Turner v. Stip*, 1 Wash. (Va.) 319; *Stevens v. Hampton*, 46 Mo. 404; *Boswell v. Flockheart*, 8 Leigh, 364; *Dimes v. Grand Junction Canal Co.* 16 Eng. L. & Eq. 64; *Sawyer v. Coz*, 63 Ill. 130; *Nicholson v. Gloucester Charity School*, 93 Va. 101, 24 S. E. 899; *Horbach v. Tyrrell*, 48 Neb. 514, 37 L. R. A. 434, 67 N. W. 485.

In some states the act of a notary in taking and certifying an acknowledgment is held to be a judicial act.

Williams v. Baker, 71 Pa. 476; *Heeter v. Glasgow*, 79 Pa. 79, 21 Am. Rep. 46; *Griffith v. Ventress*, 91 Ala. 366, 11 L. R. A. 193, 8 So. 312; *Wedel v. Herman*, 59 Cal. 514; *Stevens v. Hampton*, 46 Mo. 404; *Long v. Creus*, 113 N. C. 256, 18 62 L. R. A.

S. E. 499; *Cover v. Manacay*, 115 Pa. 338, 8 Atl. 303; *Boicden v. Parrish*, 86 Va. 67, 9 S. E. 616; *Pickens v. Knisely*, 29 W. Va. 1, 11 S. E. 932; *Johnston v. Wallace*, 53 Miss. 331, 34 Am. Rep. 699; *Wasson v. Connor*, 54 Miss. 351; *White v. Connelly*, 105 N. C. 65, 11 S. E. 177.

In taking and certifying the acknowledgment of conveyances, an officer exercises a power which is strictly ministerial, and in no sense judicial.

Shults v. Moore, 1 McLean, 520, Fed. Cas. No. 12,824; *Halso v. Seauright*, 65 Ala. 431; *Biscoe v. Byrd*, 15 Ark. 655; *Banbury v. Arnold*, 91 Cal. 606, 27 Pac. 934; *Stevenson v. Brasher*, 90 Ky. 23, 13 S. W. 242; *Lewis v. Waters*, 3 Harr. & M'H. 430; *Learned v. Riley*, 96 Mass. 109; *Odiorne v. Mason*, 9 N. H. 24; *Lynch v. Livingston*, 8 Barb. 463.

A notary in Ohio is not disqualified by reason of his interest in the mortgagee company.

Horton v. Columbian Bldg. & L. Soc. 6 Cin. Law Bull. 141.

Crew, J., delivered the opinion of the court:

On the trial of this cause in the court of common pleas, at the request of the plaintiff, the court made and stated its finding of facts separate from its conclusions of law, and the facts so found and stated by said court of common pleas are admitted to be correct, and they are not here in dispute. The sole controversy in this case arises upon the statement of facts contained in paragraphs 4 and 5 of its findings of fact so made by said court of common pleas. Said paragraphs are as follows:

"(4) That prior to and upon February 19, 1896, said assignor, Cary D. Lindsay, was a member of said the Toledo Loan Company, and on said date subscribed for ten shares of the capital stock of said company; that thereupon, on the representation of said Cary D. Lindsay to said company, and upon agreement between said Cary D. Lindsay and said company, that said loan should become and be secured by a first lien upon said lots numbers 116 and 117 in Shaw's Monroe Street addition to Toledo, Ohio, said the Toledo Loan Company, on February 19, 1896, loaned and advanced to said Cary D. Lindsay the sum of forty-eight hundred dollars (\$4,800), of and from the moneys theretofore raised by said company for said purpose of loaning to its members, said Cary D. Lindsay agreeing to repay said loan, with interest, in weekly instalments, in accordance with the constitution and by-laws of said company; that in pursuance of said representations and agreement, and to secure the payment of said money so loaned,

with interest, and simultaneously with the loaning thereof, said Cary D. Lindsay executed, acknowledged, and delivered to said defendant the Toledo Loan Company his certain mortgage for said sum of \$4,800 upon said lots numbers 116 and 117 in Shaw's Monroe street addition aforesaid.

"(5) That said mortgage was executed by said Cary D. Lindsay in the presence of Eva M. Ely and Grant Williams, and was acknowledged by said Cary D. Lindsay before Grant Williams, a notary public within and for Lucas county, Ohio; that, at the time of the execution and acknowledgment of said mortgage, said Cary D. Lindsay was a stockholder in said the Toledo Loan Company, and Eva M. Ely and Grant Williams were each owners of two shares of the stock of said company, and said Eva M. Ely and Grant Williams were not otherwise related to said the Toledo Loan Company, or in any wise employed by it, and said Cary D. Lindsay then knew that said witnesses and notary, respectively, were stockholders in said company."

Upon the foregoing facts, it is claimed by plaintiff in error, "first, that, inasmuch as Eva M. Ely and Grant Williams were both stockholders of the defendant company, the mortgage given to it by Cary D. Lindsay was never witnessed; second, that, inasmuch as Grant Williams, the notary before whom said mortgage purports to have been acknowledged by Cary D. Lindsay, was a stockholder in said company, said mortgage was never duly acknowledged; third, that, never having been acknowledged, and never having been witnessed as to its signature, said mortgage was not entitled to record in Lucas county, and the recording of the same was a nullity; fourth, that the plaintiff, as assignee, holds the legal title to said real estate free from all encumbrances or liens growing out of said mortgage."

It will thus be seen that the question here presented is whether a mortgage made to a corporation as grantee is invalid and of no effect by reason of the fact that the witnesses to such mortgage and the officer taking the acknowledgment thereof are stockholders in said corporation. The requisites as to the manner and form of the execution of instruments for the conveyance or encumbrance of real property is matter of statutory regulation, and the statute providing for and governing the execution and acknowledgment of deeds, mortgages, etc., in this state, is § 4106, Rev. Stat. 1892, which section, so far as it has relation to the present inquiry, and application to the question here involved, provides as follows: "A . . . mortgage . . . of any estate or interest in real property shall be signed by the . . . mortgagor, . . . and such

signing shall be acknowledged by the . . . mortgagor . . . in the presence of two witnesses, who shall attest the signing and subscribe their names to the attestation, and such signing shall also be acknowledged by the . . . mortgagor . . . before a judge of a court of record in this state, or a clerk thereof, a county auditor, county surveyor, notary public, mayor, or justice of the peace, who shall certify the acknowledgment on the same sheet on which the instrument is written or printed, and subscribe his name thereto."

It will be observed that, within the provisions of this section, the only requirements are that the mortgage shall be signed by the mortgagor; that such signing shall be acknowledged by him in the presence of two witnesses, who shall attest the same; and that such signing shall be acknowledged by the mortgagor before one of the several officers therein named, whose duty it shall be to make certificate thereon of said acknowledgment. But the qualifications of the witnesses so attesting and the officer so certifying are not attempted to be prescribed by said section; nor is there in said statute any provision, or even suggestion, that a witness or officer shall be disqualified or rendered incompetent as such by reason of being interested in the conveyance so witnessed and certified. In the absence, then, of any express provision in the statute forbidding it, the precise question here presented is, whether a stockholder in a corporation, not otherwise interested therein, may be a witness to, and, as notary public, may take the acknowledgment of, a mortgage executed by another to such corporation; and the proper determination of this inquiry involves, to some extent, at least, a consideration both of the purpose of the legislation requiring the observance of these formalities in the execution of a mortgage, and also of the capacity in which a notary acts in taking and certifying the acknowledgment of the grantor—whether such act on his part is judicial or ministerial in character. At common law, attestation was not necessary to the validity of a deed or mortgage, and is not now necessary, except when required by statute. The purpose of the legislature in requiring that an instrument for the conveyance or encumbrance of real property shall be witnessed by two witnesses doubtless was that there might be on record, in a matter so important as that of the conveyance or encumbrance of real property, the names of two persons who certify or attest the fact that they saw the grantor sign the instrument, or heard him acknowledge the same, and thereby to furnish an easy and effectual mode of proof of its execution, and thus provide an additional protection or security against the making

of a fraudulent or forged conveyance or encumbrance. The certificate of acknowledgment by a notary public, or other authorized officer, is simply an additional solemnity in the execution of a deed or mortgage, and is required by statute chiefly for the purpose of affording proof of the due execution of the instrument by the grantor, sufficient to authorize the recorder to make the same matter of public record. § 4134, Rev. Stat. 1892. Jones on the Law of Real Property in Conveyancing, at § 1128, in discussing the subject of "Acknowledgment," says: "The chief use of an acknowledgment, as already noticed, is to perfect the deed for record. The grantor can select such authorized officer before whom to acknowledge his deed as he chooses. He may refuse to make his acknowledgment before an interested officer. Having voluntarily acknowledged the deed, the grantor is presumed to have voluntarily consented to its record. 'If his deed is found on record, apparently executed according to the forms of law, and without any circumstances of suspicion against it, the plainest principle of equity would hold him estopped from setting up an undisclosed interest of the officer before whom he made his acknowledgment, to defeat his conveyance, as against an innocent purchaser relying upon the record as the evidence of his title.'" "An interest under a deed not apparent on its face does not disqualify an officer to take and certify an ordinary acknowledgment. Thus, if he is one of the beneficiaries in a deed of trust he may take the grantor's acknowledgment, when his interest under the deed does not appear on the face of it. The fact that he acted as the agent of the mortgagor in obtaining the money does not disqualify him to take the mortgagor's acknowledgment." What is here said by the author would seem to apply equally as well to the witnesses attesting the signature of the grantor as to the officer taking his acknowledgment.

In an early case in this state (that of *Doe ex dem. Johnson v. Turner*, 7 Ohio, pt. 2, p. 216), it was decided by this court that a witness to a trust deed given to secure an indebtedness to a bank, who at the time of the execution of such deed was a stockholder in said bank, was not thereby disqualified to act as a subscribing witness to said deed, and that such deed was not thereby rendered invalid, nor could it, on that ground, be impeached for want of sufficient attestation. The question there decided arose and was presented on the following agreed statement of facts: "Walter Turner was indebted to the Bank of Zanesville in the amount stated in the trust deed under which the plaintiffs claimed, and, on the application of C. B. Goddard, Esq., the attorney for the bank,

executed the deed which was prepared and signed by said Goddard, as one of the subscribing witnesses, he (Goddard) being a stockholder in the corporation." In the opinion in that case the court says: "The first question for the consideration of the court is the objection to the trust deed, because, at the time of its execution, General Goddard, one of the subscribing witnesses, was a stockholder in the Bank of Zanesville. If this objection is sustainable, the deed is invalid to pass the legal title of the lands intended to be conveyed to the trustee for the security of the bank, and ought not to be received in evidence in support of a legal title in the plaintiff's lessors.

. . . But is not this deed in conformity with the statute? This is admitted, in all respects, excepting that General Goddard was interested in the corporation for whose benefit it was made, when he subscribed it as a witness, and it was executed by Turner. . . . In England, the grantee must prepare the conveyance and present it to the grantor for execution. We know of no such rule here. The grantor prepares his own deed. He calls his witnesses. They are selected by himself. He must then acknowledge its execution, and not until thus acknowledged does he part with its possession by a delivery to the grantee. Every act, therefore, is the act of the grantor, while the deed remains in his possession, and the first act of the grantee is the acceptance when finally delivered to him. The grantor, then, should not, it appears to us, be permitted to object to a witness selected by himself, and in whose integrity he had reposed confidence, to bear witness to his own acts. But aside from this course of reasoning, is this deed invalid? The statute [31 Ohio Laws, p. 346, § 1] requires the deed to be executed 'in the presence of two witnesses, who shall attest such signing and sealing and subscribe their names to such attestation.' Unless the express provisions of this statute, or its plain inference, lead to the conclusion that the witnesses to a deed must be credible and competent to prove its execution at the time of their attestation, and that such was the intention of the legislature, reluctantly indeed would this court adopt such an opinion. If such be the law, it is time to look around us and ascertain by whom our deeds bear witness."

As above stated, the court in this case held that the trust deed was sufficiently attested, was valid, and could not be impeached by showing that Goddard, one of the attesting witnesses, was interested in the corporation. But it is here insisted by counsel for plaintiff in error that the doctrine of this case is modified, and the authority of the case destroyed by the decision

of this court in the later case of *Amick v. Woodworth*, 58 Ohio St. 86, 50 N. E. 437. where it is held by this court that the grantee in an instrument for the conveyance or encumbrance of real property is disqualified to be an attesting witness to its execution, or to act in an official character in taking and certifying the acknowledgment of the grantor. In the case of *Amick v. Woodworth* the instrument, the validity of which was in controversy, was acknowledged before, and was witnessed by, the person named therein as grantee, which fact readily distinguishes it from the case we are here considering. And that this distinction was not overlooked, but was clearly recognized, by the court, affirmatively appears from the language of Williams, J., who prepared the opinion in that case, when he says: "It is probably unnecessary to notice that this question was not involved in *Doe ex dem. Johnson v. Turner*, 7 Ohio, pt. 2, p. 216, and that case is unaffected." The decision in *Doe ex dem. Johnson v. Turner*, having been made by this court as early as the December term, 1836, and not having since been questioned or overruled by this court, has become a law of property in this state, and for that reason, if for no other, should now be followed and upheld. This decision in *Doe ex dem. Johnson v. Turner* must, therefore, be held to conclusively determine the question in this state that an instrument conveying or encumbering real estate cannot be impeached, and will not be held invalid on the sole ground that the witnesses to such instrument are interested to the extent of being stockholders in the corporation named therein as grantee.

This leaves, then, only the question: Is the mortgage here in controversy invalid because the notary public before whom the same was acknowledged was at the time of taking such acknowledgment a stockholder in the Toledo Loan Company, grantee in said mortgage? Counsel in this case upon both sides, as evidenced by their briefs, have been diligent in the collection and citation of authorities dealing with this question, and the cases cited show quite a conflict of authority and diversity of holding by the courts in the different states upon this question. There would seem to be two lines of authorities upon this proposition, the one holding that the act of a notary in taking and certifying an acknowledgment is a judicial act, the other holding it to be ministerial only. In those states holding the former doctrine, the notary is held to be incompetent, and the instrument, therefore, invalid. While in those states holding the latter doctrine exactly the contrary decision is reached, and in most of the authorities cited by counsel the decision in each particular case seems

to have turned upon or been controlled by the fact of whether the court rendering the decision regarded the act of the officer in taking the acknowledgment as judicial or ministerial in character. This distinction is noticed and discussed in the case of *National Bank v. Conroy*, 1 Hughes, 37, Fed. Cas. No. 10,037. Judge Hughes announcing the opinion of the United States district court in that case, among other things, says: "The question whether this writing was properly acknowledged or not, which was so ably and elaborately argued at bar, is only a secondary one in the case. The primary question is, When did this writing become a deed, as between the grantor and grantee? The acknowledgment of the writing by the grantor had reference only to its being recorded, and thereby made valid as against his creditors. If the question were only as to acknowledgment, I should decide, without hesitation, that it was properly acknowledged, for the teaching of the cases cited at bar seems to me plainly to be that an interested person may take the acknowledgment of a deed when the act is merely ministerial, though, if the act be judicial, such as taking the acknowledgment, after privy examination, of a married woman, an interested person cannot take it. *Harkins v. Forsyth*, 11 Leigh, 294; *Carper v. McDowell*, 5 Gratt. 212; *Horsley v. Garth*, 2 Gratt. 471, 44 Am. Dec. 393; *Taliaferro v. Pryor*, 32 Gratt. 277; *Johnson v. Slater*, 11 Gratt. 121; *Turner v. Stip*, 1 Wash. (Va.) 319; *Stevens v. Hampton* (1871) 46 Mo. 404; *Boswell v. Flockheart*, 8 Leigh, 364; *Dimes v. Grand Junction Canal Co.* 16 Eng. L. & Eq. 63." This case was taken on appeal to the United States circuit court, and in that court Chief Justice Waite, announcing the opinion, said: "A deed may be acknowledged by the grantor before a notary public, and upon the certificate of the notary to that effect, in proper form, recorded. The form of the certificate in this case is correct, but it is insisted that because Garnett, the notary, was interested as one of the beneficiaries in the trust, he was incompetent, in law, to receive and certify the acknowledgment. This presents the principal question in the case for our consideration. . . . It has been frequently decided that an acknowledgment before a grantee named in a deed was of no effect. *Beaman v. Whitney*, 20 Me. 413; *Wilson v. Traer*, 20 Iowa, 231; *Stevens v. Hampton*, 46 Mo. 404; *Groesbeck v. Secley*, 13 Mich. 345. It has also been held that a party interested in a deed cannot take and certify the acknowledgment of a married woman requiring a privy examination. *Withers v. Baird*, 7 Watts, 228, 32 Am. Dec. 754. The taking of such an acknowledgment is in some re-

spects a judicial act, and not ministerial only, but in the case of an ordinary acknowledgment it is purely a ministerial act. *Truman v. Lore*, 14 Ohio St. 151; *Lynch v. Livingston*, 6 N. Y. 434. Upon this principle it was decided in *Dussaume v. Burnett*, 5 Iowa, 95, that an acknowledgment before one not a grantee named in the deed, but interested in the conveyance, was good. The same distinction was recognized in *Stevens v. Hampton*, before cited. . . . And further in the same opinion it is said: "A certificate of acknowledgment is required to perfect a deed for record. The grantor can select such authorized officer for that purpose as he chooses. He has full power to protect himself against frauds by interested parties as certifying officers, for he may refuse to make his acknowledgment before them." [1 Hughes, 44.] And in this case it was held that the notary taking the acknowledgment was not disqualified, and that the deed was valid.

It has been twice held by the supreme court of this state that in Ohio the officer does not exercise judicial functions in taking an acknowledgment, and that his act, though official, is purely ministerial. *Truman v. Lore*, 14 Ohio St. 151; *Williamson v. Carskadden*, 36 Ohio St. 664. And that the legislature, in the enactment of the present statute, so regarded it, is, we think, clearly indicated by the fact that the power to take acknowledgments is not limited by the statute to judicial officers alone, such as the judge of a court of record, mayor, or justice of the peace, but is conferred as well upon county auditors, county surveyors, and notaries public. It would seem that, in those instances where the legislature intended to disqualify or limit the authority of a notary public to act in his official capacity, it has done so by express and positive statutory provision,—for instance, by § 111, Rev. Stat. 1892, it is provided: "No banker, broker, cashier, director, teller, or clerk of any bank, bank or broker or other person holding any official relation to any bank,

banker, or broker, shall be competent to act as notary public in any matter to which said bank, banker, or broker is in any way interested." By § 5269, Rev. Stat. 1892, a notary public is one of the officers authorized to take depositions; but it is provided by § 5271 that such notary must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding in which the deposition is taken. If, therefore, it had been the policy and purpose of the legislature to prohibit a stockholder of a corporation from acting as notary public in the taking and certifying of an acknowledgment to an instrument in which such corporation was interested, it would doubtless have so provided in § 4106; and, in the absence of any statutory inhibition, the disqualification of the notary to act will not be presumed.

In the case at bar it is admitted that Cary D. Lindsay, the assignor, at the time he acknowledged this mortgage, knew of the relation the notary, Grant Williams, sustained to the Toledo Loan Company, and knew that he was then the holder of two shares of stock in said company, and there is in this case no imputation or charge of improper conduct or bad faith or undue advantage arising out of such interest or relationship, nor is there any claim but that the acknowledgment was freely and fairly made, in the honest belief that it was in all respects authorized and sufficient. To hold, then, under such circumstances, that the mortgage here in controversy was invalid, unless impelled thereto by statutory requirement or the plainest considerations of public policy, would, it seems to us, be a subversion of justice, and would be contrary to the plainest principles of equity and fair dealing.

In affirming the judgment of the Court of Common Pleas in this case the Circuit Court was right, and its judgment is affirmed.

Burket, Ch. J., and Spear, Davis, Shauck, and Price, JJ., concur.

MARYLAND COURT OF APPEALS.

SAMUEL M. LAWDER & SONS COMPANY, Appt.,

v.

ALBERT MACKIE GROCERY COMPANY
of New Orleans.

(97 Md. 1.)

1. A right to credit for the purchase

NOTE.—Effect of contract to ship goods f. o. b.

I. Scope, 796.

II. Vendor's liability as to loading and transportation expenses, 796.

62 L. R. A.

price of goods sold is not given by a provision for a discount for cash, where the contract expressly states "Terms cash."

2. Payments must be made at place of shipment under a contract for sale of property, "buyer to give shipping instructions," "to be delivered as packed," "f. o. b." at place of shipment.

III. Upon whom the duty of furnishing cars or vessels lies, 797.

IV. Effect of delivery f. o. b.

a. Upon the placing of the risk, 798.

b. Upon the passing of the title, 802.

3. A buyer having a right to inspect goods to be delivered f. o. b. must exercise it at the place of shipment, and cannot insist on reserving the right until the goods reach his place of business, so as to delay payment until that time, unless the right is expressly given by the contract.

(April 1, 1908.)

APPPEAL by defendant from a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for failure to comply with a contract to deliver certain canned vegetables. *Reversed.*

The facts are stated in the opinion.

Messrs. George Whitelock and Edward I. Keontz, for appellant:

Had the vendor brought suit, an averment

of readiness and willingness to deliver free on board at Baltimore, and of notice to the purchaser, would have constituted a sufficient allegation of performance.

Benjamin, Sales, Bennett's 7th ed. §§ 679, 707; Tiedeman, Sales, § 113.

Neither receipt, nor acceptance, is a necessary averment.

Brown v. Hare, 4 Hurlst. & N. 822.

In the absence of a stipulation to the contrary, delivery was due at Baltimore.

Schouler, Pers. Prop. 3d ed. § 385; Benjamin, Sales, § 682; *Hatch v. Standard Oil Co.* 100 U. S. 134, 25 L. ed. 557.

When time, place, and mode of payment are not mentioned payment must be made to the vendor in cash and at the time and

IV.—continued.

c. Upon the place of inspection, 804.

d. Upon the time of payment, 805.

e. Upon the right of stoppage in transitu, 805.

V. Summary, 808.

I. Scoops.

The initials "f. o. b.," standing for the expression "free on board," used frequently in mercantile contracts, imply that the vendor will save the vendee from any expense attending the bringing of the goods to or upon the vehicle of conveyance specified, or to the point named. Whether such a delivery is one sufficient to pass the title of the goods and risk of transportation to vendee, and call for a payment at that time if the sale is a cash one, or whether the title passes but vendor retains a lien until the payment of the price at the destination, or whether, for the purposes of stoppage in transitu, the title does not pass upon delivery f. o. b. so absolutely as to prevent vendor's exercise of that right, are questions, among others, which it sometimes becomes most important to determine, and it is instances where questions of this nature have arisen in regard to contracts to deliver goods f. o. b. that have been the object of collation in this note.

There are numerous decisions where the facts show an actual contract to deliver goods free on board, but the specific term itself does not appear, and, although, in a sense, those decisions are relevant to this note, and perhaps present questions the same as, or similar to, those presented here, nevertheless they have been omitted for the reason that the aim herein has been to show the construction which the courts have put upon the specific expression "free on board."

II. Vendor's liability as to loading and transportation expenses.

In the dissenting opinion in *A. J. Nelmeyer Lumber Co. v. Burlington & M. River R. Co.* 54 Neb. 321, 40 L. R. A. 584, 74 N. W. 670, the following exposition of the term appears: "The initial letters f. o. b. in contracts of sale, when the property is transported, mean free on board the cars at a designated place, whether that be the initial point of shipment or place of final destination. They imply that the buyer shall be free from all the expenses and risks attending

the delivery of the property at the point named in the contract for such purpose."

And, similarly, in the English case, *Es parte Rosevear China Clay Co. L. R. 11 Ch. Div. 565*, 48 L. J. Bankr. N. S. 100, 40 L. T. N. S. 730, 27 Week. Rep. 591, 4 Asp. Mar. L. Cas. 144, the chief justice said that delivery "free on board" only means: "The price shall be that which we stipulated for, and you shall not have to pay for the wagons or carts necessary to carry the clay from the place where it is dug; we will bear all these charges and put it free on board the ship, the name of which you are to furnish."

And so it is declared in *Sheffield Furnace Co. v. Hull Coal & Coke Co.* 101 Ala. 446, 14 So. 672, that the fact that f. o. b. in contracts of sale means "free on board" is a matter of judicial knowledge, and parol evidence of a custom in regard thereto in the coke trade is inadmissible to vary the plain import of these words, which mean that the purchaser shall be free from all expense which may have attended the shipment to the point named, whether it be the initial point of the transportation or the final destination of the consignment.

The meaning of the term includes all port and harbor charges, canal dues, wharfage, etc., at the place of shipment. *George v. Glass*, 14 U. C. Q. B. 514.

Even the costs of an inspection were held to be included, in *Silberman v. Clark*, 96 N. Y. 522, where a contract provided for the sale of iron to an American buyer, "f. o. b., Continental port. Inspection at maker's works." It was proved that the letters f. o. b. meant, "free on board" the vessels which were to carry the rails to this country; and, therefore, as the rails were to be inspected before delivery, and were to be delivered free on board the vessel for the price named, it was held that the buyers were to have the rails free on board with the inspection.

Under a contract whereby purchasers agreed to pay a certain cash price per ton for old iron, "f. o. b. Berlin, . . . we to assume all cost of removing the same," construing the two clauses together, the contract was held to be that the purchasers were to put the iron on the cars and bear the expenses thereof, but were not to be put to any other expense in the matter. *Burgess Sulphite Fibre Co. v. Broomfield*, 180 Mass. 283, 82 N. E. 367.

If the contract provides for the delivery f. o. b. at the place of shipment, the payment of the freight falls upon the vendee, as in *Knapp*

place of delivery, as a condition, either precedent to, or concurrent with, delivery.

Benjamin, Sales, §§ 677, 706; Mechem, Sales, § 1408; *Daset v. Landry*, 21 Nev. 291, 30 Pac. 1064; *Hall v. Storrs*, 7 Wis. 253; *Leland v. Douglass*, 1 Wend. 492; *Haggerty v. Foster*, 103 Mass. 19; *Lineweaver v. Slagle*, 64 Md. 484, 54 Am. Rep. 775, 2 Atl. 693; *Hall v. Richardson*, 16 Md. 412, 77 Am. Dec. 303; *Salmon v. Boykin*, 66 Md. 548, 7 Atl. 701.

The buyer had no right to possession till payment of the price.

Blozaw v. Saunders, 4 Barn. & C. 941.

The appellant must be presumed to have known that, by delivering free on board, it would part with possession, and thereby lose its lien *in rem*, and vest the right of possession

and the right of property in the purchaser, subject to a precarious and uncertain right of stoppage *in transitu*.

Benjamin, Sales, §§ 362, 363, 804 *et seq.*; *Farmers' Phosphate Co. v. Gill*, 69 Md. 537, 1 L. R. A. 767, 16 Atl. 214; Blackburn, Sales, *200.

It was against this very consequence that the vendor should be presumed to have provided when it stipulated for cash.

Foley v. Mason, 6 Md. 49.

The purchaser was not denied the right of inspection at Baltimore, where, in the absence of a contrary stipulation, and certainly under the special terms of the contract, he was bound to make it.

Benjamin, Sales, p. 736; *Wadhams v.*

Electrical Works v. New York Insulated Wire Co. 157 Ill. 456, 42 N. E. 147, where, under a contract whereby a consignor shipped goods for sale on commission to a consignee in Chicago, "f. o. b. Wallingford, Conn., or N. Y.," with the right in either party to terminate the contract upon sixty days' notice, the consignee to sell the goods then on hand and remit the proceeds; the consignee upon a termination of the contract whereby it desired and agreed immediately to return the goods then on hand, waiving its right to sell them as provided by the contract, would have no right to receive back the money paid for freight and cartage from the points of shipment specified, as, under the original contract, it was liable therefor, and, the acts subsequently done being by mutual consent, the contract was not thereby changed so as to entitle the consignee to that which before it had no right to.

So, in *National Gaslight & Fuel Co. v. Bixby*, 48 Minn. 323, 51 N. W. 217, a contract provided for the delivery, by a seller, of a gas generating-apparatus of a specified kind, "f. o. b. cars at Chicago," the removal of it from the cars at Pierre, the destination, and the putting it together and setting it up at that point. In deciding the question, which arose, as to who was liable, under the contract, to pay the freight from Chicago to Pierre, the court says: "The clause as to delivering the apparatus f. o. b. the cars at Chicago is susceptible of but one rational construction, and that is that the plaintiff was to be at the expense of transporting it to and loading it on the cars; but, by necessary implication, that it was not to pay any charges for transportation from Chicago to Pierre."

And in *Green v. Sichel*, 7 C. B. N. S. 747, 29 L. J. C. P. N. S. 213, 6 Jur. N. S. 827, 2 L. T. N. S. 745, 5 Week. Rep. 663, a vendor was held under no obligation to prepay an excessive freight charge, and thus obtain a bill of lading which the ship's master would not otherwise give, and which by custom it was necessary to present to vendee upon demand of payment from him; but, it appearing that vendee in fact had knowledge of the shipment of the goods, it was held he could not take advantage of vendor's failure to procure a bill of lading.

III. Upon whom the duty of furnishing cars or vessels lies.

Unless otherwise expressly provided in a contract

to ship f. o. b., the duty of specifying or furnishing the transportation facilities falls upon the buyer.

In *Armitage v. Insole*, 14 Q. B. 728, 19 L. J. Q. B. N. S. 202, 14 Jur. 619, where a party agreed to give yearly, upon a stated consideration, twenty tons of coal to be put free on board a ship at a certain place, it was held that either naming a ship or expressing a willingness to do so was a condition precedent, to be performed by the recipient under the contract before he could recover the money.

To the same effect, and expressly based on the latter decision, is *Sutherland v. Allhusen*, 14 L. T. N. S. 666, where the agreement was merely to deliver the goods "free on board," it not being stated whether on board ship or at a railway station. It was held to be the duty of the vendee to point out the ship or specify the place where the goods were to be delivered, before the vendor was under any obligation to deliver, or tender a delivery of, the same.

So, under a contract to deliver rails f. o. b. cars, the vendor is not bound to furnish cars, nor is it, therefore, responsible for any delay in the shipments caused by a failure on vendee's part to provide cars for that purpose after the vendor had given notice of readiness for them, as held in *Baltimore & L. R. Co. v. Steel Rail Supply Co.* 123 Fed. 655.

The earlier Pennsylvania case of *Hocking v. Hamilton*, 158 Pa. 107, 27 Atl. 836, to the same effect, holds that, under a contract whereby the vendor agreed to sell coal "free on board cars at tippie," the vendees are bound to furnish the cars, and are liable in damages for a failure so to do.

And where the agreements provided for the delivery of flour free on board vessels during the month of May, and vendee did not provide vessels to receive the flour during that time, the vendee, and not the vendor, is liable to pay warehouse charges subsequently accruing on account of vendee's omission to furnish vessels. *Howland v. Brown*, 13 U. C. Q. B. 199.

And where a contract is for the delivery of goods f. o. b., whether it is intended to ship them by water or rail, it is the duty of the buyer to provide the ship or cars, and, not having done so within a reasonable time, he may not recover for a nondelivery of the goods. *Marshall v. Jamieson*, 42 U. C. Q. B. 115.

The seller is under no obligation to act in a

Balfour, 32 Or. 329, 51 Pac. 642; *Schouler*, Pers. Prop. 3d ed. § 406.

Receipt and acceptance are in no sense correlative terms. There may be receipt without acceptance, and acceptance may be made without receipt.

Hewes v. Jordan, 39 Md. 472, 17 Am. Rep. 578.

The right to inspect was a condition subsequent to payment, inasmuch as all of the terms of the contract could be preserved in their entirety by that means alone.

Knoblauch v. Kronschnabel, 18 Minn. 303, Gil. 272; *White v. Harvey*, 85 Me. 212, 27 Atl. 106.

Under the circumstances the vendor had an unquestionable right to rescind the contract, which it did.

Bollman v. Burt, 61 Md. 423; *McGrath v. Gegner*, 77 Md. 337, 26 Atl. 502; *Brantly*, Contr. pp. 212, 213; *Mechem, Sales*, §§ 1085, 1148; 28 Am. & Eng. Enc. Law, p. 545; *Fletcher v. Cole*, 23 Vt. 114.

Messrs. Gans & Haman, W. Calvin Chesnut, and Stuart S. Janney, for appellee:

The customary period of credit for the particular trade is well understood by all who engage in it, and all contracts are made with reference thereto. The expression used is only a short form for that stated by Mr. Benjamin to be of frequent occurrence, namely, "Cash less discount, with option of bill."

Benjamin, Sales, Bennett's ed. § 706; *Williams v. Woods*, 16 Md. 220.

contract for sale and delivery of goods "free on board" vessel, until the buyer names the ship to which delivery is to be made, unless either the time or place of delivery is within the seller's option, in which event it is his duty to give notice of the time or place of delivery, or both, as the case may be, for, until he has done so, the buyer could not know when or where to have the vessel ready. *Dwight v. Eckert*, 117 Pa. 490, 12 Atl. 32.

Under a contract whereby a vendor agrees to sell sugar "free on board a foreign ship," he is not bound to weigh off and deliver the sugar into the hands of the vendee, or transfer it to the latter's name upon the warehouse keeper's books; but all he undertakes to do is to deliver the sugar on board a ship to be named by vendee. *Wackerharth v. Masson*, 3 Campb. 270.

The reporter states that, in *Wetherell v. Coope*, 3 Campb. 272, note, tried a few days afterward in the common pleas, Lord Mansfield and a jury put exactly the same construction upon a similar contract.

But a contract whereby coal was to be furnished a railway company, "free on board cars on the track" of another railway company, does not require the purchasing railway company to furnish the cars. *Cincinnati, S. & C. R. Co. v. Consolidated Coal & Min. Co.* 7 Ohio L. J. 200.

IV. Effect of delivery f. o. b.

a. Upon the placing of the risk.

The effect of putting goods free on board for transportation, in compliance with an agreement so to do, consigned to the vendee without restrictions of any kind, is to place the risk of the transportation from that time on in him.

It is said, *obiter*, in *Couturier v. Hastie*, 5 H. L. Cas. 673, 25 L. J. Exch. N. S. 253, 2 Jur. N. S. 1241: "The goods are either shipped, as here, 'free on board' when it is clear that they are thenceforward at the risk of the vendee, or they are shipped 'to arrive,' which saves the vendee from all risk till they are safely brought to port."

Under a contract providing that a pump purchased was to be delivered "free on board cars at Duquoin in the state of Illinois," the carrier at that point, to whom delivery was made, thereupon became the vendee's agent, and answerable to him for the damages, if any, which resulted from delay in the transportation. *Blakeslee Mfg. Co. v. Hilton*, 5 Pa. Super. Ct. 164.

62 L. R. A.

The court says, *obiter*, in *Smith v. Edwards*, 29 Hun, 493, where the property was furnished on board cars free, that the title thereto thereupon passed to the purchaser; and that, if the property had been lost by the carrier, the consignor could not have maintained an action against the carrier for the loss thereof.

And in the late case of *Orthwein's Sons v. Wichita Mill & Elevator Co.* (Tex. Civ. App.) 75 S. W. 364, a contract made by a firm at Wichita Falls, Texas, stipulating for the sale of wheat "at 65½ cents delivered—Galveston—f. o. b., shipment within ten days," etc., was construed, in referring to Galveston, merely to intend to specify the cost of the wheat at that point, and the place of delivery was held to be the initial point of shipment at the time of putting the wheat on board the common carrier, at which time the title vested in vendee, and the transportation was thenceforward at their risk.

And in *Lord v. Edwards*, 148 Mass. 476, 2 L. R. A. 519, 20 N. E. 161, where sugar was shipped "f. o. b." at Manila for New York, guaranteed to be of a certain weight and standard, it was held to be a sale of a specified article at Manila, where, upon its delivery upon board ship, the title passed to the vendee, who thereupon assumed all risks of its future condition, and vendor was not, therefore, liable for any deterioration in its quality upon the arrival at New York, caused by the long sea voyage.

To the same effect, and expressly following the decision in *Lord v. Edwards*, 148 Mass. 476, 2 L. R. A. 519, 20 N. E. 161, is *McKee v. Wild*, 52 Neb. 9, 71 N. W. 958, where the contract of sale of corn of a specified grade, to be shipped "f. o. b. Stockham," provided for "Toledo weights and grades." It was held that the conditions of the warranty were satisfied if the corn upon the delivery at Stockham was of the grade and weight specified, according to the Toledo standard. This decision was based upon the theory that the title to the corn was admitted, by the vendee's commencing the action at bar, which was for a breach of warranty of the goods sold, to have vested in vendee upon the delivery f. o. b. at Stockham.

The cause was reversed and remanded in *Globe Oil Co. v. Powell*, 56 Neb. 463, 78 N. W. 1081, because of the court's instruction that a buyer could refuse to accept oil delivered f. o. b. a certain point if it was not placed upon the cars at that point in ordinarily good condition, or if it did not arrive at the destination in or-

A special plea is to be taken most strongly against the pleader.

Poe. Pl. § 557; *Maenner v. Carroll*, 46 Md. 215; *Dorman v. Elder*, 3 Blackf. 490; *Chitty*, Pl. 261.

When the contracts of merchants contain doubtful or equivocal terms, or are technical in their expressions, parol testimony is always admissible, indeed necessary, to explain their real significance according to the particular usage or custom which prevails in the trade to which they refer.

Williams v. Woods, 16 Md. 220; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 454, 14 L. ed. 496; 2 Kent, Com. 556.

Particular custom must always be averred and proved.

Bank of Columbia v. Fitzhugh, 1 Harr.

dmarly good condition. The court stated that, if the point designated was the point of delivery, then the title passed at that point, and that the instruction ignored in its latter portion the proposition that the matter complained of in the goods might have been produced by the negligence and carelessness of the carrier after the title to the goods had passed to the consignee; and, if so, it was without fault of the vendor, and would furnish no sufficient reason for a refusal to receive as between the vendor and vendee.

Of course if the point specified for delivery f. o. b. is the final point of destination, or an intermediate point, the delivery to the carrier at the initial point of shipment does not operate to pass the title in the goods to vendee, but the vendor still retains the title and the risk of transportation to the point named in the contract.

When the contract of a consignor was "to deliver f. o. b. at Gunter'sville, Alabama," the landing of the boat at that point with the goods safely thereon, properly consigned, was a complete fulfillment of the contract sufficient to pass the title and ownership of the goods out of the consignor and into the consignee; and the carrier immediately ceased to be the agent of the consignor and became the agent of the consignee, so that the consignor could not maintain an action against the carrier for injuries to the goods, which occurred subsequently, but before the goods were unloaded. *Capehart v. Furman Farm Improv. Co.* 103 Ala. 671, 16 So. 627.

The contract in *Heinberg Bros. v. Cannon*, 36 Fla. 601, 18 So. 714, was by Galveston, Texas, merchants, to ship oats "f. o. b. wharves, Pensacola, Florida," and therefore necessitated, not only the landing of the boat at the point named, but the discharge of the goods upon the wharf. The duty of the Texas merchants was held discharged upon the giving of due and reasonable notice to the consignees, by the master of the vessel upon his arrival at the contract place of delivery, of his readiness to deliver the goods called for by the contract. The master of the vessel, however, even after notice of his arrival and readiness to deliver the goods, they being of a perishable nature if exposed to rain, is bound, in order to relieve the consignors from the obligation, to make the delivery in weather suitable for the safe discharge of the goods. But after the consignors have thus performed their whole duty, the consignees become bound for the price, 62 L. R. A.

& G. 248; 17 Am. & Eng. Enc. Law, p. 945.

If the true meaning of the expression used was to provide, without other alternative, for a cash sale, the pleas should have so alleged; and, having failed to do this, the presumption is exactly the other way, and the pleas are bad.

Rugg v. Weir, 16 C. B. N. S. 471.

Payment was not due in any event until the goods arrived in New Orleans.

Meehem, Sales, § 1124; *Bronson v. Gleason*, 7 Barb. 475; *Rider v. Kelley*, 32 Vt. 272, 70 Am. Dec. 176; *Moody v. Brown*, 34 Me. 107, 56 Am. Dec. 640; *Gammage v. Alexander*, 14 Tex. 421; *Comfort v. Kiersted*, 26 Barb. 472; *Atkinson v. Bell*, 8 Barn. & C. 281; *Miller v. Seaman*, 176 Pa. 291, 35 Atl. 134.

and must bear any loss sustained on account of omission on their part to properly receive and care for the goods.

The facts in *Dannemiller v. Kirkpatrick*, 201 Pa. 218, 50 Atl. 928, show the loss of a car load of coffee shipped from Canton, Ohio, signed to vendees at Pittsburg under a contract which recited that vendors agreed "to bill 'Cordova' coffee at the same price f. o. b. Pittsburg" as certain other companies, and the invoice sent to vendees at the time of shipment contained the following: "All goods delivered to the carriers in good order. Claims for damage thereafter, or breakage, must be made against the transportation company delivering the goods." It was held that to "bill" coffee f. o. b. was not synonymous with the expression to "deliver" coffee f. o. b., and that the language used implied that the cost of the coffee at Pittsburg, including the expense of placing it there, should not exceed the price of coffee sold by competing firms at that point; and, while it was some evidence to the effect that delivery was to be at Pittsburg, it was not conclusive, but, with the other evidence in the case, presented a question of fact to be determined by the jury.

As a general rule when the contract is to deliver f. o. b. at the initial point of shipment no risk or title in the goods passes until the delivery on board is actually made.

Thus, under an agreement to sell eleven piles of lumber marked at a certain price per thousand feet as measured and inspected, and upon the order of the purchaser "f. o. b. cars at Williamsport," the sale is an executory one, and the title to the eleven piles of lumber did not pass out of the vendor except as it was inspected, measured, and delivered f. o. b. the cars at Williamsport; so that, where part of the lumber, which had not been delivered, was swept away by a flood, the title to it never having passed to vendee, the loss was vendor's. *Miller v. Seaman*, 176 Pa. 291, 35 Atl. 134.

And the title to lumber agreed to be delivered f. o. b. ships furnished was held not to have passed, in *Schreyer v. Kimball Lumber Co.* 4 C. C. A. 547, 13 U. S. App. 23, 54 Fed. 653, where, after being merely plied by itself in the vendor's yard, and notice of its readiness sent to vendee, but before ships were furnished, it was destroyed by fire. The court says: "Certainly in this case the title did not pass at the time the contract was entered into, nor, by the terms of the contract, was it intended to pass until after

The buyer has an absolute right of inspection before acceptance. He is not obliged to trust blindly to the seller's word that the goods resemble the description.

Mechem, Sales, § 1375; *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349; *Isherwood v. Whitmore*, 11 Mees. & W. 349.

This right is a continuing one, and in a sale of goods to a distant purchaser it is exercisable at the destination or place of consignment, at which place acceptance or rejection by the purchaser is due.

Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349; *Pope v. Allis*, 115 U. S. 372, 29 L. ed. 398, 6 Sup. Ct. Rep. 69; *Fogel v. Brubaker*, 122 Pa. 7, 15 Atl. 692.

The law will hardly presume that the parties to the contract intended to provide for payment for the goods before acceptance. These two are, in the nature of things, concurrent acts.

Benjamin, Sales, Bennett's ed. §§ 699-

actual delivery free on board such ship as Schreyer might charter and send for it."

But when the goods had previously been stored in a warehouse, had been appropriated to the vendee, and the price thereof paid, and delivery order accepted by them, it was held, in *Coleman v. McDermot*, 5 U. C. C. P. 303, that the goods were thenceforward at the risk of vendee notwithstanding that, by the terms of the contract of sale, vendors were bound to deliver the goods f. o. b.

Also, in *Hobart v. Littlefield*, 13 R. I. 341, *infra*, this division, the goods although only partially loaded, were held to have passed to vendee.

But the general rule above noted, that, under a contract to ship f. o. b., a delivery to the common carrier passes the title and risk to the vendee, is varied if the vendor takes the bill of lading to his own order, or sends the same attached to drafts upon vendee to a third party for collection.

The court, in *Erwin v. Harris*, 87 Ga. 333, 13 S. E. 513, says that, if vendor is not satisfied of the solvency of the purchaser, or is doubtful thereof, or wishes to retain the title in himself, he may take a bill of lading from the carrier to his own order; and that, when he does this, it is evident that he does not part with the title to the goods shipped, but retains the same until the draft which he sends with the bill of lading to a bank at the point of destination for collection is accepted or paid; and that, when the title is thus reserved by vendor, the carrier is his agent, and not the agent of the consignee, and the risk is the consignor's, and not the consignee's.

The contract of sale of corn in *Grant v. Lower*, 3 Tex. App. Civ. Cas. (Willson) § 232, p. 281, required its delivery free on board cars at the point of shipment. Vendors, in shipping the corn, had it consigned to their own order. Upon its arrival at the point of destination it was found to be damp and mouldy, whereupon vendees refused to receive it, and the railroad company sold it in order to satisfy the freight charges. In an action by vendors to recover of vendees the contract price of the corn, the court instructed the jury that delivery on board the cars made the contract a complete, executed

? L. R. A.

701; 2 Schouler, Pers. Prop. § 416; *Erwin v. Harris*, 87 Ga. 336, 13 S. E. 513.

F. O. B. Baltimore means nothing more nor less than that the buyer is to pay the freight from that point, and that the seller is to pay all expenses up to and including the loading of the cars.

13 Am. & Eng. Enc. Law, p. 726; *Sheffield Furnace Co. v. Hull Coal & Coke Co.* 101 Ala. 481, 14 So. 672; *Knapp Electrical Works v. New York Insulated Wire Co.* 157 Ill. 456, 42 N. E. 147; *A. J. Neimeyer Lumber Co. v. Burlington & M. River R. Co.* 54 Neb. 327, 40 L. R. A. 534, 74 N. W. 670.

Boyd, J., delivered the opinion of the court:

The appellee sued the appellant for breach of a contract, which is set out in the declaration as follows:

Baltimore, May 24, 1901.

Bought of Samuel M. Lawder & Sons

one, but, on appeal this judgment was reversed and the cause remanded, on the ground that the intent of the parties was a question of fact for the jury to decide. The court quotes the principles of law laid down by *Benjamin, Sales*, 3d ed. § 399, as follows: "First, when goods are delivered by the vendor in pursuance of an order to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the vendee. . . . Secondly, when goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain as bailor for delivery to the person indicated by the bill of lading as the one for whom they are to be carried. . . . Thirdly, the fact of making the bill of lading deliverable to the order of the vendor is, when not rebutted by evidence to the contrary, almost decisive to show his intention to reserve the *jus disponendi*, and to prevent the property from passing to the vendee. Fourthly, the prima facie conclusion that the vendor reserves the *jus disponendi* when the bill of lading is to his order may be rebutted by proof that in so doing he acted as agent for the vendee, and did not intend to retain control of the property; and it is for the jury to determine, as a question of fact, what the real intention was."

The court conceded in *Gulf, W. T. & P. R. Co. v. Browne*, 27 Tex. Civ. App. 437, 66 S. W. 341, that, where drafts with bills of lading attached were drawn upon a vendee at the point of destination, this would, prima facie, show that the vendor retained title to the goods until they were paid for; but, it appearing that the agreement, which was for the sale of cotton seed, provided for its delivery free on board cars at Gollad for shipment to Houston, terms cash; and that drafts as above were drawn upon vendee, only because he could not conveniently have a representative at Gollad at the time of putting the seed on board, and only for the purpose of thus enabling him to pay cash as he had agreed.—It was held that the facts thus presented overcame the prima facie case, and showed that according to the intention of the parties, the title to the seed passed upon its delivery upon the cars at Gollad, although vendor had a lien on

Company, Baltimore, Maryland, for account of Albert Mackie Grocery Company, Limited, New Orleans, La., seven hundred (700) cases, two pounds, Quail Tomatoes, at fifty-two and one-half cents per dozen. Terms cash, less one and one-half per cent. Buyer to give shipping instructions when requested by seller. To be delivered as packed during season of 1901. F. O. B. Baltimore. Brokers Thompson & Fowler, New Orleans, La. Accepted.

Samuel M. Lawder & Sons Co.
Percy M. Lawder, Pres.

The defendant filed, in addition to the general issue pleas, two that were marked 3 and 4, which were demurred to. The demurrer was sustained, and, the other pleas having been withdrawn, judgment was entered in favor of the plaintiff for the amount of its claim, and from that judgment this appeal was taken. The third plea alleges that

and was entitled to the possession of, the goods until they were paid for. Therefore, it was further held that vendor was not responsible for the condition of the seed upon its arrival at the destination, when it was found to have been sound and dry at the time of being loaded on the cars.

In *Browne v. Hare*, 3 Hurlst. & N. 484, vendees, merchants in Bristol, agreed through a Bristol broker to buy of vendors, merchants in Rotterdam, 10 tons of rape oil, to be shipped free on board at Rotterdam, at a certain price per ton, to be paid for upon delivery to vendees of the bill of lading, by bill to be accepted by vendees at three months after date to be dated on the day of the shipment of the oil. Five tons were shipped on a general trading ship, and bill of lading made out deliverable "to the shipper's order," which, however, was, the same day, indorsed by them specially to the vendees, and inclosed to the broker in Bristol and by him delivered to the vendees, and their acceptance of the bill obtained. In the meantime, however, the ship and oil were lost, upon learning of which fact vendees immediately returned the bill of lading. Under these facts, the question arose as to in whom the risk of the voyage lay. Three judges were of the opinion (in 3 Hurlst. & N. 484) that, upon the delivery "free on board," the property in the oil passed to the vendees, and that vendors had no intention of continuing their ownership in the goods by having the bill of lading made out "to the shipper's orders," as they immediately indorsed it to vendees, and, therefore, that this case is distinguishable from those in which the bill of lading is made out designedly to the shipowner's orders for the purpose of retaining the possession and control of the goods. One judge dissents. Upon appeal (4 Hurlst. & N. 822, 7 Week. Rep. 619) the judgment of the lower court was affirmed, it being stated that the question was whether the consignor shipped the goods in performance of his contract to place them "free on board," in which event the title to them would pass, or whether he intended to retain control over them and continue to be the owner, contrary to his contract, and that the mode of taking the bill of lading did not support the latter

the tomatoes referred to were purchased from the defendant on the terms and conditions contained in the contract set out in the declaration, and, as was known to the plaintiff, the defendant had then and still has its canning factory and place of business in Baltimore; that the defendant had canned and packed the tomatoes for account of said contract; and on November 5, 1901, in accordance with the precedent request of the plaintiff to make shipment of them, the defendant notified the plaintiff of its readiness to make delivery of said tomatoes free on board at Baltimore, which, as plaintiff was then informed, were loaded on a car ready to go forward simultaneously with payment in cash therefor at Baltimore; and the defendant requested the plaintiff to remit the purchase price thereof, to which request the plaintiff replied: "Will not pay for the tomatoes until the goods reach us."

theory or prevent the title to the property from passing.

A decision which is somewhat of an exception to the foregoing cases, unless it is justified on the ground that the intention of the parties was more freely looked into in this instance, is *Hobart v. Littlefield*, 13 R. I. 341. Cotton, which a vendor residing at Galveston, Texas, agreed to sell "f. o. b. and freight" to a vendee at Providence, Rhode Island, was drayed to the dock of a carrier steamer, but only partially loaded, when a fire occurred and the cotton remaining on the dock was destroyed. Before the fire a bill of lading with a blank indorsement, attached to a sight draft, had been sent by vendor to a bank as its agent, to collect the one and deliver the other. Under these facts, it was held that the delivery of the cotton was sufficiently complete to vest the title and risk in the vendees, it appearing from the evidence that such was the intention of the parties, notwithstanding the fact that for his own security vendor had kept the bill of lading under his own control. The court states that "it was perfectly competent for the parties to have provided that neither the title, risk, nor possession should pass, or that, the title and risk passing, the possession should not pass until the goods reached the destination and were paid for;" and that "this is a question of intention to be gathered from the facts."

What appears to be still more of an exception is *Stock v. Ingalls*, L. R. 12 Q. B. Div. 564, 53 L. J. Q. B. N. S. 356, 51 L. T. N. S. 449, 5 Asp. Mar. L. Cas. 294, where, *arguendo*, the master of the rolls comes to the conclusion that, in a contract to ship specific goods "free on board," the goods upon being put on board are at the purchaser's risk, even though payment is not to be made upon delivery of the goods on board, but at some other time, and although the bill of lading is sent forward by the seller with documents attached in order that the goods shall not be finally delivered to the purchaser until he has either accepted bills or paid cash. In another opinion the writer declares that, where the contract deals with specified goods, the introduction of the provision that they are to be "free on board" places the goods at the risk of the

It then alleges that the plaintiff failed and refused to make payment concurrently with such proposed delivery of tomatoes, and failed and refused to accept delivery of said tomatoes free on board at Baltimore for cash to be then and there paid. The other plea was, in substance, to the same effect.

It is contended on the part of the appellee that this contract means that the sale was made at 52½ cents per dozen, if paid for at the expiration of the customary period of credit for such goods, but, if cash be paid, there was to be a discount or rebate of 1½ per cent; but we cannot accept that as a proper construction of the contract. The price of the tomatoes is stated to be "at fifty-two and one-half cents per dozen," and the terms mentioned are "cash,

less one and one-half per cent." There is not only no time fixed for payment on credit, but the contract itself fixes the payment as cash, and the addition of "less one and one-half per cent" clearly means that, as the terms had been arranged for cash, the vendor had allowed that discount. We are not at liberty to read into the contract, "if cash be paid a discount of one and one-half per cent will be allowed." If we did, when would the credit expire if the buyer elect not to pay cash? It will not do to say that that would be regulated by the custom of the trade, for, in the first place, the parties themselves have undertaken to fix the terms, and, moreover, there is nothing in the record from which we can infer, much less know, that there was any such custom.

buyer. But the specific question at bar was whether, when goods are not specific, but are a certain proportion of goods to be delivered out of a larger quantity, payable by cash in London in exchange for bill of lading, the provision "free on board" places the goods at the buyer's risk, so as to vest in him an insurable interest therefor, in deciding which it was held that no difference existed in the rule between the two propositions; that under the latter circumstances, where goods were shipped in bulk to meet contracts with several parties at the point of destination, the quantity shipped to answer each contract would be at the risk of each respective buyer so as to vest in him an insurable interest when that course of business was known to the buyers.

b. Upon the passing of the title.

Not only where the specific question arises, but in a number of other instances, such as determining upon whom the risk of transportation lies, the time or place of payment or inspection, and the right of stoppage *in transitu*, does it become necessary to decide where and when the title to the goods passes under mercantile contracts to ship f. o. b., and, therefore, further references to this question will be found under the various subdivisions, where the decisions on the above subjects are collated; but, as a rule, the same principles control throughout, and a delivery on board, of the goods, consigned to the vendee, passes the title to him.

A consignor who, in pursuance of an agreement to that effect, delivers materials on board cars at the point of shipment, has no right thereafter, and after the goods have been levied upon by the sheriff under an execution against the consignee, to take possession of the same and dispose of them for his own benefit, as held in *Rechtin v. McGary*, 117 Ind. 132, 19 N. E. 731, because, as far as the consignor is concerned, by the delivery of the materials on board the cars as agreed the title thereof passed from him to consignee.

The title to machinery, the contract for the sale of which provided that it should be shipped f. o. b. at the point of shipment, passed to the purchaser when the property was shipped consigned to him, as held in *Smith v. Edwards*, 29 Hun, 493, so that the sheriff had no right, upon its arrival at the destination, to seize the machinery as the property of vendor.

A contract which requires a furnace company

to build and furnish a specified kind of engine f. o. b. cars in Cleveland, the point of shipment, for a certain sum, is fully complied with when that is done, and the title to the engine at once vests in the purchaser, who becomes bound for the purchase price; and, to obtain a mechanics' lien therefor, the affidavit must be filed within four months from that time; and this is so, notwithstanding it is necessary for the vendor subsequently to put the engine together and place it in position in the purchaser's mill. *King v. Cleveland Ship Bldg. Co.* 50 Ohio St. 320, 34 N. E. 436.

Under a contract of sale of machinery providing for its delivery free on board cars at the point of shipment, it was held that the title in the goods passed to the vendee at the time of such delivery, although the bill of lading was not actually issued and dated until two days later. *Congdon v. Kendall*, 53 Neb. 282, 73 N. W. 659.

From the facts in *Green v. Sichel*, 7 C. B. N. S. 747, 29 L. J. C. P. N. S. 213, 6 Jur. N. S. 827, 2 L. T. N. S. 745, 8 Week. Rep. 663, it appears that, under a contract of sale whereby iron was to be delivered "free on board" a vessel at Liverpool, bound for Trieste, vendors put the iron on board, but the captain refused to issue a bill of lading without a prepayment of the freight, and at a much higher rate than was usually charged. Vendees, upon being informed, refused to have anything to do with it. The carrier was told that the iron was to be at the disposal of the vendees. In an action by vendors for the purchase price the court, on appeal, held that, although for the above reason vendor did not, according to the usual custom, present a bill of lading to vendees upon making demand for payment, vendees were nevertheless liable for the price because they in fact knew of the shipment of the goods to them, and also because, as found by the jury in the court below, the placing of the iron on board ship by vendors was done with the intention of delivering it to vendees.

But, of course, where the place of delivery "f. o. b." is the point of destination, the title passes only when that point is reached, and not when the goods are delivered to the carrier at the initial point of shipment.

In an action for the price of goods where the contract of sale was for grate coal, "f. o. b. Grand Island," which was the point of destination, a finding of the jury that Grand Island was

If there be such, and the parties did not want to be governed by it, how could they more clearly express their intention than by the use of the expression, "terms cash?" When contracting parties thus undertake to set out the terms of their contract, and in stating when the payment shall be made simply say "terms cash," it excludes all idea of credit, and when they add to that expression, "less one and one-half per cent.," upon what principle can the latter clause be construed to indicate an intention to give credit at the option of the purchaser? It is not difficult to understand what that expression means, if it be true that such goods are frequently or usually sold on credit. Brokers, of course, are kept informed, as to the market price of goods they deal in. These brokers

from New Orleans prepared this memorandum by which they proposed to buy of the appellant, for account of the appellee, the tomatoes at 52½ cents per dozen, and if they had stopped there, and it was proved that by the custom of the trade the purchaser was entitled to a credit of say thirty days, then presumably it would have meant that the sale was at that figure, payable at the expiration of that time. But the proposition of the brokers did not leave that to custom or usage, and named the terms. That was submitted to the appellant, and was accepted by it, and the contract thus made first named the price of the tomatoes, which we presume was the market price, and then proceeded to agree upon the terms of payment which were to govern this particular

the point of delivery was held sustained by the evidence. The court states that while, as a general rule, the delivery of goods to a carrier, consigned to the purchaser, is a delivery to the purchaser, this is by no means universal, and depends upon the facts, circumstances, and contract in each case. *Havens v. Grand Island Light & Fuel Co.* 41 Neb. 153, 59 N. W. 681.

The court held, in *Condon v. Kendall*, 53 Neb. 282, 73 N. W. 659, that, under a contract of sale to ship goods f. o. b. at the point of shipment, the title passed at the time of shipment, but stated that, had the agreement been to deliver the goods f. o. b. at the point of destination, a different rule might obtain.

As was apparent in *Stock v. Inglis*, L. R. 12 Q. B. Div. 564, 53 L. J. Q. B. N. S. 356, 51 L. T. N. S. 449, 5 Asp. Mar. L. Cas. 294 (*supra*, IV. a), and again appears in *Ogg v. Shuter*, L. R. 10 C. P. 159, the English doctrine seems to uphold, more strongly than the American cases, the effect of a delivery f. o. b. to pass the title in the goods to vendee; and the fact that vendor takes out the bill of lading himself or order, as consignee, is not deemed conclusive of an intent to prevent the title from passing, if, from all the facts, a contrary intent may be established. In *Ogg v. Shuter*, by the terms of a contract of sale of potatoes, they were deliverable free on board a ship at Dunkirk, payment to be by cash against bill of lading signed by the captain, and a part payment made before shipment in earnest of the bargain.

The purchaser made a part payment, and the potatoes were put on board a ship bound for London in sacks sent over for the purpose by buyer, under a bill of lading which made them deliverable to order, and was indorsed by vendor to his agent in London. The case turned on whether the property in the potatoes passed to vendee, so that he could institute an action for conversion against vendor's agent upon the latter's selling them upon the arrival of the ship at the destination. The chief justice, in making his decision, said that the expression "free on board," in the contract, was a strong element to be considered in favor of the conclusion that the title did vest in the purchaser upon delivery on board ship, and, taken with other circumstances leading to the same conclusion, the evidence of intention to pass the title at Dunkirk was held to outweigh the evidence of a contrary intent contended to be shown by the fact that the purchaser was not to receive the bill of lading un-

til he paid the price, and that the bill of lading was indorsed to the order of vendor. In a concurring opinion the justice remarks that, standing by itself, the fact that the bill of lading was indorsed to consignee's agent, and that the contract provided for "cash against bill of lading," might be conclusive of an intention not to pass the property upon its delivery on board ship; but that there were other circumstances in the case, *viz.*, that delivery was to be "free on board," that there was a part payment, and that the sacks in which the potatoes were shipped were the buyers'; and, relying upon *Browne v. Hare*, 8 Hurlst. & N. 484, 27 L. J. Exch. N. S. 372, affirmed in 4 Hurlst. & N. 822, 5 Jur. N. S. 711, 29 L. J. Exch. N. S. 6, 7 Week. Rep. 619, the justice came to the conclusion that, there being in the case at bar, not only the agreement to deliver the goods "free on board," but also the additional facts above noted, the evidence pointed more strongly to an intention that the property should pass at Dunkirk, although vendor's lien upon the goods was preserved by the term "cash against bill of lading." In one of the opinions the justice in discussing the evidence says: "There is, first, the fact that the bill of lading was indorsed to the consignee's agent, which is strongly in the defendant's favor. But then there are the other circumstances, which appear to me of still greater weight in the plaintiffs' favor, *viz.*: That the delivery was to be free on board, that there was a part payment, and that the sacks in which the potatoes were shipped were the plaintiffs'. All these are extremely strong facts pointing to the conclusion that the property passed, and one of these was considered so very strong in the case of *Browne v. Hare*, as to make that almost a decision in point to the present case. It is true that the cases run very fine, but they none of them, I think, depart from the proposition that the question is one of intention for the jury, when there are circumstances pointing both ways."

However, in *Wait v. Baker*, 2 Exch. 1, 17 L. J. Exch. N. S. 307, the property in barley agreed to be delivered f. o. b. was held not to pass by its delivery on board a vessel, when consignee received from the master of the vessel a bill of lading by which the cargo was deliverable to his order, or assigns, upon payment of the freight at the destination.

In *Colles v. Lake Cities Electric R. Co.*, 22 Ind. App. 86, 53 N. E. 256, a proposal to ship

transaction, stating that they were "cash," and they then agreed upon the discount, which was doubtless allowed by reason of the cash payment being agreed upon. If the contract had said "at fifty-two and one-half cents per dozen, less one and one-half per cent for cash," the contention of the appellee might have some foundation; but when the terms mentioned are "cash," and no suggestion of anything else, it would be striking down all the safeguards of a contract in writing to give the effect to the expression, "less one and one-half per cent," contended for by the appellee. Even if it be possible to read into this written contract any usage or custom which might change its ordinary meaning, no such usage or custom is alleged in the pleadings, and we are only

to pass on them as they are found in the record. The case of *Foley v. Mason*, 6 Md. 37, to say the least, would have made evidence of a custom on that subject very doubtful, if it had been offered. See also *Gibney v. Curtis*, 61 Md. 201; *Susquehanna Fertilizer Co. v. White*, 66 Md. 456, 59 Am. Rep. 186, 7 Atl. 802; *Baltimore Base Ball Club v. Pickett*, 78 Md. 387, 22 L. R. A. 690, 28 Atl. 279. As the case is now presented, it seems clear to us that the buyer did not have the option of either paying cash at 52½ cents per dozen, less 1½ per cent; or having credit, without getting the benefit of the discount.

But it is contended that, conceding that the appellant had the right to require the payment in cash, it could only be demanded

a described heater f. o. b. cars at the point of shipment, which was accepted with the condition that the heater remain the property of consignor until accepted, was held an executory contract, in which the title did not pass until the heater was accepted and paid for by the consignee, and the rejection of the heater before acceptance was held to be the exercise of a right reserved; although the court stated that, without the modification of the contract stipulated by consignee, the delivery of the heater to the carrier and its consignment to consignee would have put upon the latter the duty to receive and accept if the heater corresponded to the terms of the contract.

It appearing that a contract for the purchase of certain materials for a building provided for their delivery on board cars at the point of shipment, and further, that they must conform to the plans and specifications and be accepted by the architect and board of commissioners, the court said, *obiter*, in *Rechtin v. McGary*, 117 Ind. 132, 19 N. E. 731, that the consignor could not maintain an action for the value of the materials until they had been received by the architect, etc., unless he averred and proved that the materials were in fact in accordance with the plans and specifications; but held, however, that, as to consignor, the title passed immediately upon his delivery of the material upon board the cars, it being presumed, as against him, that the materials were in conformity with the plans and specifications.

c. Upon the place of inspection.

No strict rule may be evolved as to the time and place of inspection of goods contracted to be shipped "f. o. b.," as that question is necessarily decided with reference to the circumstances of each particular case, the form of the contract, nature of the goods, intent of the parties, etc. While no decision has been found exactly similar to, and supporting the doctrine of, *SAMUEL M. LAWDER & SONS CO. v. ALBERT MACKIE GROCERY CO.* on this question, on the other hand, those which permit inspection to be made at the point of destination, almost without exception present some circumstances which make such a holding logical, and not in conflict with the above decision.

For instance, in *Stewart v. Atkinson*, 22 Can. S. C. 315, the transaction was not a cash one. Under a contract for the purchase of deals of a 62 L. R. A.

specified quantity by the agent of London merchants, mode of delivery f. o. b. vessels at Quebec, payments by drafts payable in London, one hundred days' sight from date of shipment, it was held that the delivery was at Quebec, subject to an acceptance upon inspection in London.

In *Erwin v. Harris*, 87 Ga. 333, 13 S. E. 513, the title did not pass upon the delivery f. o. b., as, under an agreement to ship goods according to sample f. o. b. the cars at the point of shipment, consignor took the bill of lading in his own name, and sent it, attached to a draft to consignee, to a bank at the point of destination for collection. It was held that the consignee had the right, at the point of destination, before making payment, to inspect the bulk of the goods purchased. It was contended that vendee should have paid the draft, and then sued for a breach of warranty if the goods did not come up to the standard of the sample; but the court said that, while this might have done had the parties lived in the same state, the better rule and practice were to allow the purchaser to inspect the bulk before requiring him to pay.

In *Gorman v. Kennedy*, 126 Mich. 182, 85 N. W. 458, where there was a contract to ship paving stones from Medina, "f. o. b. cars at Detroit," there was an oral agreement that the stone should be up to the specifications of the board of public works. The expression "f. o. b. cars at Detroit," it was held, did not mean the place agreed upon for inspection and acceptance, but only defined the place where the expense of transportation for vendor ceased and that of vendee commenced, when the inspection by the board of public works was made upon the streets where the stone was used, and this was known to vendor. *Gorman v. Kennedy*, 126 Mich. 182, 85 N. W. 458.

But *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 340, comes very near conflicting with *SAMUEL M. LAWDER & SONS CO. v. ALBERT MACKIE GROCERY CO.* The contract in this case was made between dealers in New York with manufacturers in Liverpool, for the purchase of iron hoops to be delivered "free on board" at Liverpool, to be paid for on arrival in New York. The action was brought to recover back duties and expenses besides a part payment on the contract price by vendees, on the ground that the hoops were unmerchantable, and therefore rejected. It was contended that vendees could inspect and accept or reject the iron only at the time of its delivery "f. o. b." at Liverpool. But the court held

after the tomatoes reached New Orleans. We are, however, again confronted with the terms of the contract, in passing on that question. It provides: "Buyer to give shipping instructions when requested by seller. To be delivered as packed during season of 1901. F. O. B. Baltimore." There is nothing in that language which would justify us in saying that the cash was not to be paid until the tomatoes reached New Orleans. Indeed, there is no express provision in the contract for shipping them to that city. It may be said that it states the residence of the buyer to be at New Orleans, and hence the presumption is that they were to be shipped there. In the absence of some instruction to the contrary from the buyer, it may be that the contract should be con-

strued to mean that they were to be shipped to that city; but as the seller was only required to deliver them "f. o. b. Baltimore," and the contract provided for the "buyer to give shipping instructions when requested by seller," there would be no reason why the seller should not ship them to some other point, if so instructed by the buyer, unless such shipment would impose a greater burden on the seller than shipping them to New Orleans would have done. If, for example, the buyer had sold those tomatoes in bulk to someone in Richmond, there could be no valid reason for the seller sending them to New Orleans, and thus require the buyer to pay the freight to that place, and then reship them to Richmond. It would seem, therefore, to be possible that the to-

that, since the place of inspection was not fixed by the contract, the right of inspection continued until the goods were received and accepted at their ultimate destination; and that, while the title to the iron for some purposes vested in vendees upon delivery at the steamer, it was, as between vendors and vendee, a conditional title, subject to the right of inspection and rejection for inferior quality upon arrival in New York. Further, the court pointed out that the facts confirmed the view that the parties did not contemplate that the right of inspection should be exercised at Liverpool, *vis.*: The contract was made in New York, and vendees had no agent at Liverpool; the vendors shipped the iron on steamers selected by themselves, and gave vendees no notice in advance, of the time of shipment so as to enable them to exercise the right of inspection. This decision may possibly be distinguished from *SAMUEL M. LAWDER & SONS CO. v. ALBERT MACKIE GROCERY CO.* by the fact that in that case, construed to be a cash transaction, payment was held properly made at the time of shipment, while in this it was agreed to be made upon the arrival of the goods at the destination.

Alden v. Hart, 161 Mass. 576, 37 N. E. 742, also does not sustain *SAMUEL M. LAWDER & SONS CO. v. ALBERT MACKIE GROCERY CO.* And here, too, as in *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349, the facts do not show a cash transaction. The contract of sale provided for the shipment of coal "f. o. b. Weehawken," on a certain barge. The question whether the title to the coal passed to the vendee when laden free on board the barge at Weehawken, and when bills of lading were given to vendor, under which the cargo was to be delivered to vendees, they paying the freight, the court expressly refrained from deciding, stating that it was not free from doubt; but assuming, however, that it did, it was held to be a conditional title only, the condition being that the coal must be found to be of the quality purchased, and if, upon examination at the point of destination, it did not conform to the implied warranty that it should be merchantable, vendee could reject it.

Where the contract provided that examination and acceptance should be made at time of delivery f. o. b. cars, it was held that the examination and acceptance should immediately precede the delivery. *J. K. Armsby Co. v. Blum*, 137 Cal. 552, 70 Pac. 669.
62 L. R. A.

d. Upon the time of payment.

The contract in *J. K. Armsby Co. v. Blum*, 137 Cal. 552, 70 Pac. 669, provided for the shipment of peaches f. o. b. cars at a certain point, packed in bags, examination and acceptance to be made at time of delivery. There was no provision as to the time of payment. The court held that, in the absence of an agreement respecting the time of payment, the legal presumption is that the vendor was entitled to payment for the peaches immediately upon their delivery on board the cars.

When goods are agreed to be delivered free on board for cash, at the place where the goods are, according to *Clark v. Rose*, 29 U. C. Q. B. 168, the purchaser must pay or tender the price of the goods before he can require the seller to put them on board.

A Boston dealer telegraphed parties in San Angelo, Texas, as follows: "Wire f. o. b. Boston price scoured wool sight draft bill of lading." In answer he received the following: "Will take forty cents per pound f. o. b. here for scoured twelve months wool." In deciding as to the construction of this telegram, upon the contention that the word "here" designated only the place of delivery, and not the place of payment, the court, taking into consideration the interpretation put upon it by the acts of the parties, refused to sustain the contention, holding that the contract was for the payment of the money for the wool at San Angelo, and, therefore, that the act of vendee in authorizing a bank at that place to make the payment only under certain conditions was a breach of contract. *Owens v. Jackson* (Tex. Civ. App.) 65 S. W. 1125.

e. Upon the right of stoppage in transitu.

The right of stoppage in transitu of goods shipped f. o. b. depends, according to the weight of authority, upon whether a delivery of the goods was made at any time prior to the desired exercise of the right, sufficient to pass the title thereof and vest it in the vendee; and, for the purpose of determining this question, the manner of the delivery on board the cars or ships, the form of the bill of lading taken at that time, as well as other acts of the parties tending to reveal their intent in the matter, are scrutinized with great care. Therefore, it is apparent that each case must be determined for itself according to its facts and circumstances, and no def-

atoes might never have gone to New Orleans, under the terms of the contract, and hence it is difficult to see how it can be said that the cash was not to be paid until they reached that city.

But if it be conceded that the contract contemplated that the shipment should be to New Orleans, and not elsewhere, it cannot be denied that, if the appellant had placed the tomatoes purchased, in proper condition, on board the cars at Baltimore, with correct shipping instructions, its responsibility would have been at an end. The carrier would then have been the agent of the buyer, and the seller would have had no redress against the carrier in case of loss. If

the goods had been destroyed or injured, the buyer, and not the seller, could have held the carrier responsible, so far as there was any responsibility; and, if there was none, the buyer would have been compelled to sustain the loss. The seller would not even have had a lien on the goods for the purchase money, and no right but that of stoppage *in transitu*, if circumstances arose that justified the exercise of that right. When, then, the contract provides for payment of cash, and only requires the seller to deliver the goods free on board at Baltimore, why should the seller be required to wait until they arrive at New Orleans before it is entitled to its money? While the terms "f. o. b.

inite rule may be laid down as to a vendor's rights in regard to this question.

A decision where the facts were construed to present a complete delivery at the initial point of shipment and a vesting of the title in the vendee at that time so as to prevent the exercise of the right of stoppage *in transitu* is *Cowas-jee v. Thompson*, 5 Moore P. C. C. 165, 3 Moore Ind. App. 422. In accordance with an agreement to deliver "pig lead" "free on board," to be paid for by acceptance at six months, upon delivery on board, or in cash at a specified discount, at the option of the sellers, the lead was delivered on board a vessel indicated by the purchasers, and the lighterman took receipts therefor from the mate of the vessel, the master of the vessel signed bills of lading in the purchasers' names, and the sellers elected to be paid by acceptances at six months, which they immediately received from the purchasers, and the latter failed soon after. The question then arose, at the end of the voyage, in an action of trover, whether the goods were *in transitu* after their delivery on board the vessel, so as to give the sellers the right of stoppage. The court held that, upon the delivery on board and making out of the bill of lading, the goods were completely vested in purchasers, and the fact that the mate's receipt was never given up by the sellers to the purchasers was immaterial, because sellers' election to be paid by a bill and the receipt thereof completed the delivery of the goods, and rendered the mate's receipt of no effect. Lord Brougham, in the opinion, declares: "It is proved beyond all doubt,—indeed, it is not denied,—that, when goods are sold in London 'free on board' the cost of shipping them falls on the seller, but the buyer is considered as the shipper."

But where the vendor, in the contract, or upon putting the goods f. o. b. the cars or vessel for transportation, inserts some stipulation, or does some act, inconsistent with an intent to pass the title, this will, in the absence of stronger evidence to the contrary, be construed as a retention by him of a control over the goods sufficient to allow him the right of stoppage *in transitu* under the proper circumstances. This was illustrated by the following cases:

In *Craven v. Ryder*, 6 Taunt. 433, 2 Marsh. 127, Holt, 100, 16 Revised Rep. 644, sugar was shipped f. o. b. a vessel, and a receipt taken from the mate in the master's absence, to the effect that the goods were received for and on account of the vendors. Vendee had, in the meantime, resold the cargo to a third party, and

received payment therefor, and the vessel had been engaged by the latter for the voyage, and the master signed a bill of lading for the sugar as shipped by the third party, deliverable to still another party or his order at the destination. The original vendee having become insolvent, vendors claimed the sugar, but the master of the vessel refused to deliver. Under these facts, it was held that, under the receipt given vendors, they did not part with their control over the goods, and were entitled to retain them until they delivered the receipt to vendee or exchanged it for a bill of lading, which in this instance they had not done, and were, therefore, still entitled to the right of stoppage *in transitu*.

A vendor sold to a purchaser, who afterwards became insolvent, certain timber, under a contract of sale, specifying the price "free on board, payable by buyer's acceptance of seller's draft at six months from date of bills of lading. Shipment to London." It was also provided that the sellers were to provide ships. In regard to this original contract, the vice chancellor declared it to be plain that there was no intention that the goods should be at their destination when they were free on board, as the seller was to find a vessel and undertook the delivery of the goods in London; so that, although the property in the goods might pass when the bill of lading was handed over in exchange for the accepted bills, that would not determine the right of stoppage *in transitu*, since the goods were, under this contract, to be shipped in a chartered vessel, and not in the purchaser's own ship, in which latter event there would be an absolute delivery, unless the shipper protected himself by taking a bill of lading deliverable to his order only. Subsequently, however, this contract was varied by parol, by an arrangement under which vendor was no longer to find a ship; but one was chartered by the purchaser and sent out from London for the purpose of taking on board the cargo, and vendor, as a precaution, took the bill of lading in the following form: "Shipped by him (the vendor), to be delivered at the port of London unto order, or to assigns," and vendor indorsed it in blank, and delivered it to the purchaser in exchange for the accepted bills of exchange. It was thereupon argued that the words "free on board" indicated that the *transitus* was at an end when the goods were on board the purchaser's ship; but the court held the effect of the whole transaction to be, together with the form in which the bills of lading were made out, that

Baltimore" required the seller to place, at its own expense, the goods on board in Baltimore, the buyer was required to pay the freight to the carrier, and the goods were then at his risk. This contract not only uses the term "f. o. b. Baltimore," but it says, "To be delivered as packed during season of 1901. F. O. B. Baltimore." In the record there is a period after "1901," but the expression "to be delivered," etc., unquestionably refers to and is connected with "f. o. b. Baltimore," and hence shows that the delivery was intended to be there. Although the sale was for cash, a delivery made unconditionally and without fraud or mistake would have vested the title to the

goods in the appellee (*Foley v. Mason*, 6 Md. 37), and hence such a delivery in Baltimore would have had that effect, and a delivery elsewhere would not have been in accordance with the contract. It seems clear to us then that, by the terms of the contract, the payment was to be made in Baltimore upon delivery of the tomatoes on board the car; and the appellee having refused, as alleged in the pleas, to make such payment, it cannot sustain this action, without in some way meeting the allegations of the pleas. Any other construction would be placing the appellant in a position not contemplated by the contract.

It was conceded by the appellee that a

the master of the ship chartered by purchaser was a person interposed between the vendor and purchaser in such a way that the *transitus* was not at an end until the goods reached London, and therefore that the right of stoppage *in transitu* existed in vendor until that time. *Berndtson v. Strang*, L. R. 4 Eq. 481, 36 L. J. Ch. N. S. 879, 16 L. T. N. S. 583, 15 Week. Rep. 1168.

Where upon the putting of goods upon a vessel, f. o. b. according to contract, vendor's agent, in the absence of the master, tendered to the mate a receipt by which the goods were acknowledged to be shipped on account of vendor, but this receipt the mate kept and refused to sign, and later the master signed bills of lading to the order of vendees, who, before the delivery of the goods to them, became insolvent, it was held that, under the circumstances, the *transitus* was not ended upon the delivery f. o. b. the vessel, as the master ought not to have signed the bill of lading until the receipt had been handed to him by vendees after having been delivered to them by vendor. *Ruck v. Hatfield*, 5 Barn. & Ald. 632, 24 Revised Rep. 507.

The case of *Ex parte Rosevear China Clay Co.* L. R. 11 Ch. Div. 565, 48 L. J. Bankr. N. S. 100, 40 L. T. N. S. 730, 27 Week. Rep. 591, 4 Asp. Mar. L. Cas. 144, goes on a somewhat different theory. The question was whether vendors had a right of stoppage *in transitu* as to china clay which, in accordance with their agreement, they had delivered f. o. b. a vessel hired by the purchaser, and no bill of lading had been signed, neither had the purchaser given any acceptance for the price of the clay. The chief judge held that the right ceased the moment the clay was put on board; that there was no *transitus* except from the quarry to the side of the ship hired by the buyer for the very purpose of carrying the clay, and that delivery "free on board" only means: "The price shall be that which we stipulate for, and you shall not have to pay for the wagons or carts necessary to carry the clay from the place where it is dug; we will bear all these charges, and put it free on board the ship the name of which you are to furnish." On appeal, however, it was held that the right of stoppage *in transitu* remained as long as the goods were in the hands of a common carrier, who was an intermediate between vendors and purchasers, although hired by the latter; but vendor's liability was declared to be at an end upon the constructive delivery to vendee constituted by putting the goods on board ship, and that the property in the goods passed to vendee, 42 L. R. A.

subject to the vendor's right to retake them before they actually come into the possession of the vendee, if the latter becomes insolvent and the goods are not paid for.

Citing *Ex parte Rosevear China Clay Co.* L. R. 11 Ch. Div. 565, 48 L. J. Bankr. N. S. 100, 40 L. T. N. S. 730, 27 Week. Rep. 591, 4 Asp. Mar. L. Cas. 144, and *Berndtson v. Strang*, L. R. 4 Eq. 481, 36 L. J. Ch. N. S. 879, 16 L. T. N. S. 583, 15 Week. Rep. 1168 (*supra*, this division), a writer in 1 Law Quarterly Rev. 397, lays down the following rule: "Where goods are sold 'free on board' the transit is not at an end when the goods have been shipped, but continues until the termination of the voyage; and the goods may be stopped at any time before such termination, although the vendor may not have known, at the time of the sale, for what port they were destined."

The only relevant American decision found on the point is *A. J. Neimeyer Lumber Co. v. Burlington & M. River R. Co.* 54 Neb. 321, 40 L. R. A. 534, 74 N. W. 670. The contract between the parties arose as follows: Certain lumber dealers, not being able to fill an order, authorized dealers in Waldo, Arkansas, to send the lumber ordered by their customers in Omaha, Nebraska. The Arkansas dealers agreed to do so, "price f. o. b. Omaha." The prevailing opinion as to the point of delivery under the contract was to the effect that it took place upon the delivery to the carrier at Waldo, Arkansas. It was conceded, however, that the payment of freight by the vendor was a circumstance which afforded some, although not conclusive, evidence that vendor intended to retain the *jus disponendi* of the goods shipped, but other facts in evidence, such as the taking of a bill of lading to the vendee as consignee, and the failure to give any specific directions as to the place of delivery, were held to overthrow this presumption and establish the intent of the parties in using the language, "price f. o. b. Omaha, Nebraska," to merely inform the vendees what the lumber would cost them at the point named, and not that the delivery of the lumber was to take place there. The conclusion reached was concurred in by another judge on the ground that, conceding that the expression, "price f. o. b. Omaha," might, of itself, afford a presumption that the delivery was to be made at Omaha, and that the title should pass there, the other evidential facts were sufficient to ground an inference, the question being one of fact, that the title should pass at the place of shipment, and that vendor thereafter, therefore, had no

cash sale means a sale for cash to be paid on delivery of the goods, and that as a general rule the place of delivery is the place where the goods are being manufactured; but it is said this rule is not invariable, and

may be affected by the situation of the parties, the nature and subject-matter of the contract, and other collateral circumstances which show a different intention, to which the courts give effect, and that there is a

control over the goods sufficient to give him any right to a stoppage *in transitu*. But in a strong dissenting opinion it is said: "The initial letters 'f. o. b.' in contracts of sale, when the property is to be transported, mean 'free on board' the cars at a designated place, whether that be the initial point of shipment or place of final destination. They imply that the buyer shall be free from all the expenses and risks attending the delivery of the property at the point named in the contract for such purpose. . . . It is obvious that the true construction of the contract of purchase and sale involved in the present case is that plaintiff's agreement was not performed until the delivery of the lumber free on board the cars in Omaha, and that the title was not divested until the shipment arrived in that city.

V. Summary.

The initials "f. o. b." in mercantile contracts stand for the expression "free on board," and imply that the vendor must bear the expense of conveying the goods to or upon the vehicle of conveyance specified, or to the point named, including, as has been held (II.) all port and harbor charges, canal dues, wharfage, etc., at the place of shipment, as well as the expenses of an inspection where that was stipulated to be had at the works of the maker who had agreed to deliver the goods f. o. b. at the point of shipment (Silberman v. Clark, 98 N. Y. 522; II.). If the point named is the destination, vendor must pay, also, all freight charges.

Unless express provision is otherwise made in the contract, under an agreement to deliver f. o. b. at the initial point of shipment, vendor is under no duty to provide the transportation facilities, nor even to make any attempt to deliver until cars or ships are provided or named, by vendee, unless the time or place of delivery is within the option of vendor, in which event he must give notice of his readiness to deliver, or specify the place where, as the case may be, when vendee must on his part provide or specify the vehicles of conveyance for the goods.

Upon vendor's putting the goods on board, under a contract to deliver f. o. b. at the initial point of shipment, consigned to the vendee, without qualification, the cases are practically uniform that the title thereupon passes from vendor to vendee, so as to place in the latter the risk of the transportation. If, however, the point specified for delivery f. o. b. is the point of destination, vendor retains the title and assumes the risk until that point is reached.

As a rule, when the contract is for delivery f. o. b. at the initial point of shipment, no risk or title passes until the goods are actually on board. An exception to this rule is *Coleman v. McDermot*, 5 U. C. C. P. 303 (IV. a) where the goods had been previously stored in a warehouse, had been appropriated to the vendees, the price paid, and delivery order accepted by them.

If vendor, not wishing to divest himself of his title to and control over the goods, takes out the bill of lading consigned to himself, or order, or assigns, or sends it attached to a draft upon vendee, to third parties at the point of destination 62 L. R. A.

tion for collection, such a course operates to prevent the risk of the transportation from passing to vendee, and it still rests in vendor along with the title to the goods. The intent of a vendor, however, in thus taking out bills of lading is not conclusive, but, according to numerous decisions, both English and American, may be rebutted by evidence of facts showing a contrary intent; and a question of fact for the jury is then presented, to tell what the real intention was. In *Hobart v. Littlefield*, 13 R. I. 341 (IV. a), notwithstanding vendor kept the bill of lading under his own control, it was held from the evidence to be the intention of the parties that, upon the delivery f. o. b., the risk and title passed to vendee.

No definite rule can be laid down as to the time and place of inspection and payment under a contract to deliver f. o. b., as those questions are to be determined in reference to the stipulations in the contract, and the circumstances of each particular case. As to payment, however, there is some authority for saying that, in the absence of any agreement respecting the time of payment, the legal presumption is, that the vendor is entitled, in a cash transaction, to payment immediately upon the delivery on board the cars.

So, also, no strict rule exists in regard to the right of stoppage *in transitu* under f. o. b. contracts, as this right depends upon whether the title to the goods has entirely passed from vendor to vendee prior to the desired exercise of the right. If vendor consigns the goods to vendee upon the delivery f. o. b. this, in the absence of stronger evidence to the contrary, will be deemed sufficient to pass the title to vendee at that time, and prohibit any further interference with the goods by vendor. But, on the other hand, if vendor retains the bill of lading within his own control, or does some other act indicative of an intent to retain the title, it has been held that he has the right of stoppage under the proper circumstances. A somewhat different theory is presented in *Es parte Rosevear China Clay Co. L. R. 11 Ch. Div. 565*, 48 L. J. Bankr. N. S. 100, 40 L. T. N. S. 730, 27 Week. Rep. 591, 4 Asp. Mar. L. Cas. 144 (IV. e), to the effect that the right of stoppage *in transitu* remains as long as the goods are in the hands of a common carrier, as such carrier is an intermediate between vendor and vendee until vendee actually receives the goods. (See also *Berndston v. Strang*, IV. e.) However, in all cases, it seems to be a question of the intention of the parties as to the passing of the title to be deduced from the facts in the case, including the language of the contract, the manner of delivery, form of bill of lading, etc.

In the only American decision found on this point (*A. J. Neimeyer Lumber Co. v. Burlington & M. River R. Co.* 54 Neb. 321, 40 L. R. A. 534, 74 N. W. 876, IV. e), it was held, after weighing all the facts in the case, that, under the contract, the title passed upon delivery to the common carrier at the point of shipment, and that, therefore, vendor thereafter had no control over the goods sufficient to give him any right to a stoppage *in transitu*. M. M. M.

distinction noted in the authorities between the rules governing deliveries in sales of specific and ascertained chattels and those of goods not in existence, but to be manufactured by the seller to correspond with the description in the contract of sale. It is true that such a distinction is made in the absence of stipulations in the contract which govern the parties, but when the contract itself prescribes the terms, and those terms are free from doubt, they must be the guide for courts in passing on the rights of the parties.

Great stress was placed on the right of the appellee to inspect the goods before acceptance. If it be conceded that it had such right, as it may be, the further question arises as to where, under this contract, it could be exercised. The mere fact that the buyer has the right to inspect goods before acceptance does not necessarily mean that the inspection is to be made at the residence or place of business of the buyer. He might inspect at the seller's place of business, but, if the contract provides for delivery at a particular place, he must accept or reject at that place, unless otherwise provided for in the contract. In short, a contract to deliver at one place cannot be said to mean delivery at another place, because the buyer lives there and has the right to inspect the goods, and there is no such uncertainty as to the place of delivery in this contract as would justify the court in holding that it was at New Orleans, because the appellee had its place of business there. An inspection of canned goods at any place away from the canning establishment must be attended with some difficulties. Every can that is opened is doubtless injured for the ordinary purposes of trade; for unless it is speedily sold the fruit or vegetables must soon become worthless. There is nothing in the record to show what the custom is as to inspection, and the parties made no special provision in the contract for it, but it is manifest that there could not be an inspection of every can in 700 cases at the place to which they were to be shipped. But whatever inspection was to be made could be done as well at the place from which the goods were shipped as at the point of destination, and it is mainly a question of convenience to the respective parties as to where it shall be made. If they determine that by their contract it must control, and if it is silent as to inspection, but is as clear as this is as to delivery, any inspection that is desired before payment must be made before or at the time of delivery, when the terms are cash.

It was said on behalf of the appellee that the usual method of collecting the purchase money for such goods is for the vendor to

draw on the vendee, and not deliver the bill of lading until the draft is paid; but a sufficient answer to that is that it was not the method adopted in this contract. The standing of these parties is not known to us, and we do not mean to reflect upon either of them; but, if a vendor wants to relieve himself of all risk of loss or unfair dealing by a vendee residing at a distance, he has the undoubted right to require payment at the place where the goods are to be shipped from, and not subject himself to the risk of loss or inconvenience by the vendee declining to accept the goods at the place of destination; and when the contract provides for that, as we think this does, the contracting parties are bound by it.

So, without deeming it necessary to further prolong this opinion by considering such warranties as may be implied in sales of this kind, or other matters affecting the rights of the respective parties, we are of the opinion that the court below erred in sustaining the demurrer to these pleas, and the judgment must be reversed.

Judgment reversed, and a new trial awarded, the costs to be paid by the appellee.

BOARD OF SUPERVISORS OF ELECTIONS FOR WICOMICO COUNTY, *Appt.*

v.

George W. TODD *et al.*

(97 Md. 247.)

The legislature cannot impose upon a court the duty of receiving and acting on petitions for the submission to the voters of the question whether or not intoxicating liquors shall be sold, under a Constitution separating the departments of government.

(April 15, 1903.)

A PPEAL by defendant from an order of the Circuit Court for Wicomico County granting a writ of mandamus to compel the holding of an election upon the question whether or not licenses should be granted for the sale of intoxicating liquors. *Reversed.*

The facts are stated in the opinion.

Messrs. Joseph N. Ulman and Alonzo L. Miles, with *Messrs. Samuel J. Harman, Samuel R. Douglass, and Miles & Stanford*, for appellant.

NOTE.—For a case in this series holding to the contrary to the one above, that imposing upon a court the duty of determining when a local-option election shall be held is not unconstitutional. see *State ex rel. Paul v. Circuit Judge*, 1 L. R. A. 86.

Messrs. Elmer H. Walton and John H. Handy, for appellees:

The duties imposed are judicial in their nature, and the law, therefore, is not unconstitutional.

McCrea v. Roberts, 89 Md. 238, 44 L. R. A. 485, 43 Atl. 39; *Devin v. Bell*, 70 Md. 352, 17 Atl. 375; *Wailes v. Smith*, 76 Md. 469, 25 Atl. 922.

Although the court could not be legally compelled to perform duties imposed on it by the legislature, if it does perform them its action is valid and binding, under § 20, art. 4, of the Constitution.

State v. Chase, 5 Harr. & J. 304; *Goldsborough v. Lloyd*, 86 Md. 378, 38 Atl. 773.

Jones, J., delivered the opinion of the court:

The act of assembly of 1896 (p. 314, chap. 195), a public local law of Wicomico county, enacted in its 1st section "that whenever such of the registered qualified voters of Wicomico county, or of any election district, city, or town thereof, as constitute one half of all the votes cast for all the candidates for governor at the last election in said county, or in any election district, city, or town thereof, shall petition the circuit court for said county for the submission, at the next regular congressional election held in said county of the question of granting or not granting any license for the sale of intoxicating liquors for beverages therein, the said circuit court shall, within ten days after the receipt of said petition, issue an order for an election on this question to the sheriff of the county, whose duty it shall be to give the same notice and perform all other acts required of him for the holding of elections under the election law of this state, and subject to like penalties in case of his default in his performance of said duties." The 2d section enacts "that such elections shall be held and conducted under the provisions of the election laws applicable to the said county." The 3d section provides that after an election so held there shall be no other such election within four years. The 4th section provides how the question thus to be submitted to vote shall be indicated on the ballots, how the preference of the voters upon the question is to be made to appear and be ascertained, how the ballots are to be counted and canvassed in respect to this question, how the result of the voting is to be certified, and how notice is to be given of the result in case it shall "appear that the majority of the votes cast is against the sale of intoxicating liquors for beverages." The succeeding sections of the law in question are provisions for carry-

ing into effect the prohibition of the sale of intoxicating liquors for beverages in the county, election district, city, or town as the case may be, according to the submission made in respect to locality, when it appears that a majority of the votes cast upon "the question of granting or not granting any license for the sale of intoxicating liquors," etc., is against the granting of such license. This case arises under this law, and originated in a petition for the writ of mandamus filed in the court below on the 24th day of October, 1902, by the appellees, George W. Todd and William A. Crew, against the appellants, in which it is alleged that the petitioners, "together with four hundred and forty (440) other voters and residents" of the ninth election district of Wicomico county, on the 18th day of October, 1902, presented to the circuit court for that county a petition verified by affidavit praying the court "to submit to the voters of said district the question of granting or not granting any license for the sale of intoxicating liquors for beverages therein . . . in pursuance of the provisions contained in § 1, chapter 195, p. 314, of the Acts of Assembly of Maryland of 1896;" that upon "the hearing of said petition and the motion of the objectors thereto" the said court passed the following order: "No sufficient cause to the contrary having been shown, it is, this 23d day of October, 1902, ordered by the circuit court for Wicomico county, Maryland, that, in pursuance of § 1, chapter 195, p. 314, of the Acts of 1896, the sheriff of Wicomico county, Maryland, shall submit to the voters of the ninth election district of Wicomico county the question of granting or not granting licenses for the sale of intoxicating liquors for beverages in said district, and the clerk is hereby directed to serve a copy of this order on the said sheriff of Wicomico county immediately;" that in pursuance of said order the sheriff on the 24th day of October, 1902, notified the county commissioners of said county and on said day the county commissioners notified the supervisors of election of said county, but said supervisors refused "to advertise the question," and were "preparing the official ballots to be used in said district without any provision for the submission of the aforesaid question to the voters." It is then prayed that the writ be issued "directed to the said supervisors of election of Wicomico county," who are the appellants here, "commanding them to advertise said question, and to prepare the official ballots to be used in the ninth district of Wicomico

county . . . at the election to be held on November 4, 1902, in accordance with the provisions of § 4 of said chapter 195, p. 315, of the Acts of 1896." Upon this petition the court below passed an order that cause be shown immediately by the appellants why the writ of mandamus should not issue. On the same day that this order was passed the appellants filed their answer, in which they admitted the allegations of fact in the petition, and rested their refusal to advertise the question of granting or not granting licenses for the sale of liquor, and to place such question upon the ballots at the approaching election, as set out and stated in the petition upon the ground that the act of 1896, p. 314, chap. 195, is unconstitutional and void; that, if not unconstitutional, it is in conflict with the provisions of chapter 202, p. 327, of the act of 1896, from which the appellants, as supervisors of elections, derive all of their powers and authority over elections in said county; and that by § 47, p. 355, of the said chapter 202 of the act of 1896 "all questions of local concern which are to be submitted for approval to the vote of the people" of a county must be certified to the board of supervisors of elections by the county commissioners of the county not less than thirty days before the election at which such question is to be submitted; and that the question of granting or not granting any license for the sale of intoxicating liquors in the ninth election district of Wicomico county had not been so certified thirty days before the election as a question to be submitted for approval. The appellees demurred to the answer, and upon hearing the court on the same day the answer was filed, October 24, 1902, ordered the writ of mandamus to issue as prayed. From such order this appeal was taken.

In the view we take of this case, the ground of defense first set up in the answer of the appellants against the application for mandamus is sufficient to dispose of the case upon this appeal, and it will be unnecessary to consider any other. We think it advisable to dispose of it upon this ground because future litigation under the law in question will thus be avoided. The legislature has seen fit to prescribe as a condition for the law (chap. 195, p. 314, of the act of 1896) being called into existence and put into operative effect that an application shall be made to the circuit court for Wicomico county for a submission of the question of the adoption of the law to the voters of the county or of a town or election district of the county, as the case may be; that the said court shall order the submission of such

question to a vote upon conditions prescribed; and that, upon the vote being had, a majority of the votes of the locality to be affected according to the submission shall appear to be in favor of putting the law into operation. The existence of the law with operative effect is made to depend upon the observance of these prescribed proceedings, the initial step in which is the application to and the order from the circuit court for the submission of the question whether the law shall be put into effect to the voters within the territorial limits to be affected. The question raised is as to the validity of this legislation. The inquiry as to this is whether it is within the constitutional power of the legislature to impose upon the judiciary, or invest them with a function of this character, and whether the judiciary, in the attempt to discharge such a function, are not acting without constitutional warrant. In making this inquiry we are not dealing with any question of expediency or policy; nor can we have regard to the question whether, in the particular instance, the legislature has prescribed a course of proceeding best adapted to the accomplishment of a laudable object. The public policy involved in the inquiry is determined and fixed in our Bill of Rights and the Constitution,—the fundamental law,—and we are limited to the question of constitutional power. As was said in the case of *Thomas v. Owens*, 4 Md., at page 225: "Under our system of government its powers are wisely distributed to different departments. Each and all are subordinate to the Constitution, which creates and defines their limits. Whatever it commands is the supreme and uncontrollable law of the land." This distribution of the powers of our state government was declared in our original Bill of Rights accompanying the Constitution of 1776 in this language: "That the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other." Article 6, Bill of Rights 1776. There are a number of decisions of this court having reference to this article of the Bill of Rights sanctioning its wisdom, and enforcing practically the principle involved in the declaration. Only those which may have more immediate reference to the case at bar need be referred to. Among those which arose under the Constitution of 1776 is that of the *State v. Chase*, 5 Harr. & J. 297, in which Judge Buchanan in the course of his opinion says: "New judicial duties may often be unnecessarily imposed, and services not of a judicial nature may sometimes be required. In the latter case a

judge is under no legal obligation to perform them,"—which was to say that the opinion of the court was that duties "not of a judicial nature" could not legally and constitutionally be imposed upon the courts or the judges. In the subsequent Constitutions adopted in this state in 1851, 1864, and 1867 the declaration which has been quoted from the Bill of Rights of 1776 has been incorporated, and emphasized by adding thereto this language of exclusion: "And no person exercising the functions of one of said departments shall assume or discharge the duties of any other." Article 6, Bill of Rights, Const. 1851; article 8 in each of the Constitutions of 1864 and 1867. And in each of these subsequent Constitutions there is this further declaration: "No judge shall hold any other office, civil or military, or political trust or employment of any kind whatsoever, under the Constitution or laws of this state, or of the United States, or any of them." Article 30, Bill of Rights 1851; article 33 in each of the Constitutions of 1864 and 1867. The force of the opinion of the court, speaking through Judge Buchanan, in case of *State v. Chase*, 5 Harr. & J. 297, is enhanced, therefore, not only by the subsequent more emphatic declarations of the fundamental law in reference to the separation of the powers of government, but by the express inhibition against the exercise by a judge of any other "political trust or employment whatsoever." It would seem thus to be made evident in our fundamental law that the policy and intent of that law is that the courts and judges provided for in our system shall not only not be required, but shall not be permitted, to exercise any power, or to perform any trust, or to assume any duty not pertaining to, or connected with, the administering of the judicial function; and that the exercise of any power or trust or the assumption of any public duty other than such as pertain to the exercise of the judicial function is not only without constitutional warrant, but against the constitutional mandate in respect to the powers they are to exercise and the character of duties they are to discharge. In accord with this are recent decisions of this court. In the case of *Robey v. Prince George's County*, 92 Md. 150, 48 Atl. 48, a statute which required the judges of the circuit court to approve the accounts of certain county officers before payment of the same by the county commissioners was held unconstitutional as to this requirement because it imposed on the judges a nonjudicial duty. For the same reason, in the case of *Beasley v. Ridout*, 94 Md. 641, 52 Atl. 61, a statute that imposed upon the judges of the circuit

court the duty of appointing members of a board of visitors for the county jail of Anne Arundel county was pronounced unconstitutional. Therefore, to test the constitutionality of the law here in question in respect to the duty assigned by it to the circuit court, we have only to inquire whether the duty so assigned to the court is a judicial duty. It is quite unnecessary to undertake to define here the essential qualities of a judicial act, or to prescribe the precise limits to be observed by the legislative branch of the government in assigning duties to the judiciary. Such attempt could, in its results, only be misleading and confusing. It would not be practicable to lay down a rule for all cases, and it would be inappropriate that the courts should undertake to do this. It is only necessary in this case to say that counting the names upon a petition, ascertaining whether the names appended thereto are those of voters at the last election for governor, and ordering an election is not a judicial function is a proposition that would seem to be too plain to need argument to enforce it. The order which, by the statute here under consideration, the court is required to pass is not to be the result of any judicial inquiry. It is not to be passed in the course of, or in connection with, any judicial proceeding. It is not to be made as preparatory or preliminary to the bringing of any matter within the judicial cognizance, nor as a means necessary or appropriate to aid in any way the efficient and appropriate exercise of the judicial function. In short, there is no view in which the duty to pass the order required by the statute presents itself as a judicial act. In assuming the duty to pass the order in question, therefore, the court assumes a political trust or duty distinct from its constitutional duty as a court. Again, if the court can be required to take one step in proceeding to hold an election for the object indicated in the statute in question, or for such other purpose as the legislature, within its powers, may see fit to order an election, why may not all the duties in connection with the holding of such election be devolved upon the courts? Why may they not be required to name time and place of holding such election, appoint the judges and clerks of election, canvass the votes, and declare and certify results? The initial step in holding such elections would be no more judicial in its character than all the other necessary proceedings therein. It is not reasonable to impute to the fundamental law, in view of the declarations therein heretofore noticed, an intention to make the courts subject to have devolved upon them duties so

distinct from those pertaining to the exercise of the judicial function, and which could be imposed to such an extent as to seriously interfere with the efficient discharge of the duties of the judicial office. This being so, the provision of the act of 1896 (p. 314, chap. 195) which requires of the circuit court for Wicomico county the duty of ordering elections as therein prescribed is repugnant to the Constitution and Bill of Rights, and therefore void. As these elections, by the terms of the act, must depend upon the orders from the circuit court, the act must fail.

No reference has been made to authorities or precedents in other states, among which there is more or less conflict as to the ques-

tions herein considered. It is sufficient that the views expressed and the conclusions reached seem to be the logical and inevitable consequence of the principles embodied in our organic law and of our decisions expounding them. As authorities, however, maintaining similar views in analogous cases, we may refer to *Dickey v. Hurlburt*, 5 Cal. 343, and *Case of Election Super.* 114 Mass. 249, 19 Am. Rep. 341. As a result of our views, we must reverse the order of the circuit court for Wicomico county from which the appeal in this case was taken.

Order reversed, with costs to the appellants.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Dana E. WILDE

v.

Dennis J. MAHANEY.

Natick Five Cents Savings Bank, Trustee.

John J. Scott, Claimant.

(183 Mass. 455.)

1. An assignee of the principal debtor may appear in a proceeding to reach a fund by trustee process, and raise the objection that the fund is not subject to such process.
2. A claim for unliquidated damages arising out of contract is not the subject of trustee process, although a verdict has been rendered for it in favor of the principal debtor against the trustee, in which judgment has not been entered under a statute authorizing process only when the trustee has in his possession "goods, effects, or credits" of the principal debtor, and contemplating that the whole matter shall be disposed of on the answer of the trustee.
3. Where no fund is held under the writ in a proceeding to reach a fund by trustee process, the trustee cannot be directed to make any payment to one claiming as assignee of the principal debtor.

(May 25, 1903.)

EXCEPTIONS by claimant to rulings of the Superior Court for Middlesex County in a proceeding to reach a fund in the hands

NOTE.—As to garnishment of unliquidated claims, see also, in this series, *Waples-Platter Grocer Co. v. Texas & P. R. Co.* 59 L. E. A. 353, and note.
62 L. R. A.

of a trustee in satisfaction of a demand against the principal defendant, which was claimed under an assignment from the principal defendant. *Sustained.*

The facts sufficiently appear in the opinion.

Mr. John J. Scott, in propria persona:

The statute under which the plaintiff seeks to hold the funds provides that, where a person has credits of the defendant entrusted or deposited in his hands or possession, such credits may be attached and held to respond to the final judgment in the suit, in like manner as goods or estate attached by the ordinary process.

Mass. Pub. Stat. chap. 183, § 21, Rev. Laws, chap. 189, § 19.

The term "credit" is used as the correlative of debt.

Drake, *Attachm.* 7th ed. § 544.

Debt is a sum of money due by certain and express agreement.

3 Bl. Com. 154.

The distinguishing and necessary feature of a debt is that a fixed and specific quantity is owing.

1 Bouvier, *Law Dict.* 15th ed. 485.

The fact that a verdict may have been rendered in an action of tort, or for other unliquidated damages, will not render the same susceptible of being attached by trustee process.

Thayer v. Southwick, 8 Gray, 229.

Unliquidated damages are not debt which may be reached by trustee process.

Bennett v. Sweet, 171 Mass. 600, 51 N. E.

183; *Capes v. Burgess*, 135 Ill. 61, 25 N. E. 1000; *Stanly v. Ogden*, 2 Root, 259; *Selheimer v. Elder*, 98 Pa. 154; 2 Wade, Attachm. § 447; *Drake*, Attachm. 7th ed. § 548; *Day v. Bennett*, 18 N. J. L. 287; *Duncan v. Lyon*, 3 Johns. Ch. 351, 8 Am. Dec. 513.

Debt means liquidated damages arising out of a contract.

Jeffery v. Wooley, 10 N. J. L. 123; *Hoover v. Hathaway*, 9 Mackey, 591; *Clark v. Wilson*, 3 Wash. C. C. 560, Fed. Cas. No. 2,841; *Hugg v. Booth*, 24 N. C. (2 Ired. L.) 282; *Bucklin v. Powell*, 60 N. H. 119.

Claims of lessees for breach of covenant for quiet enjoyment are not debts.

Eastman v. Thayer, 60 N. H. 575; *Fillebrown v. Hoar*, 124 Mass. 580; *Brown v. Holyoke Water Power Co.* 152 Mass. 463, 25 N. E. 966; *Sherman v. Williams*, 113 Mass. 481, 18 Am. Rep. 522; *Dexter v. Manley*, 4 Cush. 14.

Mr. William Reed Bigelow, for plaintiff:

The claimant has no standing to contend that nothing is due from the trustee to the defendant.

Clark v. Gardner, 123 Mass. 358; *Butler v. Butler*, 162 Mass. 524, 39 N. E. 182.

The claimant has no lien by statute before final judgment and execution.

Simmons v. Almy, 103 Mass. 33; Mass. Rev. Laws, chap. 165, § 48; Mass. Pub. Stat. chap. 159, § 42.

Claims for property and for torts done to property are assignable.

Rice v. Stone, 1 Allen, 566.

Defendant's damages against the bank had been liquidated by the verdict, and there is no reason why the bank should not be charged as trustee.

Aldrich v. E. W. Blatchford & Co. 175 Mass. 369, 56 N. E. 700.

Loring, J., delivered the opinion of the court:

This case was begun in the first district court of Southern Middlesex by a writ of trustee process. The trustee filed an answer setting forth that, before the service of the trustee writ, the principal defendant recovered a verdict against it in the sum of \$161, and it recovered a verdict against the principal defendant of \$24, and that judgments had not been rendered on either verdict. The claimant appeared in that court, and filed a claim, in which he set forth, in effect, that the verdict against the trustee was made in an action to enforce a cause of action not the subject of trustee process, and that by an assignment made six days after the trustee writ was served an assignment was made to him of the chose in action in which the ver-

dict was rendered. The district court made an order discharging the trustee, and the plaintiff appealed to the superior court. In the superior court the records of the two actions in which the verdicts were rendered, referred to in the trustee's answers, were filed by agreement of the plaintiff and trustee, and made part of the record.

The claimant asked the presiding judge to rule that "(1) upon all the evidence in this case trustee process does not lie; (2) upon all the evidence in this case the trustee should be discharged; (3) upon all the evidence in this case there should be a finding in favor of the claimant, and for his costs." The judge refused these rulings, and ordered the trustee to be charged. The case is here on exceptions taken by the claimant to the refusal to give the three rulings requested.

The plaintiff's first contention is that it is of no consequence whether the ruling made below is right or wrong, for that is a question on which the claimant has no right to be heard. In support of that contention he relies on *Clark v. Gardner*, 123 Mass. 358, approved in the subsequent cases of *Moors v. Goddard*, 147 Mass. 287, 290, 17 N. E. 532, and *Butler v. Butler*, 162 Mass. 524, 39 N. E. 182. On looking at the original papers it appears that the case which it was held in *Clark v. Gardner*, the claimant had no right to go into was this: The claimant was the assignee of future earnings of the principal defendant under an assignment duly recorded. He was allowed by the superior court to show that the sum due when the trustee writ was served on the trustee, if anything was then due, was due under an entire contract, which had not been performed, and was, therefore, not a sum due absolutely and without any contingency within what is now Rev. Laws, chap. 189, § 23. It was held that he had no right to do this, not on the ground that proof of that fact contradicted the answer of the trustee,—there was no such objection in that action,—but on the ground that for the claimant to prove that there was no fund held by the trustee writ was to prove himself out of court. This conclusion was reached as matter of construction of the statute giving the claimant a right to intervene now (Rev. Laws, chap. 189, § 32). That act provides that the claimant shall be admitted a party for the purpose of determining his title to the debt due the principal defendant. It had been previously settled that, if there is no debt held by service of the trustee writ, there is no standing for the claimant (*Peck Bros. & Co. v. Stratton*, 113 Mass. 406); and it was held in *Clark v. Gardner* that the claimant was limited to as-

serting a title to the fund in court, and could not be heard to protect his interest in a fund, to which but for the attachment he had a good title by assignment, by showing that it was not the subject of trustee process, and that the court ought not to direct the trustee to pay it to the plaintiff.

In *Webster v. Lowell*, 2 Allen, 123, it was held that a principal defendant is bound by a judgment charging a trustee by reason of his having a fund due the principal defendant not arising out of a contract, and therefore not properly the subject of trustee process; and in that case not only is it laid down that the principal defendant has a right to litigate that and any other question in which he is interested, but this court went one step farther, and held that, if the principal defendant wished to raise the objection that the fund was not the subject of trustee process, he should have been admitted as a claimant of the fund, and raised it in that capacity. The two cases are in conflict, and, in our opinion, the rule of practice laid down in *Webster v. Lowell* is the true one.

A claimant who has appeared in the trustee process must have the right to raise this question in some way, unless he is to have the right to sue the trustee under his assignment in spite of the judgment charging the trustee under the trustee writ. It is true that in Rev. Laws, chap. 189, § 43, providing that the judgment against the trustee shall discharge him from all demands by the defendant, persons claiming by assignment under the defendant are not expressly mentioned, and it is also true that the rights of the assignee could be worked out by allowing him to have the right to make the defense under consideration in the name of the trustee. But we are of opinion that Rev. Laws, chap. 189, § 43, is to be construed as if a person claiming under the principal defendant by assignment from him were expressly mentioned in that act, and that such a person who has appeared or who has had notice to appear, in the trustee process, is bound by a judgment charging the trustee. We think that the purpose of Rev. Laws, chap. 189, § 32, allowing a claimant to intervene in the trustee action, is that there may be a final determination of all questions in which the claimant is interested, so that a judgment charging the trustee shall acquit the trustee of all demands by the defendant and those claiming under him who have had notice and an opportunity to be heard, as well as from all demands by the principal defendant him-

self. We are therefore of opinion that the claimant had the right to go into the question whether the fund due the principal defendant was one which could be reached by trustee process or not.

The plaintiff's second contention is that the ruling made below was right, and that a claim for unliquidated damages arising out of the breach of a contract is the subject of trustee process. There is no case in this commonwealth on the point. But it has been decided in other jurisdictions that such a claim cannot be reached in foreign attachment. *Hugg v. Booth*, 24 N. C. (2 Ired. L.) 282; *Eastman v. Thayer*, 60 N. H. 575; *Bucklin v. Powell*, 60 N. H. 119, and cases there cited; *Capes v. Burgess*, 135 Ill. 61, 25 N. E. 1000; *Selheimer v. Elder*, 98 Pa. 154, 158, and cases cited. And the textbooks lay down the same rule. 2 Shinn, Attachment & Garnishment, § 483; Drake, Attachment, § 548; 2 Wade, Attachment, § 447.

The reasons given in the opinion in *Hugg v. Booth*, 24 N. C. (2 Ired. L.) 282, decided sixty years ago, are conclusive of the matter. Chief Justice Ruffin in that opinion points out, not only that the word "credits" is the correlative of "debts," and that the use of that word in describing what choses in action can be trusted means that liquidated demands alone can be reached, but he also points out that the statute contemplates that the questions of the trustee's being indebted to the principal defendant, and in what amount, are to be disposed of on the answers of the trustee, and on those answers alone, without any provision being made for the litigation of questions which cannot be disposed of in that way, and for that reason that the North Carolina statute as to foreign attachment did not contemplate a claim for unliquidated damages being reached in such proceedings. There is nothing to be added to this discussion of the subject. It remains only to show that it applies to our statute as to foreign attachment.

By our statute trustee process does not lie unless the trustee has in his possession "goods, effects, or credits" of the principal defendant. Rev. Laws, chap. 189, § 19. In construing this provision in other connections, it has been laid down by this court that a credit is the correlative of debt, and should be so construed in this act. *Wentworth v. Whittemore*, 1 Mass. 471, 473; *Wilder v. Bailey*, 3 Mass. 289, 292; *Fellows v. Duncan*, 13 Met. 332, 334. Again, our statute contemplates the whole matter being disposed of (if disposed of in the orig-

inal proceeding) on the answers of the trustee (Rev. Laws, chap. 189, § 10), or on facts stated by him for the purpose of submitting his liability to the court (§ 13), or on answers by him to interrogatories filed by the plaintiff (§ 11). Not only that, but it is expressly provided that the answers of the trustee are to be taken as true, and cannot be contradicted by either party to the principal action (§ 15), and that the judgment against the trustee shall acquit and discharge him of all demands by the principal defendant for all credits paid or accounted for by the trustee by force of such judgment. When the liability of the trustee is not disposed of in the original action, and a writ of scire facias is sued out, the answers of the trustee in that proceeding are taken to be true, as they are when made in the original action. *Fay v. Sears*, 111 Mass. 154, 155; *Tryon v. Merrill*, 116 Mass. 299.

No case has been cited by the plaintiff, and none has come to our notice, in which it has been held that a claim for unliquidated damages arising out of the breach of a contract is the subject of trustee process. The argument of the plaintiff in this case is, first, that, inasmuch as such a chose in action can be assigned at common law, and by statute passes to an assignee in bankruptcy, it is also the subject of trustee process. But the considerations involved when a creditor voluntarily assigns a chose in action, and those involved where a creditor of that creditor is given the right to apply that chose in action (or so much thereof as is necessary) against his will in payment of a debt due from him, are very different. A creditor may well be allowed to assign, if he wishes to do so, any chose in

action where the assignee can properly represent his rights; that is to say, choses in action arising out of contract, but not arising out of torts for personal injuries. *Rice v. Stone*, 1 Allen, 566; *Bennett v. Sweet*, 171 Mass. 600, 51 N. E. 183. But to give to a creditor of a person who has a right of action the right to enforce his rights in whole, or so far as it is for the interest of the creditor to enforce them, against the will of the principal defendant to whom the right of action belongs, is a matter involving very different considerations. And, for the reasons already given, we are of opinion that the legislature did not intend to give the plaintiff in trustee process a right to reach all choses in action due the principal defendant, but has restricted him to trustee debts due to the principal defendant.

The only other argument advanced by the plaintiff is that the damages were liquidated by the verdict. But the verdict does not convert the claim for unliquidated damages into a debt (*Thayer v. Southwick*, 8 Gray, 229); it does not become a debt until it passes into judgment. See also, in this connection, *Rice v. Stone*, 1 Allen, 566; *Bennett v. Sweet*, 171 Mass. 600, 51 N. E. 183; *Lincoln v. Hurley*, 104 Mass. 353.

Where no fund is held under the trustee writ, no judgment can be entered directing the trustee to pay the fund to the claimant. In such a case he is entitled to no more than his costs. *Peck Bros. & Co. v. Stratton*, 118 Mass. 406; *Blume v. Gilbert*, 124 Mass. 215; *Moore v. Goddard*, 147 Mass. 287, 290, 17 N. E. 532. For that reason the third ruling requested by the claimant was wrong.

Exceptions sustained.

62 L. R. A.

NEW HAMPSHIRE SUPREME COURT.

UNIVERSITY OF ILLINOIS

v.

Solomon SPALDING *et al.*

(71 N. H. 168.)

1. Writing otherwise irrelevant and not admitted to be genuine may be admitted in evidence for comparison with disputed writings in the case, if they have been found to be genuine by the presiding judge upon clear and undoubted evidence.
2. Genuine signatures are not inadmissible in a case, for comparison with disputed ones, because made subsequent to the making of the latter, if made before the controversy has arisen, or under such circumstances as to negative all idea that they were made for the purpose of being used as evidence in favor of the one making them.

(December 8, 1901.)

NOTE.—Comparison of handwriting.

- I. Introductory, 817.
- II. The English general rules.
 - a. Before the statute of 1854.
 1. At common law, 818.
 2. In the ecclesiastical courts, 829.
 - b. After the statute of 1854, 830.
- III. The various American general rules, 832.
- IV. Comparison of ancient writings, 861.
- V. Comparison with writings already in evidence, or in the record.
 - a. Writings already in evidence, 862.
 - b. Writings otherwise in the record, 864.
- VI. Comparison with writings made in court, 864.
- VII. Comparison with extraneous writings.
 - a. Writings proved to be genuine, 866.
 - b. Writings admitted to be genuine, 866.
 - c. Writings whose genuineness the other party is estopped to deny, 867.
- VIII. Comparison by the jury and by the court, 867.
- IX. Comparison by witnesses, 869.
- X. Comparison to show copying of signature (the *Hovland Will Case*), 870.
- XI. Construction and validity of the statutes, 871.
- XII. Weight and relevancy of the evidence.
 - a. Weight, 871.
 - b. Relevancy, 873.
- XIII. Comparison of lost instruments, 873.

I. Introductory.

"There is, perhaps, no branch of the law," says Byrd, J., in *Kirksey v. Kirksey*, 41 Ala. 626, speaking of comparison of handwriting, "which has given rise to such a contrariety of adjudications in this country as that which relates to the evidence above referred to. It would be a laborious, if not an useless, task to attempt to review, or to reconcile, the various decisions on this recondite offshoot of American jurisprudence." It will be well, then, first to

EXCEPTIONS by plaintiff to rulings of the Hillsboro County Court made upon a motion to set aside a verdict in favor of defendants in an action brought to enforce defendants' liability upon a bond. *Overruled.*

The material facts sufficiently appear in the opinion.

Messrs. Charles J. Hamblett, Charles H. Burns, and John S. H. Frink for plaintiff.

Messrs. George B. French and Oliver E. Branch for defendants.

Remick, J., delivered the opinion of the court:

1. The judiciary system was not reorganized by the act of March 10, 1901, to legislate anybody out of court. If the new system has any advantages over the old, it was in-

notice carefully what are the several established modes of proving the origin of disputed handwriting. Such will be found to be seven in number; and of the seven two are directed simply to the act of writing, the other five being directed to the character of the writing produced; the first two consist of direct evidence, from knowledge, and the others consist of indirect evidence, from opinion. They are:

- (I.) Proof of admission of the act.
- (II.) Proof by witnesses who saw the pen form the letters.
- (III.) Proof by witnesses who know the handwriting of the author from having seen him write.
- (IV.) Proof by witnesses who know the handwriting from correspondence with the author, on which he has acted.
- (V.) Proof by witnesses who know the handwriting from familiarity with authentic documents.
- (VI.) Comparison by witnesses in court with genuine specimens of the handwriting of the same person.
- (VII.) Comparison by the court or jury with the same genuine specimens.

With the last two methods of proof only, this note is directly concerned; and it becomes necessary, then, to determine what is meant by "comparison of handwriting."

As was said by Greenleaf (*Evidence*, § 576), a statement quoted scores of times by as many courts: "All evidence of handwriting, except where the witness saw the document written, is, in its nature, comparison. It is the belief which a witness entertains, upon comparing the writing in question with its exemplar in his mind, derived from some previous knowledge." With the admissibility in general of this kind of "comparison" (that is, with a mental exemplar only), which, for the sake of brevity, will here be called pseudo-comparison, we are at present not concerned as a part of the subject annotated; but because, in the study of the historical growth of evidence by the real comparison of hands, the two kinds of evidence or methods of proof of handwriting are found to be

tended that pending, as well as future, cases should have the benefit of them. If the plaintiffs have lost the right of appeal, it is owing to their own laches, not to legislative nonsuit. The finding of the presiding justice exonerates the plaintiffs from fault in this behalf, and the exception based upon this ground is, therefore, overruled.

2. The questions and answers objected to in the stenographer's notes of the testimony of Charles W. Spalding were, in view of his testimony as a whole, as shown by the stenographic minutes before us, competent on cross-examination, and as bearing on the credibility of the witness. This was the ground upon which they were admitted, and no exception lies.

3. The remark of the defendant's counsel,

greatly confused and entangled, especially in the earlier times, in the minds of the judges and the legislature, it is impossible wholly to ignore the simpler method of proof in the treatment of the other. By "comparison of handwriting" is now universally meant the actual juxtaposition in court, either by the jury (or a court in its place), or by witnesses, of a writing whose authorship is unknown, with another writing admitted or proved to have been written by a person alleged and denied to have written the first,—of course, with the object of determining the genuineness of the disputed writing, or, looking at the matter in a different way, the identity of its author.

It is proper to remark in this place that, while the most remote and impalpable knowledge of a handwriting has been considered in England, from early times, sufficient to allow a witness to express his opinion of the authorship of a disputed writing, even if that knowledge is derived merely from seeing him write once (and that nineteen years before the trial, as in *Horne Tooke's Case* [1794] 25 How. St. Tr. 1), evidence which is now considered of far greater probative value, being derived from a physical juxtaposition and comparison in court with approved genuine standards, after an interesting and difficult struggle for existence, was, in England (with two excepted cases *ex necessitate*), finally judicially abolished, only to be brought to life by statute, however, some twenty years later in the enactment of the common law procedure act of 1854. This judicial destruction of an important and invaluable class of evidence was accomplished in spite of the apparent fact that "it is . . . more satisfactory to submit a genuine paper as a standard, and let the jury compare that with the paper in question and judge of its similitude, than the evidence, continually received, of allowing a witness, who has seen the party write once, to compare the disputed paper with the feeble impression and transient view the writing may have made in his memory." *Farmers' Bank v. Whitehill* (1823) 10 Serg. & R. 110.

An admirable example of the absurdity to which the admission of knowledge evidence, at the same time with the exclusion of comparison evidence, had led is shown in the case of *Smith v. Sainsbury* (1832) 5 Car. & P. 196; the court implying (something that it could not believe) that greater certainty could be attained by evidence from the shadowy standard in the witness's

mind, than from actual juxtaposition. A witness who had never seen a person write, but believed that he knew her handwriting from having observed her name signed to an affidavit on the record which had been used by the opposing party, was allowed to prove the handwriting; but Park, J., solemnly said that, "if it was a mere comparison of handwriting, it would not do. But it is not so. The witness says he took notice of the signature, and, in his mind, formed an opinion which enables him to swear to his belief."

4. The exception next considered presents the question whether signatures of the defendant on papers otherwise irrelevant, and not admitted to be genuine, were admissible

ness's mind, than from actual juxtaposition. A witness who had never seen a person write, but believed that he knew her handwriting from having observed her name signed to an affidavit on the record which had been used by the opposing party, was allowed to prove the handwriting; but Park, J., solemnly said that, "if it was a mere comparison of handwriting, it would not do. But it is not so. The witness says he took notice of the signature, and, in his mind, formed an opinion which enables him to swear to his belief."

The objections offered to this kind of evidence have been many and various, some of them sound, some of them obviated by statutes, and some of them having no application to modern times,—at least in this country; and they have been concisely set forth in an opinion of the Kansas supreme court. "The principal, if not the only, objections urged against this kind of evidence are as follows: 1. The writings offered in evidence as specimens may be manufactured for the occasion. 2. Fraud may be practised in the selection of the writings. . . . 3. The other party may be surprised: he may not know what documents are to be produced, and therefore he may not be prepared to meet the inferences sought to be drawn from them. 4. The handwriting of a person may be changed by age, health, habits, state of mind, position, haste, penmanship, and writing materials. 5. The genuineness of the specimens of handwriting offered in evidence may be contested, and others successively introduced, to the infinite multiplication of collateral issues, and the subversion of justice. 6. Juries are too illiterate, and are not competent to judge of this kind of evidence." *Macomber v. Scott*, 10 Kan. 339.

II. *The English general rules.*

a. *Before the statute of 1854.*

1. *At common law.*

The actual reasons for the final rejection of this kind of evidence in England are probably different from those just mentioned, as may be seen later, and are largely accidental in character, being due partly to a misunderstanding of early practice and early reports, besides a confusion of terms.

The most important early case bearing upon the subject, and a case which is largely, though

for the mere purpose of comparison with the signature in dispute. By the general rule of the common law, comparison by juxtaposition was limited to the writing in issue and writings in the case for other purposes. The introduction of writings otherwise irrelevant for the mere purpose of comparison was permitted only when the writing in issue was so ancient as not to admit of proof based on knowledge derived from seeing the party write, or its equivalent. 1 Greenl. Ev. § 580; Lawson, Expert Ev. 323, 329; Rogers, Expert Testimony, § 136; 15 Am. & Eng. Enc. Law, 2d ed. pp. 264, 265; *Bromage v. Rice*, 7 Car. & P. 548; *Doe ex dem. Perry v. Newton*, 5 Ad. & El. 514; *Doe ex dem. Mudd v. Suckermore*, 5 Ad. & El. 703; *Griffits v. Ivery*, 11 Ad. & El. 322; *Hickory v. United*

States, 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. Rep. 334. This general rule of the common law has been adopted and is enforced in its integrity in the United States courts. *Strother v. Lucas*, 6 Pet. 763, 8 L. ed. 573; *Rogers v. Ritter*, 12 Wall. 317, 20 L. ed. 417; *Moore v. United States*, 91 U. S. 270, 23 L. ed. 346; *Williams v. Conger*, 125 U. S. 397, 414, 31 L. ed. 778, 786, 8 Sup. Ct. Rep. 933; *Hickory v. United States*, 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. Rep. 334; *Stokes v. United States*, 157 U. S. 187, 39 L. ed. 667, 15 Sup. Ct. Rep. 617. It has also been adopted in most of the states. 1 Greenl. Ev. § 581; Rogers, Expert Testimony, § 137; Lawson, Expert Ev. 371, 407; 15 Am. & Eng. Enc. Law, 2d ed. p. 265. The tendency, however, of legislation and judicial deci-

indirectly responsible, for one of the errors which have clouded the discussion of the question of the proof of handwriting, was that of the judicial murder in 1683 of Col. Algernon Sidney, the report of which is found in 9 How. St. Tr. 818.

On this trial, for high treason, the attorney general offered to prove a certain book in manuscript, found in Sidney's closet when he was arrested, to be in his handwriting, and, according to the report in the State Trials, established this by means of the testimony of two witnesses who had seen Sidney write, one of them having seen him indorse several bills of exchange (which, as far as appears were not produced before the court and jury), and believed the writing to be his. To this evidence Sidney objected on the ground, which was then sound in regard to criminal trials, "that similitude of hands can be no evidence." He cited, in support of this contention, *Lady Carr's Case*, 1 Sid. 418, decided fourteen years before, and mentioned in his remarks on Sidney's Case by Sir John Hawles, who was solicitor general in the succeeding reign when Sidney's attainder was reversed by act of Parliament. The earlier case was an indictment for perjury, and declared that a letter of the person indicted, "although sworn to by one that he believes that it is his hand," was not evidence to prove perjury, and would not be received by the court. There can be no question that this evidence, although unimpeachable now, was then not legal evidence to prove a criminal charge of misdemeanor, and so, *a fortiori*, to prove a charge of treason: "The evidence . . . was, proving the book produced to be Col. Sidney's writing because the hand was like what some of the witnesses had seen him write,—an evidence never permitted in a criminal matter before,"—says Sir John Hawles, 9 How. St. Tr. 1003. Jefferies, the lord chief justice, however, received the evidence, besides committing many other outrages upon law and justice. It is to be noted, however, that in *Coleman's Case*, 7 How. St. Tr. 1, five years before, *Scroggs, L. Ch. J.*, had allowed a witness who "was his gentleman . . . five years," and Titus Oates, who had never seen him write, to prove the defendant's hand to letters: *Scroggs* saying, by way of excuse: "Little proof will serve the turn, because they were taken in his possession."

The fury aroused by this atrocious case is clearly shown in the wording of the act of Parliament, 62 L. R. A.

liament reversing Sidney's attainder; and because the act "alleges, with the ignorance and confusion peculiar to such documents, that the evidence of the handwriting was insufficient" (*Phillimore, Hist. Ev.* 386), and proves too much besides, it is responsible in great part for the odium in which what was then called indifferently "similitude of hands," or "comparison of hands," was held for a hundred years, and which later attached to the real comparison of hands,—that is, comparison by juxtaposition. The act annulling the attainder was as follows (1 Wm. & Mary, chap. 7): "Whereas, Algernon Sidney, Esq. . . . in the court of King's bench at Westminster, by means of an illegal return of jurors, and by denial of his lawful challenges to divers of them for want of freehold and without sufficient legal evidence of any treasons committed by him; there being at that time produced a paper found in the closet of the said Algernon supposed to be his handwriting, which was not proved by the testimony of any one witness to be written by him; but the jury was directed to believe it by comparing it with other writings of the said Algernon; besides that paper so produced there was but one witness to prove any matter against the said Algernon; and, by a partial and unjust construction of the statute declaring what was his treason was most unjustly and wrongfully convicted and attainted and afterwards executed for high treason . . . Be it enacted, . . . that the said conviction, judgment, and attainder . . . be and are repealed, reversed, made and declared null and void."

There is little doubt that the real objection of the legislature was to the use in a criminal trial of any evidence of handwriting (other, of course, than that of a witness who saw the pen form the letters); and, although the words of the statute declare that the jury were directed to believe the book to be in Sidney's hand, "by comparing it with other writings of the said Algernon," there is no indication in any report of the case that such a thing was done, that the jury actually compared (juxtaposed) the book with any other writings of the prisoner, or that there was any comparison in the case at all other than the pseudo-comparison, made by the witnesses with the uncertain exemplars in their minds. There is a single possibility of confirming the averment of the act as to the comparison, and that is that the bills of exchange, which the witnesses swore were indorsed by Sidney,

sions, is away from this strict and narrow rule, toward the more liberal one permitting comparison with any writing established to be the writing of the party whose hand is in issue, whether otherwise relevant or not, and without reference to the age of the particular writing in controversy. 15 Am. & Eng. Enc. Law, 2d ed. pp. 265, 269. The rule has been so enlarged in England by statute (17 & 18 Vict. chap. 125, § 27); also by statute in many of the states of this country. 15 Am. & Eng. Enc. Law, 2d ed. p. 270. In other states the same result has been reached by judicial decisions. Rogers, Expert Testimony, §§ 138 *et seq.*; Lawson, Expert Ev. 371; 1 Greenl. Ev. § 581; 15 Am. & Eng. Enc. Law, 2d ed. pp. 267, 268; *Woodman v. Dana*, 52 Me. 9; *Adams v. Field*, 21 Vt. 256;

Moody v. Rowell, 17 Pick. 490, 28 Am. Dec. 317. While more or less has been said to the same effect by the courts in this jurisdiction, much not in terms overruled has also been said to the contrary. *Myers v. Toscan*, 3 N. H. 47; *Bowman v. Sanborn*, 25 N. H. 87; *Reed v. Spaulding*, 42 N. H. 114; *State v. Shinborn*, 46 N. H. 497, 88 Am. Dec. 224; *State v. Hastings*, 53 N. H. 452; *State v. Clark*, 54 N. H. 456; *Carter v. Jackson*, 58 N. H. 156. In *Myers v. Toscan* it was held that comparison was permissible only in connection with evidence based on direct knowledge of the handwriting in question, and that, in the absence of such primary evidence, comparison was wholly inadmissible. No mention is made of the well-established common-law exceptions in favor of writings

and were thus used to qualify them as having knowledge of his hand, were actually produced before the court and jury, in accordance with the customary practice at this time in civil trials (as will be seen later), and compared by the jury with the book; and this procedure, since the wrong was in the admission of any evidence at all of handwriting in a criminal trial, would have been invulnerable against no more strongly than the pseudo-comparison which certainly was permitted.

That the objection of incompetency was on account of the kind of proceeding in which the evidence was offered, and not on account of the kind of evidence; and that no distinction was made at this period between real and pseudo-comparison, as far as admissibility was concerned,—is seen clearly from the next few cases of trials for treason.

In *Hayes's Case* (1684) 10 How. St. Tr. 307, "Walpole testified that he served Mr. Hayes, also, four years and three quarters, and did believe the letter to be Mr. Hayes's hand.

"Hayes: 'My lord, in matters of treason I hope you will not admit of comparison of hands and belief for evidence.'

"L. Ch. J. [Jefferies]: 'Yes, no doubt of it.'

"Hayes: 'It has not been so in other cases that have not been capital; as particularly in the *Lady Carr's Case*.'

"L. Ch. J.: 'This is a mistake. You take it from *Algernon Sidney*; but without all doubt it is good evidence.'

And a little later in the same case, when actual comparison by the jury was proposed by the prosecution and permitted by the court as if it were in a civil proceeding, the objection of the accused was precisely the same:

"Sir John Trevor, counsel for the King: 'This gentleman was a trader with the East India Company, and made contracts with them, which are entered in their books. We will compare them with the writing in this letter' . . .

"Capt. Piercehouse produced a note which he said was Mr. Hayes's, and that he supposed it to be his hand, and compared it with the hand in the book, and said that he delivered the goods upon it, and Walpole then said he believed it to be Mr. Hayes's hand. . . . The letter and the East India books were then shown to the jury and to the prisoner.

"Hayes: ' . . . May not counsel be admitted to plead whether comparison of hands and belief are any evidence in criminal causes? 62 L. R. A.

I have been informed it hath been denied to be evidence.'

"L. Ch. J.: 'You are under a mistake; somebody has put it into your head and puffed you up with a vain story; there is no such thing; it is a fiction, a mere whim, only said by Mr. Sidney and no ground in the world for it. . . . Comparison of hands was allowed for good proof in *Sidney's Case*. We must not alter the law for anybody.'

In the *Trial of the Seven Bishops* (1688) 12 How. St. Tr. 183, a reaction from the rulings of *Jefferies* is seen, and the court was equally divided on the point of the admissibility of handwriting evidence in general in a criminal trial, so that that line of evidence was perforce abandoned by the prosecution; and the argument of Sergeant Pemberton, for the bishops, against the admission of evidence by "similitude of hands" in a criminal trial is important as showing what the real practice at this time was in civil cases. He said: "Your lordship knows that in every petty cause where it depends upon the comparison of hands they use to bring some of the party's handwriting which may be sworn to be the party's own hand, and then it is to be compared in court with what is endeavored to be proved, and upon comparing them together in court the jury may look upon it and see if it be right. . . . In such manner of proofs by comparison of hands the usage is that the witness is first asked concerning the writing he produces. Did you see this writ by the defendant whose hand they would prove? If he answers 'Yes, I did,' then should the jury, upon comparison of what the witness swears to with the paper that is to be proved, judge whether those hands be so like as to induce them to believe that the same person writ both."

"Justice Holloway: 'My lord, . . . there ought to be a more strong proof, for certainly the proof ought to be stronger and more certain in criminal, than in civil, matters. In civil matters we do go upon slight proof, such as the comparison of hands for proving a deed or a witness's name, and a very small proof will induce us to read it; but in criminal matters we ought to be more strict, and require positive and substantial proof that is fitting for us to have in such a case; and without better proof I think it ought not to be read.

"L. Ch. J. [Wright]: 'You must go on to some other proof, Mr. Solicitor; for the court is divided in their opinions about this proof.'

otherwise in the case, and ancient writings not susceptible of direct proof. The exclusion, so far as appears, was general, subject only to the exception first declared. In *Bowman v. Sanborn* it was decided that comparison with genuine writings in the case for other purposes was permissible, and without proof based upon direct knowledge, —to this extent modifying the doctrine of *Myers v. Toscan*. The facts in *Bowman v. Sanborn* bring it clearly within the common-law exception, and the opinion is a distinct and unqualified recognition of the general common-law rule of exclusion. In *Reed v. Spaulding* the common-law rule was again followed. The court said: "It is only between signatures admitted to be genuine, and which are in evidence before the jury, and

the one in question, that the expert is allowed to institute a comparison and give an opinion." A second case of *Reed v. Spaulding*, decided in Sullivan county, December law term, 1862, and not reported, is referred to in *State v. Hastings* as deciding that writings "might be introduced anew for the purposes of the comparison, as well as to use those already in the case for other purposes." It was incredible that a decision modifying so essentially the common-law rule, and so at variance with all former decisions of the same court, should have remained unreported; and it appears from an examination of the record that the papers used as standards of comparison in that case "had been introduced in the course of the trial for other purposes than that of com-

In *Crosby's Case* (1605) 12 How. St. Tr. 1291, 1 Ld. Raym. 39, 12 Mod. 72, real comparison of signatures was attempted to be made, and, although the attempt was not successful, owing to the rule thought to be established by the reversal of Sidney's attainder, a wholly new doctrine was stated by Lord Chief Justice Holt, permitting its use as corroborative evidence. In the State Trials it is said that a witness produced Crosby's "contraction book which he writ at the College of Dublin;" and in the report in 12 Mod. it is said: "Several treasonable papers were produced, which they swore they believed to be the handwriting of the prisoner. And on this, a question arose whether comparison of hands was sufficient.

"Per Curiam: It is not sufficient for the original foundation of an attainder, but may be well used as circumstantial and confirming evidence if the fact be otherwise fully proved, as in my Lord Preston's Case [12 How. St. Tr. 736; really only pseudo-comparison], his attempting to go with them into France, and principally where they were found on his person; but here, since they were found elsewhere, to convict on a similitude of hands was to run into the error of Colonel Sidney's Case."

And it is interesting to note that in Scotland, at about this same time, according to a note in the report of Spreull's Case, 10 How. St. Tr. 725, p. 764 (quoting from Sir George Mackenzie's "Laws and Customs of Scotland in Matters Criminal"), "the Marquis of Argyle was convicted upon letters written by him to General Monk, these letters being only subscribed by him and not holograph, and the subscription having been proved '*per comparationem litterarum*,' which were very hard in other cases, seeing '*comparatio litterarum*' is but a presumption, and men's hands are oftentimes and easily imitated, and one man's writ will differ from itself at several occasions."

But that the custom and practice in civil trials was at this time to permit the jury to examine and compare specimens of handwriting, as Sergeant Pemberton maintained in his argument against the use of any kind of comparison, pseudo or real, in criminal trials; although the confusion of the cases decided at about the close of the 18th century shows that the courts generally lost sight of this fact; and although at the same time witnesses, who were not acquainted with the handwriting in question from having seen its author write were not allowed

to compare in the same way; and that the practice continued at nisi prius up to a comparatively recent date will seem to be established by the following cases:

In *Osbourne v. Hosler* (1716) 6 Mod. 167, an action on a bond, the signature of one witness having been proved by the plaintiff, the defendant produced a person of the same name as that of the other subscribing witness, and he testified that the hand was very like his, but denied the signature. "Holt, Ch. J., ordered them both to write their names, and thereupon left it to the jury, who found for the plaintiff."

In *Layer's Case* (1722) 16 How. St. Tr. 93, the same thing was done, but here by the court, to determine, in place of the jury, the competency of evidence. In order to prove the genuineness of an identification mark put upon papers by one having them in custody, the witness, on cross-examination and at the instance of the prisoner, wrote her initials in the presence of the court for comparison with the mark on the papers, and it was said by the Lord Chief Justice "(having compared the letters made by Mrs. Mason in court with those on the papers): 'The character which she now writes is like what she writ on those papers, and so confirms her evidence.'"

In *Carbone v. Cotton* (1719) 12 Vin. Abr. Evidence, T. b. 48, pl. 11, on a question as to the genuineness of the signature to a promissory note of a witness who denied that it was his, but admitted his subscription to two other papers which were produced, "Pratt, Ch. J., left it to the jury, on the similitude of the hands between the deeds proved and the note."

Evidence to the same effect is found in the argument of Sergeant Wynne in *Atterbury's Case* (1723) 16 How. St. Tr. 323, when he emphatically objected to the reception of opinion evidence of handwriting unless accompanied by the production of the examples of handwriting from which the opinion was formed. He quotes Cujacius, in his Commentary on Justinian's Novellae, 73, on the practice of the Roman Law, and says: "It was necessary to bring both [the disputed and the specimen writings] into court, that the judges themselves might make the comparison, and not leave the witnesses to be the only judges of it." Then he goes on to say (at page 547): "It was never known, and I may defy all the writers of law to show me one instance, that any evidence of the similitude of hands (which can only be made out by compar-

parison," and the genuineness of the signatures had been established by evidence addressed to the court in order to make them admissible for such other purposes. They were, therefore, admissible for the purpose of comparison by the strict rule of the common law. There was no occasion to decide, and the court did not decide, that the papers would have been admissible for the mere purpose of comparison had they been otherwise irrelevant. On the contrary, the case fully supports *Bowman v. Sanborn* and *Reed v. Spaulding*, 42 N. H. 114. In *State v. Shinborn* the signatures used for comparison "were not proved in for the purpose of enabling the expert to testify." They were undisputed signatures already in the case, and were, therefore, admissible according to

the common-law rule, and upon the authority of the cases in this jurisdiction up to that time. In *State v. Hastings* the standard permitted to be used was not otherwise in the case, and was introduced for the mere purpose of comparison; and the opinion is there expressed, in language not open to doubt, that writings may be introduced for the mere purpose of comparison, although otherwise wholly irrelevant; and this, too, without regard to the age of the writing in issue, or whether testimony based on direct knowledge is or is not already in the case. As shown, this is contrary to the common law and all previous decisions in this state. Moreover, it was based in part, at least, upon the erroneous assumption that a similar result had been previously reached in the

son) was admitted, but where the papers pretended to be written in the same hand, were produced and compared; which is so far from being the present case that . . . the only witnesses in the case never had an opportunity of comparing the original letter . . . with any of the intermediate letters which they affirm to have been written in the same hand."

And in the case of *Ferrers v. Shirley* (1731) Fitzg. 195, an important case deciding that the knowledge of a witness called to swear to the identity of handwriting must be acquired from having seen the author of it write, or from letters received from him in an established correspondence, and that a witness was not competent who had merely seen letters said to have been written by him; where counsel, as in the last case, made the further objection to the witness, "that he should produce the letter, that the court and jury might be able to judge of the resemblance between the hand to the letters and that to the deed; but this was overruled by the court [really, not as being improper, but unnecessary], because the witness might well have acquired a knowledge of [the subscribing witness's] Cottington's character, by having seen several letters wrote by him."

In *De La Motte's Case* (1781) 21 How. St. Tr. 687, we find three things: First, proof of the defendant's handwriting, by witnesses acquainted with it, at last allowed again in a criminal trial; second, proof of handwriting by real comparison by witnesses expressly barred, under the mistaken notion, apparently, that such was the real intention of the legislature in the reversal of *Sidney's attainer*, the court declaring that "similitude of handwriting" meant what we now call comparison of handwriting, and that what was, in fact, in *Sidney's* time called "similitude of handwriting" was proper evidence; and we find, third, the jury allowed to compare specimens of the handwriting of the accused. The court (Bulwer, J.) said in the charge (p. 810): "Counsel . . . objected that similitude of handwriting is no evidence. They certainly are right, . . . but the objection does not apply. . . . Similitude of handwriting is where a paper is produced not sworn to by any person that has ever seen him write, or has any knowledge of his hand; but the inference is made that it is his handwriting because it is like some other which is so; but that is not the evidence that has been offered to you respecting any one of the papers

which you have heard read; they have all been proved by persons who were acquainted with his handwriting. . . . They speak, not from the similitude of the writing only, but from their knowledge of his handwriting. . . . That, gentlemen, is the only evidence which can be given of handwriting, except it happens that there be a person who saw the prisoner actually write the papers." And yet the jury were (at p. 766) requested by the defendant's counsel to take and compare specimens of the handwriting of the prisoner which were produced in court, and to which a witness had sworn.

Next we find Lord Kenyon, in *Allesbrook v. Roach* (1795) 1 Esp. 351, saying that, although some judges had doubts of "the rule . . . allowing of the jury to judge by comparison of hands, . . . for my part I have been always inclined to admit it, and shall do so in this case."

But the most illuminating statement in regard to the old practice of allowing the jury to compare is made by Lord Denman in his judgment in the great and leading English case of *Doe ex dem. Mudd v. Suckermore* (1837) 5 Ad. & El. 703, at p. 750, 2 Nev. & P. 16, W. W. & D. 405, 7 L. J. Q. B. N. S. 33, showing that the practice actually continued, even to that late date, in spite of the vacillating and inconclusive decisions made at different times during the preceding half century. He said: "The same effect, I am aware [as when the jury compare letters admitted for the general purposes of the cause], might possibly be produced if the writings from which the handwriting was judged of, were in court; for I apprehend the jury might then desire to see the documents on which the witness judged; and my brother Parke has informed me that at nisi prius he has felt himself bound to permit them. Prejudice might thus be unfairly excited by a crafty selection. This would be an abuse; and, when exposed in broad daylight, would draw the usual consequences of taking unfair advantages on the party making the attempt. But the possibility of abuse is no reason for excluding what may throw light on the truth, and is in its own nature evidence."

And in 1758 we find the court in *Hensley's Case*, 19 How. St. Tr. 1342, 1365, allowing comparison, even by a witness, and in a criminal case.

"Da Costa: 'I know the prisoner's handwriting very well, and I am sure these are his hand-

unreported case of *Reed v. Spaulding*. More than this, there was no evidence whatever before the court or the jury that the writing offered for comparison was the defendant's. To use the words of the court: "There is no more evidence that the prisoner wrote it than that anybody else did." The question whether specimens otherwise irrelevant are admissible for the mere purpose of comparison could not properly arise until a specimen was offered. None was offered in that case. What was offered was no more a specimen than if it had been a piece of blank paper. What the court said, therefore, on the general subject, was the merest *dictum*, and, right or wrong, without the weight of a judicial decision. In fact, it is stated in the opinion that the portion relating to the com-

parison of handwriting was written supposing that there would be an amendment of the case to warrant it; which amendment was not obtained. Altogether, it is not a satisfactory case to mark so radical a departure from the common law and from the earlier New Hampshire cases, which it did not assume to overrule. In *State v. Clark* the standard introduced for comparison was apparently not in the case for any other purpose, and it was admitted to be genuine; but other evidence was introduced, based on direct knowledge of the defendant's handwriting. The admission of the standard was sustained, but no authority was cited; and it is impossible to know from the opinion whether the decision was based upon the doctrine in *State v. Hastings*, or the doc-

writing. . . . I should know his letters and writings from all others, for I have been well acquainted with his handwriting for ten years past and have often seen him write.'

"Have you, sir, about you any one of those letters the prisoner sent you? If you have you might compare it with these.

"Da Costa (pulls out of his pocket one of his own letters which the prisoner had sent him and compares them together): 'They are exactly alike.'"

There was apparently no objection to this comparison, although the defendant's counsel had previously objected to the proof by "comparison of hands" by persons who had seen the defendant write. It is noticeable that this admission of comparison by a witness may have been intended to be upon the authority of Lord Holt in *Crosby's Case* (1695) 12 How. St. Tr. 1291, 1 Ld. Raym. 39, 12 Mod. 72, as corroborative evidence of the proof already given by the same witness from his personal knowledge of the defendant's hand.

A case upon the civil side of the same court at the same period, but a few months before, is important as introducing for the first time the evidence by comparison of expert witnesses upon handwriting. In *Kemp v. Macrill, Sayer*, 130, in the King's bench in 1754, on an issue whether the name of the defendant subscribed to two of three exhibits and the date of those exhibits were in the defendant's handwriting, expert opticians, an engraver, and writing master were examined, and agreed in saying that they had measured the dates of the three exhibits, which were in all three the same, in nine different manners, and that every one did agree so exactly that two of the dates must have been copies of the third, it being impossible for any person, either by chance or with design, to have written the three dates so exactly alike without copying two of them from the third; and the chief justice, in summing up the evidence to the jurors, observed that the evidence of the witnesses who had measured the names and dates was exceedingly material. Unfortunately, the reports of both these cases are meager upon this point. In *Hensley's Case* the reprint is incomplete, and no charge is included in it; and in *Kemp v. Macrill* there is no discussion of the evidence, and no objection seems to have been made to the reception of such evidence.

We now come to a long series of decisions of 62 L. R. A.

Lord Kenyon which are utterly inconsistent and irreconcilable, and formed the principal stumbling block to the later judges, undoubtedly inducing the narrowing decisions which stopped the natural course of the development of the law of the proof of handwriting by comparison, and culminated in the great case of *Doe ex dem. Mudd v. Suckermore* in 1837; for it seems reasonably clear that that natural development would have meant supplementing comparison by the jury, which at this time seems to have been established in practice although not generally or expressly recognized in the books, with the expert testimony of witnesses as assistants of the court and jury,—a development seen in every other branch of the law of evidence, in cases where matters beyond the knowledge of ordinary witnesses and jurymen are the subject of investigation, and it is necessary to resort to the opinions of persons who have made the subject-matter of inquiry the object of particular study and attention. How powerful still remained the influence, in the minds of the judges, from *Sidney's Case*, of the old fear of the use of "comparison of hands" in matters of great importance, does not always appear, but there are many references to that case from this time on, and even in the case of *Doe ex dem. Mudd v. Suckermore*, among the opinions which were thought to exhaust the learning on the subject and took several months to prepare: we find in the judgment of Patteson, J., the statement that the reversal of *Sidney's* attainder showed that "comparison was not at that time considered to be legitimate evidence;" a statement which, as has been indicated before, involved several errors.

But before entering upon the vagaries of Lord Kenyon upon this subject, it is necessary to observe a case decided in 1770 by Yates, J., a judge regarded as a strong authority. This decision (*Brookbard v. Woodley, Peake N. P. Cas.* 20, note) refusing to allow comparison by either witnesses or the jury in a case involving the proof of an ancient document,—a kind of evidence always allowed since, and probably always before, *ex necessitate*, for the reason that in the case of dispute as to the genuineness of the handwriting of a person long dead there would be no one who could swear to the handwriting from personal knowledge acquired from having seen the person write (see *infra*, IV.),—is remarkable, not only because, contrary to other cases on the same point, but because it

trine of *Myers v. Toscan*, to which the language of the opinion would seem to be applicable. If the latter, then the question whether genuine writings not otherwise in the case are admissible for the purpose of comparison was not involved in the decision. On the question whether the court understood the case to be controlled by *State v. Hastings*, it is not without significance that the learned judge, who had participated in that opinion only a year previous, did not cite it or make mention of it whatsoever. In *Carter v. Jackson* the signature to a bond was in dispute. "The jury were allowed to compare it with other genuine signatures." The court said: "The ruling . . . upon the question of the comparison of handwriting was correct." It does not appear

shows, in the first clause of the opinion quoted here, entire ignorance of the last two cases mentioned, decided only a dozen years before. In order to prove the signature of a rector, who had been dead many years, the plaintiff offered for comparison with it ancient official entries, made by him and signed with his name. It was said by the court: "I do not know any case where comparison of hands has been allowed to be evidence at all. No trial can be decided by opinion and speculation, but by evidence. Where a witness has seen the party write, and speaks to his belief of that writing, . . . that is evidence. But where it is merely opinion on similitude of the writing, collected by barely comparing them, the jury may compare them as well as anybody else, and any two people may think differently. . . . The case now in question is not like a rental, terrier, old title deeds; these are received without evidence of handwriting because of the place they come from, which gives them authenticity. Suppose some of the jury cannot read or write, how are they to judge of the similitude of hands?"

In the first of the remarkable decisions of Lord Kenyon, *Macferson v. Thoytes* (1790) Peake N. P. Cas. 20, jury comparison was rejected, although both standard and disputed writing were upon the same slip of paper, so that no collateral issue could be involved. Upon the plaintiff offering to prove the first indorsement of a bill of exchange by comparison of it by the jury with the handwriting of the acceptance, Lord Kenyon said: "Comparison of hands is no evidence. If it were so the situation of a jury who could neither write nor read would be a strange one, for it is impossible for such a jury to compare the handwriting."

The next year we find the same judge allowing experts to compare separate papers. In order to establish forgery of a will the defendant asked two postoffice clerks, who swore that they were used to detect forgeries and had studied the two papers, whether the instructions for drawing up the will were in the handwriting of the person proved to have written a memorandum of attestation, and the question was allowed by Lord Kenyon although objected to as being comparison of hands. They were also allowed to testify that the instructions were in an imitated hand. This was *Goodtitle ex dem. Revett v. Braham*, 4 T. R. 497.

But two years later, in *Stranger v. Searle* (1798) 1 Esp. 14, upon a defense of forgery to 62 L. R. A.

whether the signatures compared were in the case for other purposes. If they were, the decision was correct, according to the rule of the common law. If not, and they were admitted for the mere purpose of comparison, the decision was contrary to *Myers v. Toscan*, *Bowman v. Sanborn*, *Reed v. Spaulding*, and *State v. Skinborn*. The question does not seem to have received special consideration, and, to all appearances, the decision was made to rest upon the *dictum* in *State v. Hastings*.

While the law remains in the conflicting and inconclusive shape disclosed by the foregoing review of the authorities, confusion and controversy are inevitable. Consistency and efficiency alike require a definite rule, authoritatively declared. In this

an action on a bill of exchange, an inspector of franks at the postoffice, who did not know the defendant's handwriting, was not allowed by Lord Kenyon to testify as to the genuineness of the bill from comparison with other bills accepted by the defendant and proved to be in his handwriting.

Two years after, Lord Kenyon allowed comparison by the jury; in an exactly similar situation, a defense of forgery to an action on a bill of exchange, a witness who had in his possession certain bills of the defendant, upon being shown the bill in dispute, said that he did not think the acceptance was in the defendant's hand; and a comparison of these bills with the acceptance of the bill in question showed that they were dissimilar. The counsel for the defendant then offered to the jury several other bills admitted to be of the defendant's handwriting, and desired the jury to compare them and draw their own conclusion. This was objected to. Per Lord Kenyon: "Some judges have doubted of the policy of that rule of evidence respecting the allowing of the jury to judge by comparison of hands, because often at a distance from the metropolis the jury are composed of illiterate men, incapable of drawing proper conclusions from such evidence. For my part I have always been inclined to admit it, and shall do so in this case." *Allesbrook v. Roach*, 1 Esp. 351.

The next case, decided at another period of two years (*Dacosta v. Pym* [1797] Peake, Ev. 154), shows a wrong application of a wrongly decided case, and then failure of the court—perhaps out of respect for the practice in such cases which we have before observed—to enforce the principle laid down, which refused to the jury the privilege of looking at the papers for comparison. For comparison with an account signed by a party, in order to prove a forgery "several notes signed, etc., by plaintiff were produced to the jury, but Lord Kenyon said the best rule was that laid down by Mr. Justice Yeates [in *Brookbark v. Woodley*], for, if the jury were to look at the papers, their judgment would depend on their knowledge of writing, which some might know better than others. It was best to rely on the evidence of those well acquainted with the character of the defendant's handwriting. The jury nevertheless were permitted to compare the different signatures." Peake, Ev. Appx. xxvii.

The same year, in a case (*Cary v. Pitt*, Peake, Ev. 154) deciding that an inspector of

view, we have re-examined the question, both from the point of reason and authority. It may be safely stated as a fundamental proposition that, on the question whether a given signature is in the handwriting of a particular person, comparison of the disputed signature with other writings of that person known to be genuine is a rational method of investigation, and that similarities and dissimilarities thus disclosed are probative, and as satisfactory in the instinctive search for truth as opinion formed by the unquestioned method of comparing the signature in issue with an exemplar of the person's handwriting, existing in the mind, and derived from direct acquaintance, however little, with the party's handwriting. The objections upon which the com-

mon-law rule of exclusion is founded are threefold: (1) Ignorance of jurors, and their inability to make intelligent comparison; (2) danger of unfairness and fraud in the selection of specimens, with no sufficient opportunity for the opposing party to investigate and expose; (3) collateral issues as to the genuineness of the specimens presented. (1) The first objection, however justified by the state of English society when it was originally announced, has no weight at the present time in a jurisdiction where intelligence and education are general, and needs no further comment. (2) Since the right to produce specimens under a rule allowing comparison is equally open to both parties, and the specimens are all subject to examination and cross-examina-

franks at the postoffice, who had never seen the person write whose handwriting was disputed, could not prove or disprove his signature, Lord Kenyon said: "The furthest extent to which the rule had been carried was to admit a person who had been in the habit of holding an epistolary correspondence with the party." He added, by way of an excuse for one of his inconsistencies, that, although evidence as to whether the handwriting was feigned or genuine had been "received in *Goodtitle ex dem. Revett v. Braham*, he had, in his charge to the jury, laid no stress upon it." Peake, Ev. Appx. xxvi.

Garrells v. Alexander (1801) 4 Esp. 37, so far as it refuses to allow one not an expert, who had seen the defendant sign a bond in the action, to compare the disputed writing with that signature, was correct according to the modern notion; but the reasons given for the decision are the height of absurdity, ignoring the earlier opinions of the same learned judge, and showing the effect in his mind of the old bogie of *Sidney's Case*, founded on an ignorant or mistaken notion of the facts of that case. It was an action on a bill of exchange, and one who had seen the defendant sign a bail bond in the action, after being asked whether he believed the acceptance to be in the handwriting of the defendant, and answering that he could form no belief on the subject, was not allowed by Lord Kenyon to compare the acceptance with the signature on the bail bond, but swore that the acceptance was "like" the signature on the bond. Lord Kenyon held that this was sufficient evidence to go to the jury. "To be sure, mere comparison of hands is not admissible evidence of itself; that was *Algernon Sidney's case*; but there the witness had never seen him write [in fact two witnesses who had seen him write swore to his handwriting]; and the only evidence in the case was mere comparison of hands; but in the present case the witness has seen the defendant write, and he speaks to the likeness which the handwriting in which the bill is accepted bears to that which he has seen the defendant actually write."

And so far as the case decides that the evidence of a witness, testifying without actual comparison, that handwriting is "like" other that he has seen written, without swearing to his belief in its genuineness, is enough on which to go to the jury, it was expressly disapproved by Lord Eldon in *Eagleton v. Kingston*, 8 Ves. Jr. 439, two years later. He said there, after 62 L. R. A.

considerable discussion of the earlier cases: "Till very lately I never heard of evidence in Westminster Hall of comparison of handwriting by those who had never seen the party write; though such evidence had been frequently received in the ecclesiastical court. . . . There is a principle here that may account for the difference of practice in the ecclesiastical courts and the courts of common law. Suppose some of the jury cannot read; how can they judge of the similitude? . . . These later cases [*King ex rel. Jackson v. Cator*; *Macferson v. Thoytes*; *Brookbaird v. Woodley*, and *Cary v. Pitt*] appear to have brought back the law to the state in which it stood twenty-five years ago. I doubt the authority in the case of *Garrells v. Alexander*; where, if a man will not take upon him to say, he believes it to be the writing of the person, but says, he thinks it like, Lord Kenyon is made to say, that is evidence. I doubt that." But even Lord Eldon is found, as late as 1814, in *Wade v. Broughton*, 3 Ves. & B. 172, speaking of evidence of handwriting without juxtaposition, as "comparison of handwriting."

King ex rel. Jackson v. Cator ([1802] 4 Esp. 117), referred to in *Eagleton v. Kingston*, was an important case, and marks the turning point in the trend of the decisions on this general question. An expert witness, an inspector of franks at the postoffice, who had never seen the defendant write, was not allowed to say that two papers were written by the same hand, one of them being the libel in question and the other an admitted writing of the defendant. Baron Hotham said: "This question seems to have been solemnly decided [by Lord Kenyon in *Goodtitle ex dem. Revett v. Braham*]; but when I see the same able and learned judge repenting of what he had suffered in the former case, and expressly saying [in *Cary v. Pitt*] he could not receive such evidence, and observing that, though such evidence was received in *Goodtitle ex dem. Revett v. Braham*, he had in his summing up to the jury laid no stress upon it,—this being the case, I cannot consider it so adjudged but that I may exercise my own judgment in rejecting it."

Burr v. Harper (1816) Holt, 420, was apparently an attempt to avoid, by an indirection, the effect of *King ex rel. Jackson v. Cator*, which was accepted as law; and the principle stated, allowing a nonexpert witness to handwriting to refresh his recollection at the time of the trial by means of a standard in his possession, has

tion, the opportunity for advantage from unfair selections is too slight to furnish reason for closing the door against this important avenue of investigation. (3) The third objection—that to permit comparison with specimens not otherwise in evidence, and admitted for the mere purpose of comparison, would introduce collateral issues, and confuse and distract the jury—is, when applied to specimens neither admitted by the parties nor found by the court to be genuine, firmly grounded in reason and authority. The whole doctrine of comparison presupposes the existence of genuine standards. Comparison of a disputed signature in issue with disputed specimens would not be comparison, in any proper sense. When the identity of anything is fully and certainly

established, you may compare other things with it which are doubtful, to ascertain whether they belong to the same class or not; but, when both are doubtful and uncertain, comparison is not only useless as to any certain result, but clearly dangerous, and more likely to bewilder than to instruct a jury. If disputed signatures were admissible for the purpose of comparison, a collateral inquiry would be raised as to each standard; and the proof upon this inquiry would be comparison again, which would only lead to an endless series of issues, each more unsatisfactory than the first, and the case would thus be filled with issues aside from the real question before the jury. Juries are, indeed, more intelligent than when the common law denied them even the

since received general applause in jurisdictions where direct comparison is not allowed. In an action on a contract in writing a witness proved that he once saw the defendant sign a paper which he then had in his possession, but that he would not venture, from the mere inspection of the contract, to say whether the signature omitted was the defendant's, but that, by comparing the signature of the agreement with the paper in his possession, he could swear that he believed it to be the defendant's writing. Dallas, J., said: "How far the comparison of handwriting may be admitted in evidence was much discussed in the case of *King ex rel. Jackson v. Cator*. The present case, however, turns upon a different point. It is a case of great novelty and difficulty; but, being required to form an opinion upon the subject, I shall admit it as evidence to be left to the jury. . . . But the present evidence cannot, in strictness, be called a comparison of handwriting. . . . He has seen the person write, and he is presumed to have formed a standard in his mind, and, with that standard, to compare the writing in question. This standard will be more or less perfect according as the instances have been more or less frequent. The mere fact of having seen a man once write his name may have made a very faint impression upon the witness's mind, but some impression, however slight in degree, it will make. . . . Here a basis is laid in the fact of his having seen the defendant sign his name once. . . . He then recurs to a paper which he knows to be an authentic writing. He used it to retouch and strengthen his recollection, and not merely for the purpose of comparison. I think, therefore, the evidence is admissible."

That this was considered to be an evasion of what had by this time got to be almost an established rule is indicated in the opinion of Patteson, J., in *Doe ex dem. Mudd v. Suckermore* (1837) 5 Ad. & El. 703, 2 Nev. & P. 10, W. W. & D. 405, 7 L. J. Q. B. N. S. 33: "In the case of *Burr v. Harper*, Holt, 420, Lord Chief Justice Dallas allowed what I consider to have been comparison of handwriting; and I do not think that decision right."

Clermont v. Tullidge (1829) 4 Car. & P. 1, the first decision by Lord Tenterden on the subject, was correct according to the modern rule excluding comparison by nonexpert witnesses, but the reason given is unsatisfactory. A witness admitted on cross-examination that a letter

was signed by a party in his presence, but that another letter was not so signed, and was asked, upon being shown both letters, whether they were not of the same handwriting: Lord Tenterden, Ch. J., said: "I think that that question cannot be put. It was formerly held that persons conversant with handwriting could be asked whether certain letters were genuine or not, but it has been since held that that is not evidence."

Two other decisions by the same judge are apparently directly opposed to each other: In *Allport v. Meek* (1830) 4 Car. & P. 267, an action on a bill of exchange accepted by the defendant, who was proved to have acknowledged that the acceptance was his, the plaintiff offered to submit the instrument to the jury to see whether the indorsement was of the same handwriting as the drawing, since the acceptance admitted the drawing to be correct; the evidence was rejected. But that the objection of the court to the evidence was not that jury comparison (of examples, here, already in evidence) was not, as such, allowable, but that it must have been that no other proof of handwriting had been first offered, mere submission of the issue to the jury not being enough, clearly appears from the other case, *Sollita v. Yarrow* (1831) 1 Moody & R. 133, on practically the same facts. On the question of likeness between a letter alleged and denied to have been written by a party and a bill of exchange admitted by him to be in his handwriting, and already in evidence, counsel relied strongly on the comparison of the disputed writing with the admitted writing in the bill, and Lord Tenterden, in summing up, made similar remarks, and desired the jury to take the papers and compare them.

With the case of *Griffith v. Williams* (1830) 1 Crompt. & J. 47, appears for the first time, in the struggle to exclude jury comparison, the distinction between specimens, to be used as standards of comparison, which had already been admitted in evidence for other purposes, and specimens having no direct connection with the issues, and offered merely for the purpose of comparison with the disputed writing. The plaintiff put in evidence several letters (apparently for another purpose) which were admitted to be in the defendant's handwriting, and called witnesses to prove that the letter upon which the question mainly depended was also in the handwriting of the defendant; it was held by the court of exchequer that, "where two docu-

right to make comparison with admitted signatures not otherwise in the case, but the time has not yet come when they should be left without chart and compass. It is due to them and to the administration of justice that, when called upon to pass upon the identity of a signature, the standards furnished for this purpose should be genuine standards. The jury should not be required, nor should they be permitted, to make comparison with disputed standards, and to settle for themselves the collateral question of the genuineness of the standards, which might often be more difficult than the main question of the genuineness of the writing in issue. Such a practice is not only indefensible in reason, but it is against the judicial and legislative opinion of the world,

almost without exception. 15 Am. & Eng. Enc. Law, 2d ed. pp. 272, 273; Lawson, Expert Ev. 408; Rogers, Expert Testimony, § 138. By the civil and ecclesiastical law, where a more liberal rule of comparison prevailed than at common law, the genuineness of the standard was an indispensable prerequisite to its admission. By the ecclesiastical law "the instruments of comparison were required to be proved by witnesses who saw them written, and it was for the judge to decide whether they were sufficiently proved." By the civil law it was provided that "the writing must either be of a public nature, such as signatures made before a notary or judge, etc., or papers written or signed in some public capacity; or, if private papers, they must be admitted, in the

documents are in evidence, it is competent for the court or the jury to compare them. The rule as to the comparison of handwriting applies to witnesses, who can only compare a writing to which they are examined, with the character of the handwriting impressed upon their own minds; but that rule does not apply to the court or jury, who may compare the two documents when they are properly in evidence."

But this decision refusing to allow witnesses, yet permitting the jury, to compare specimens already in evidence, needed, as to the second point, a converse decision, which was supplied in *Rex v. Morgan* (1831) 1 Moody & R. 134, note, a trial for sending a threatening letter. Evidence of handwriting being very slight, the prosecution offered a document undoubtedly written by the prisoner, but unconnected with the charge, that the jury might inspect it and compare it with the letter in question; and it was contended, on the authority of *Griffith v. Williams*, that the evidence was admissible; since, if the comparison be admissible in itself, it must be allowable to put papers in evidence for the purpose of enabling the jury to make it. *Bollaund, B.*, on the authority of the case cited, was at first inclined to allow the evidence to be given, but afterwards said that it was not the intention of the court in that case to decide anything more than that the jury were at liberty to compare the disputed handwriting with that of documents which were in evidence in the cause independent of that question. To say that a party might select and put in evidence particular letters bearing a certain degree of resemblance or dissimilarity was a very different thing from allowing the jury to form a conclusion from inspecting a document put in for another purpose, and therefore free from the suspicion of having been so selected.

Four cases bringing up the whole question of jury comparison and witness comparison were argued in 1836, although the last, *Doe ex dem. Mudd v. Suckmore*, was not decided until the next year.

In the first, *Bromage v. Rice*, 7 Car. & P. 548, where a party, in addition to the usual proof of handwriting, offered to put in the hands of the jury a great number of bills and notes which had been paid by him, bearing the signature of the same person, for comparison with the signature in dispute, *Littledale, J.*, said: "I shall reject the evidence. The jury are not to compare any other writing with that in dispute except

documents which are otherwise evidence in the cause."

The second, *Waddington v. Cousins*, 7 Car. & P. 595, was a libel action. Upon the production of a witness to swear to his belief of the handwriting of the defendant, whom he had seen make entries in his books, which were offered for the jury to see to form their opinion as to the authorship of the writing in dispute, the books were rejected by Lord Denman; and a witness, asked a question intended to institute a kind of comparison, but designed to evade the rule, "as to the defendant's handwriting of particular words which were in the book, and also in the libel," was not allowed to testify,—one would think erroneously, on any basis. And in the same case a letter written by the defendant, which contained an allusion to some of the matter in dispute, objected to because the purpose was to show it to the jury to enable them to judge of the handwriting of the paper principally in dispute, was read in evidence, being "admissible in its own nature;" but the defendant's objection to its being afterward shown to the jury was apparently sustained,—also a doubtful decision under the strictest rule.

In *Doe ex dem. Perry v. Newton*, 1 Nev. & P. 1, 5 Ad. & El. 514, W. W. & D. 403, 6 L. J. K. B. N. S. 1, where it was proposed to give to the jury for comparison letters admitted on cross-examination to be genuine, Lord Denman, following *Rex v. Morgan*, said, in excluding the evidence: "*Griffith v. Williams* was supposed to go a long way when it established the right, on the part of a jury, to take other papers already in evidence and compare them with the questionable one for the purpose of coming to a conclusion, from the comparison, whether that questionable one was genuine. The real ground on which that case stands is that comparison in such a case is unavoidable. When two documents are placed before a jury, one of which is in question and the other is clearly known to be the handwriting of the party, no human power can prevent the jury from forming some opinion whether those two were written by the same person. . . . I own I do not find it easy to reconcile what I have now said with what passed before Lord Kenyon in the case of *Allesbrook v. Roach*, 1 Esp. 351. What was done in that case is not consistent with the uniform practice in Westminster Hall. . . . It is, in my opinion, infinitely safer and better to abide by the rule which has existed up to the present

case, by the party to whom they are attributed, to be of his own handwriting. A previous admission of them or previous proof will not make them admissible." The controversy in the great case of *Doe ex dem. Mudd v. Suckermore*, 5 Ad. & El. 703, was not to secure the admission of disputed signatures to be passed upon by the jury, but to the end that specimens already established to be genuine might be used as a basis of comparison. Williams, J., and Denman, Ch. J., while contending in that case for the right to compare specimens admitted to be genuine, expressly conceded that disputed specimens should not be permitted to go to the jury. A few years later the inherent value of comparison as a method of proof, and the inconsistency of permitting

it with papers happening to be in the case, and denying it with genuine specimens admitted for the purpose, was recognized by Parliament by 17 & 18 Vict. chap. 125, § 27, as follows: "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." While the refinements, distinctions, and exceptions which had confused the subject and embarrassed the administration of justice were thus wiped away, and the door opened wide for comparison with genuine specimens, it is to be noted that the essential

time, that evidence of handwriting by comparison is inadmissible, except in cases where it is unavoidable."

To the same effect upon this point is *Queen v. Shepherd* (1845) 1 Cox C. C. 237. Entries in a book kept by the prisoner as an officer of a club were not allowed to be put in the hands of the jury, for the entries were not material for the proof of the case, and, accordingly, were not properly papers or writings in the cause, the court saying: "If this were allowed particular entries may be selected for the purpose, differing materially from the prisoner's general handwriting, and a wrong impression be thereby produced."

Doe ex dem. Devine v. Willson (1855) 10 Moore P. C. C. 502, an appeal from New South Wales, to which the common-law procedure act was held not then to apply, lays down the same rule.

And conversely, in an action on a bill of exchange, the question being whether the defendant accepted it, several letters from the defendant on the subject of the bill were read in evidence, and, upon the jury expressing a wish to see the letters, Gurney, B., said: "If these letters and papers had related to distinct transactions, I think the jury could not have been allowed to look at them; but, as they all relate to this transaction, they may see them." *Eaton v. Jervis*, 8 Car. & P. 273.

Curiously enough, the evidence offered and rejected, as to which the struggle was made and all the argument directed, in *Doe ex dem. Mudd v. Suckermore* (1837) 5 Ad. & El. 703, 2 Nev. & P. 16, W. W. & D. 405, 7 L. J. Q. B. N. S. 33, the case which is considered to have settled the English general rule as to comparison of handwriting with documents not properly in evidence in the case for other purposes, was not actually evidence by comparison at all. It was an action of ejectment, and a witness swore that the attestation to the will on which title depended was in his handwriting, which was denied, and he then admitted, on cross-examination, that some twenty papers shown to him were in his own handwriting; whereupon an inspector of handwriting at the Bank of England was called, and the offer was made to put in his hands the admitted and disputed writings so that he might determine whether both were written by the same hand. Vaughan, J., was doubtful of the propriety of the evidence, and submitted the question to Chief Baron Abinger, who submitted

an opinion against its admissibility; this was read in court, and the evidence then excluded. The expert was then asked whether he was acquainted with the handwriting of the witness to the will, and when it appeared that his knowledge of it was acquired merely from a careful examination of the specimens the day before, the offer to put the will in his hands, and ask him whether from his knowledge of the witness's handwriting he believed the attestation to be genuine, was rejected, and, upon the argument of a rule for a new trial upon the ground of the improper rejection of evidence, the court of King's bench was evenly divided. The judgments of Lord Chief Justice Denman and Williams, J., proceed upon the ground that the evidence disputed, not being comparison of hands, was admissible because the knowledge of the witness was legitimately obtained. The opinions of Coleridge and Patteson, JJ., argued that the evidence from such knowledge was actually the same thing as comparison of hands, which, with two special exceptions (the cases of ancient documents and of specimens for comparison which were already properly in evidence in the cause), had been uniformly rejected. How false this reason was has been seen from the earlier cases. So Williams, J., says at p. 722, 5 Ad. & El.: "It seems to me that the evidence, so far as this objection is concerned, was admissible, because it was not the comparison of handwriting in the proper and ordinary sense of the term. To reject it, because what was equivalent to a comparison of handwriting took place, would go far—so far as the reason of the thing is concerned—towards disturbing the rule altogether, and letting in a comparison of handwriting as a medium of proof in all cases whatsoever, or excluding, in a great degree, all possibility of proof." Patteson, J., on the other hand, said that two modes of acquiring knowledge, on which opinions of handwriting might be given, had been recognized: First, from seeing a person write; second, from receiving correspondence and afterward having some communication thereto with the other person, by which it is acknowledged; and that it was now sought to introduce a third mode, by satisfying a witness by some information or evidence that a number of papers were in the handwriting of the party, and then asking him to study those papers so as to acquire a knowledge of his handwriting, and afterwards putting the disputed paper in his hand and asking his belief respect-

principle of the common law forbidding disputed signatures and collateral issues was distinctly preserved by the provision limiting comparison to writings "proved to the satisfaction of the judge to be genuine." So, wherever the door has been opened to this class of proof, whether by legislation or by judicial expansion and adaptation of the common law, the same safeguard has been preserved. Rogers, *Expert Testimony*, § 138; Lawson, *Expert Ev.* 408; 15 Am. & Eng. Enc. Law, 2d ed. p. 273. *State v. Hastings*, 53 N. H. 452, is a notable exception. There the court said: "In England, under that statute, the jury probably need not consider the question of the genuineness of the paper, . . . as the statute seems to make the finding of the judge on that

point conclusive; but without such a statute it would seem to be necessary that the evidence of the genuineness of such paper should be introduced to the jury, and then, that the jury should find that fact for themselves upon all the evidence. With this modification, we see no reason why this English rule may not be adopted in this state as a plain and just rule to be followed in all such cases." Of the doctrine involved in the suggested modification, it may be said: (1) It is *dictum*. (2) It is opposed to the whole body of English and American authority. (3) It is contrary to general opinion and policy, as indicated by the whole trend of modern legislation. (4) It is unsupported by any, and is contrary to many, New Hampshire cases. *Myers v. Toscan*, 3

ing it; this was actually a comparison; "but" he declared, "this court recently, in the case of *Doe ex dem. Perry v. Newton*, 5 Ad. & El. 514, 1 Nev. & P. 1, W. W. & D. 403, 6 L. J. K. B. N. S. 1, has expressly determined that documents irrelevant to the issues on the record shall not be received in evidence at the trial in order to enable a jury to institute such a comparison. Much less can it be permitted to introduce them in order to enable a witness to do so."

Although Baron Parke is found declaring, in *Hughes v. Rogers*, 8 Mees. & W. 123, 10 L. J. Exch. N. S. 238, "there was no point decided in that case," the real effect of this great case was, therefore, to decide that specimens of handwriting not already in evidence, and so irrelevant to the issues, could not be used in a trial by expert witnesses as standards for comparison with the disputed writing; two of the judges declaring that the evidence as to which the real contention was made was not admissible, being comparison; and the other two denying that it was comparison, and admitting in effect that real comparison was not competent.

But *Doe ex dem. Mudd v. Suckermore* and its predecessors left undecided the question whether an expert witness should be allowed to testify, by comparison in court with specimens already in evidence in the cause, as to the genuineness of disputed writings. *Goodtitle ex dem. Revett v. Braham*, the case of which Lord Kenyon "repented," in *Cary v. Pitt*, Peake Ev. 154, indeed, allowed just such evidence, but that case was discredited by the later decisions; and in *Griffith v. Williams* it was held that witnesses could "only compare a writing to which they are examined, with the character of the handwriting impressed upon their own minds;" but these were ordinary, nonexpert, witnesses; and on this point the case was followed by *Reg. v. Caldwell* (1847) 1 A. M. & O. 324.

The question was answered in *Queen v. Shepherd* (1845) 1 Cox C. C. 237, a nisi prius decision by Erle, J.; but the conclusion arrived at, that an expert might compare handwriting with papers in evidence, to disprove its genuineness, but not to prove the same thing, is extraordinary, and one for which there seems to be no authority. It was an indictment for sending a threatening letter, and an expert was not allowed to compare the letter with another writing proved to be the prisoner's, which had already been admitted as part of the case for the prosecution, the court saying: "The rules of

evidence as applicable to this case will not allow you to do so. You may call a scientific witness to disprove by comparison the writing at issue from being the writing of the party whose writing it is said to be, not to affirm it. All that your are authorized to ask this witness as a scientific witness is as to his belief of the writing being in a natural or feigned hand."

2. In the ecclesiastical courts.

Comparison by witnesses or the court was always allowed in the ecclesiastical courts of England.

"From 1 Oughton's *Ordo Judiciorum*, title 225, *De Comparatione Litterarum ad probandum manum testatoris*, §§ 1, 2, 3, 10, 11, it appears that, when the handwriting of a testator or other principal party was disputed, and the attesting witnesses were deceased before the suit commenced, or were not called, it was allowable to proceed by the comparison of other instruments. These instruments of comparison were required to be proved by witnesses who saw them written. It was for the judge to decide whether they were sufficiently proved; and then the comparison was made by sworn comparitors whom he appointed, to the number of four or six *c senioribus procuratoribus, et peritioribus in arte scribendi*. . . . The ecclesiastical law appears to have made no limitation as to the quality of the instruments which might be made the foundation of the comparison; *alia scripta quamvis omnino impertinentia ad causam institutam*." Opinion of Coleridge, J., *Doe ex dem. Mudd v. Suckermore*, 5 Ad. & El. 708, 2 Nev. & P. 16, W. W. & D. 405, 7 L. J. Q. B. N. S. 33.

Against the probate of a codicil, a contestant offered in evidence several receipts which were alleged to be the deceased's handwriting, and to differ from the codicil, both in the character, and manner of spelling; they were objected to as having been written three years before the codicil, in which time a man's handwriting might greatly vary, and as, therefore, no evidence to prove the codicil not to be the deceased's handwriting. But the evidence was admitted. *Machin v. Grindon* (1756) 2 Ad-dams Eccl. Rep. 91, note.

An allegation pleaded that a paper was, in the opinion of persons skilled in handwriting, written in a studied and fabricated hand, and also that it appeared to be written by the same person who had written the memorandum at the

N. H. 47; *Bozman v. Sanborn*, 25 N. H. 87; *Reed v. Spaulding*, 42 N. H. 114; *State v. Shinborn*, 46 N. H. 497, 88 Am. Dec. 224. The headnote to *Carter v. Jackson*, "A jury may compare a disputed signature with others admitted, or found by them, to be genuine," was (at least the portion italicized) wholly unwarranted, either by the facts of the case, or the opinion of the court. (5) It was based upon *State v. Ward*, 39 Vt. 225, which has since been repudiated by the same court. *Rowell v. Fuller*, 59 Vt. 688, 10 Atl. 853. (6) It has been reviewed in Maine and rejected. *State v. Thompson*, 80 Me. 194, 13 Atl. 892. (7) Text writers have criticised it. Rogers, *Expert Testimony*, § 138; Lawson, *Expert Ev.* 395, 397. Finally, it is as unsound as it is anomalous. If ad-

hered to as a rule, it would make comparison a source of confusion, rather than of instruction. Its vices may not be emphasized by every case, but they are nevertheless inherent and obvious, and should not have judicial sanction. The true rule is that, when a writing in issue is claimed on the one hand and denied upon the other to be the writing of a particular person, any other writing of that person may be admitted in evidence for the mere purpose of comparison with the writing in dispute, whether the latter is susceptible of, or supported by, direct proof or not; but, before any such writing shall be admissible for such purpose, its genuineness must be found as a preliminary fact by the presiding judge, upon clear and undoubted evidence. *State v. Thompson*, 80

bottom of the paper. This was objected to as extending the doctrine of comparison of handwriting further than it had yet been carried, viz., to produce evidence to show that it could not be the handwriting of any person whatever. The court said: "Comparison of hand has always been admitted in the ecclesiastical courts in different ways; the old way was to refer it to the officers of the court. In *White v. Terry & Longmore*, before Sir George Hay in 1774, the court referred to the deputy registrars of the admiralty and the consistory of London for their opinion as to handwriting. It is observable, also, that it has been admitted in this very cause in the court of King's bench [apparently Goodtitle *ex dem.* *Revett v. Braham* (1791) 4 T. R. 497, above, II, a, 1]; but this court does not want such a precedent." *Reilly v. Rivett* (1792) 1 Phillim. Eccl. Rep. 78, note.

In *Heath v. Watts* (1798) 1 Phillim. Eccl. Rep. 78, note, the court directed the deputy registrars of the admiralty, the arches, and of the prerogative courts to inspect several signatures of the testator, and also two exhibits in his handwriting which had been produced in the cause, and to compare them with the signature to the will; whereupon they reported that the signatures were not written by the same person.

An allegation pleading that the signature to a will was not the handwriting of the person whose it purported to be, and that, by comparison of the signature in question with other signatures of that person, it evidently appeared to persons judges of handwriting and fully competent to form an opinion thereof, that the signatures were not by the same person, was admitted. The court said that no case had been suggested upon which such evidence had ever been rejected; and that the court was not at liberty to refuse it from any opinion it might entertain of the effect of such evidence. *Beaumont v. Perkins* (1809) 1 Phillim. Eccl. Rep. 78.

It is said in *Saph v. Atkinson* (1822) 1 Addams Eccl. Rep. 162: "All evidence as to the handwriting of any party is the mere statement of an opinion formed by the witness on comparing a writing said to be his with some standard; and to say that the mere having seen that party write furnishes, under all circumstances and universally, the best standard, would, in my judgment, be absurd. . . . Evidence of this description [real comparison] has always been received in these courts."

62 L. R. A.

But the influence of the decisions of the common-law judges against this kind of evidence seems to be shown in the later reported cases in the ecclesiastical courts. So we read in *Lock v. Denner* (1822) 1 Addams Eccl. Rep. 353: "If evidence of handwriting by comparison be admissible at all, which it is too late to make a question of, at least in these courts, the more numerous the standards of comparison furnished are, the more satisfactory that evidence is likely to be."

The opinions of persons who, without any previous knowledge of a person's handwriting, undertake to judge, from their skill and experience in such matters, whether a signature said to be his be so or not, by comparing it with others admitted to be his; or to determine from the general appearance of handwriting whether it be written in a natural or imitated character,—have been constantly held to be the lowest and weakest species of evidence that can be offered. *Robson v. Locke* (1824) 2 Addams Eccl. Rep., 53.

And in *Young v. Brown* (1828) 1 Hagg. Eccl. Rep. 556, the distinction is drawn, on the point of evidential value, between comparison of handwriting to prove genuineness, and comparison to prove imitation of handwriting,—between evidence of similitude and evidence of dissimilitude. The opinion says in this case that dissimilitude of handwriting is the weakest and most deceptive of all evidence; if such evidence may have some slight weight, where the case for its affirmative proof depends on handwriting, still, against the positive evidence of witnesses attesting and deposing to a signature as actually made in their presence, it can scarcely have any effect.

On an issue as to the alteration of a will, experts were permitted to state their opinion, from an examination of the links, that certain lines were written at different times, and that certain alterations were made after the will was completely written. *Cooper v. Bockett* (1846) 4 Moore P. C. C. 419, 10 Jur. 931.

But although comparison with irrelevant papers was admissible, it was not of itself sufficient to establish a will in the absence of other confirmatory testimony. *Crisp v. Walpole* (1829) 2 Hagg. Eccl. Rep. 635.

b. After the statute of 1854.

The common-law procedure act of 1854 (17

Me. 194, 13 Atl. 892; *Rowell v. Fuller*, 59 Vt. 688, 10 Atl. 853; *Com. v. Coe*, 115 Mass. 481; *Costello v. Crowell*, 139 Mass. 588, 2 N. E. 698; *Bragg v. Colwell*, 19 Ohio St. 407, 413; *Rogers, Expert Testimony*, § 138; *Lawson, Expert Ev.* 408; 15 Am. & Eng. Enc. Law, 2d ed. p. 273. This involves, indeed, a marked departure from the common law. It does away with the common-law limitation of comparison to standards otherwise in the case, and hence with its exceptions, and the controversy and confusion which have grown out of them. It also abrogates the rule of *Myers v. Toscan*, making proof by comparison dependent upon the introduction of primary proof based on knowledge. In some states, as already shown, legislation has been deemed essen-

tial to bring about such changes; but in others, as we have also shown, the same result has been accomplished by judicial action. As the common-law rule was based primarily upon the assumed incapacity of jurors to make intelligent comparison, such judicial action would seem warranted under the power to adapt the common law to new conditions. The value of comparison as a method of proof being now generally conceded, juries being no longer too ignorant to derive benefit from that source, and the danger of spurious specimens and the objections to collateral issues being fully met by requiring the genuineness of the standard to be determined as a preliminary fact by the trial judge, there remains, it would seem, no satisfactory reason for the old limitations

& 18 Vict. chap. 125) radically changed the law of proof of handwriting. It allows comparison by both witnesses and jury with writings having no relation to the issues involved, the only express limitation being that the standard to be used for comparison must be proved, to the satisfaction of the judge, to be genuine. The text of § 27, which has been adopted into the statute books of many states, frequently verbatim, is as follows: "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." Scotland and Ireland were excepted from the operation of the statute; but in 1856, by 19 & 20 Vict. chap. 102, § 30, the common-law procedure act for Ireland, the same law was extended to Ireland.

Whether "any writing" included one not relevant to the issues was a question, however, requiring a decision. In an action on a bill of exchange, the defense being forgery, the plaintiff offered, for the purpose of comparison, certain signatures of the defendant and the signature book of the defendant's bankers in which he had signed his name, for the purpose of identifying his signature, and, over the objection of the defendant that the documents were not relevant to the issue, it was held that such documents, not otherwise relevant, were admissible for the purpose of comparison when properly proved to be in the defendant's handwriting, under the common-law procedure act. *Birch v. Ridgway* (1858) 1 Fost. & F. 270.

In *Roupell v. Haws*, 3 Fost. & F. 784, similar documents were used for comparison by experts.

Another decision was necessary to determine whether the statute applied to criminal cases. One accused of forgery, upon being questioned as to the forged paper, wrote, upon request, his name and the forged name, and these signatures were later produced upon the trial; it was held that they were not admissible in evidence, as they could only be material for the purpose of comparison of handwriting, and a document was not admissible simply for that purpose in a criminal case under the common-law procedure act. *Reg. v. Aldridge* (1863) 3 Fost. & F. 781.

But this omission was supplied in 1865 by the passage of 28 & 29 Vict. chap. 18, § 8, making the same rule apply in criminal trials.

62 L. R. A.

In *Hughes v. Dinorben* (1859) 32 L. T. 271, an action for a libel, where two admitted letters were put in evidence and examined by the jury to prove the handwriting of the defendant, and, in order to prove malice, seven anonymous letters were also put in evidence, which, in the opinion of the witnesses, were also in the defendant's hand; but the question whether they were sufficiently proved to serve as media of proof and standards of comparison was not passed upon by the trial judge, and no appeal was made to him upon that question,—it was held that, since the seven letters were not given in evidence as a standard for comparison, permitting the jury to take the admitted letters and also the anonymous ones for comparison was no error.

But it has been held that the production of writings by the opposing party for comparison with the disputed writing will not be ordered at the hearing of a summons for their production, since the disputed writing may be compared only with other writings proved, to the satisfaction of the judge, to be genuine; and this proof could only be furnished at the trial. *Wilson v. Thornbury* (1874) 43 L. J. Ch. N. S. 356, L. R. 17 Eq. 517.

At what time the comparison by the jury may take place was determined in *Cresswell v. Jackson* (1860) 2 Fost. & F. 24. A witness who had attested a codicil was asked, upon cross-examination, whether the handwriting of the codicil was not his own, which he denied, and other writings were put in his hands and admitted by him to be his own; they were then permitted to be shown to the jury for the purpose of comparison before the cross-examination was proceeded with. And in a reporter's note to this case it is said. "It is not expressed [in the statute] when the writings are to be submitted to the jury and the comparison may be made, but it is implied that the writings and the evidence of witnesses are to be submitted to them at the same time; and, if other writings are produced in course of cross-examination of a witness, and they are the writings of the witness, the most convenient time will probably be then. In other cases, according to the ordinary rule, it will doubtless be in the discretion of the judge. . . . One restriction is implied, *viz.*, that the disputed writing must be relevant to the issue; . . . but . . . there is no restriction on the section as to whether the comparison of handwriting may be

and exceptions. And it is fair to assume that, had no statute been enacted, the common law of England, adjusting itself to changed conditions, would now accord with the rule we have announced. Such a tendency was indicated by the discussion and decision in *Doe ex dem. Mudd v. Suckermore*, which was so soon followed by the act of Parliament referred to. In any event, the essential principle of the common law is preserved, and the dangers and objections against which it was aimed met, by requiring the genuineness of the standard to be found by the court as a preliminary fact, upon clear and positive testimony. In the present case no objection appears to have been made to the introduction of the specimen signatures upon the ground that their genuineness had not been predetermined by

the court, and what has been said upon this subject has been said incidentally to the discussion of the main question, and with reference to a rule of practice for future guidance, and not because it was required by the exception. The exception, as we understand it, rests upon the fundamental ground that writings not otherwise in the case, and not admitted to be genuine, are inadmissible for the purpose of comparison, even though first shown to be genuine to the satisfaction of the court. This is contrary to the conclusion we have already announced.

5. The exception to the admission of the signatures because they were made subsequent to the time the bond purported to have been made cannot be sustained. True, "the claimed author of disputed writings cannot make testimony in his favor by

as to the handwriting of the witness or of a party in the cause."

And a related question was answered in *Cobbett v. Kilminster* (1863) 4 Post. & F. 490. The defendant, upon cross-examination, having been got to write on a piece of paper a certain date containing several of the figures of one of the memoranda the handwriting of which he denied to be his, the paper was allowed to be handed to the jury for the purpose of comparison with the memoranda. A note to this case says: "Before the act, documents not in evidence, and not admissible as not being relevant, could not be produced for the purpose of showing similarity in the form of letters or figures and the mode of writing, though they might for the purpose of proving a particular habit of spelling (*Brookes v. Tichborne*, 5 Exch. 929, 20 L. J. Exch. N. S. 69, 14 Jur. 1122). And documents in evidence could be shown to the jury for the purpose of comparison (*vide* common-law procedure act 1854). Section 27 provided that 'comparison . . . shall be permitted to be made by witnesses, and the evidence of witnesses respecting the same may be submitted to the court and jury.' . . . This says nothing as to the admissibility to the jury of documents not in evidence; nor does it say anything as to the admission of documents for the mere purpose of showing to the jury for comparison. But, as before the act, any documents in evidence might be shown to the jury for that purpose (*Doe ex dem. Perry v. Newton*, 5 Ad. & El. 514, 1 Nev. & P. 1, W. W. & D. 403, 6 L. J. K. B. N. S. 1,) and, as this clause makes a document admissible for comparison by witnesses, and so makes it admissible as evidence, being in evidence, it may be shown to the jury. And if a document is admissible for comparison by witnesses it does not matter that the real object with which it is put in is for comparison by the jury,—especially where, as here, the writing put in is that of a witness, or of a party to the cause who is a witness."

And where, in an action on a bill of exchange, no evidence was offered by the plaintiff as to the acceptance by the defendant, except that the bill and a letter were produced at the trial in accordance with the notice to produce by the defendant, so that the jury had an opportunity of comparing the handwriting if they had thought it necessary, it was held that there was 62 L. R. A.

some evidence to go to the jury of the defendant's handwriting, and a refusal to nonsuit was proper. *Scard v. Jackson* (1875) 24 Week. Rep. 159.

That a witness, by comparison under the statute, must be an expert, seems to have been assumed in the cases discussed, in accordance with the general rule as to opinion evidence; but this point was decided in *Queen v. Silverlock* [1894] 2 Q. B. 766, 63 L. J. M. C. N. S. 233, 10 Reports, 431, 72 L. T. N. S. 298, 43 Week. Rep. 14, 18 Cox C. C. 104, 58 J. P. 788. On an indictment for obtaining money by false pretenses, where the solicitor for the prosecution was called as an expert for comparison of the handwriting in dispute with the admitted handwriting of the defendant, and it was objected that the solicitor was not an expert, since he had never before given evidence as to handwriting, and had obtained his knowledge of handwriting apart from his professional work, it was said by Lord Russell that the witness who is called upon to give evidence founded upon a comparison of handwritings must be *peritus*, but it could not be said that he must have become *peritus* in the way of his business, or in any definite way. The question is, Is he skilled? And if he is not skilled the judge will tell the jury to disregard his evidence.

III. The various American general rules.

The rules in the American courts as to the admission of proof by comparison, generally, are so variant as to make it seem to be convenient if not necessary to treat separately the decisions of the different states as to the general rule, taking up one jurisdiction at a time. The reasons for the great divergence in these American decisions are to be found, probably, in the different conceptions, at different periods, when the law of the various states was receiving its first form, of the prevailing common-law rule in England, which, as has been seen before, went through several transformations. In some of the older states, for instance, comparison by the jury never ceased to be the practice, while in other states in which there is no record of any practice or decisions until the time of the late decisions in England before the statute, the limited rule then prevailing in that country was adopted without any general dissent, although in

bringing in for comparison a writing manufactured by him for that very purpose after the controversy has arisen. He is confined to the production of papers written by him before the controversy commenced, or those subsequently made by him in the usual course of business, and under such circumstances as to negative all idea that they were made for the purpose of being used as evidence in his own favor. A party cannot be allowed to manufacture this class of testimony, more than any other, in his favor. The utmost limit to which the cases and practice go in this respect is to allow the opposing party, when the upholding party takes the stand as a witness, in cross-examination to call upon him to write in the presence of the jury, that he may use such

specimens of his writing for comparison with the disputed writing by the jury and experts against him." *Sanderson v. Osgood*, 52 Vt. 309; *King v. Donahue*, 110 Mass. 155, 14 Am. Rep. 589; *Hickory v. United States*, 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. Rep. 334. There is no pretense in the present case that the signatures introduced for the purpose of comparison were made after controversy arose, or that they were manufactured for the purpose of comparison. The mere fact that they were made subsequent to the execution of the bond is not sufficient to render them inadmissible.

Exceptions overruled.

Parsons, J., did not sit. The others concurred.

very many cases with local distinctions and limitations which have never found place in the English law on the subject.

In the Federal courts.

From several early cases in the United States courts it does not clearly appear whether the comparison of hands mentioned is real or pseudo comparison.

In *Brooke v. Payton* (1802) 1 Cranch C. C. 96, Fed. Cas. No. 1,934, a libel action, "the defendant prayed the court to instruct the jury that evidence by comparison of hands is not sufficient to prove the publication. The court unanimously refused to give the instruction."

But in an action of covenant counsel "endeavored to prove a receipt of defendant by comparison of hands. Per Curiam: This kind of proof is inadmissible." *Martin v. Taylor* (1803) 1 Wash. C. C. 1, Fed. Cas. No. 9,186.

And in *Reld v. Hodgson*, 1 Cranch C. C. 491, Fed. Cas. No. 11,667, we find the court apparently treating as comparison ordinary proof of handwriting, by witnesses having knowledge from correspondence, and saying: "It is evidence by comparison of hands, and is the best evidence the nature of the case will admit."

In *Dunlop v. Silver* (1801) 1 Cranch C. C. 27, Fed. Cas. No. 4,169, we find real comparison. "The plaintiff offered to prove the handwriting of one of the indorsers by comparing it with the signature of the bail bond filed in the case, and contended that, as it was a bond taken by a sworn officer and filed in court, it could not be denied. This evidence was admitted by Kilty, Ch. J., and Marshall, J., Cranch, J., *contra* because the bond itself was not proved to be signed by the defendant."

This case, allowing comparison with papers on the record, but not actually in evidence, represents the law as developed in several cases many years later, as in *Medway's Case* (1870) 6 Ct. Cl. 421 (below); but it was plainly overruled by another case in the same volume, *Shannon v. Fox* (1803) 1 Cranch C. C. 133, Fed. Cas. No. 12,706, which is indistinguishable from it. The plaintiff ordered to prove the defendant's handwriting "by comparing it with his signature to the power of attorney filed in this cause, considering it as a matter of record. The court (*nem. con.*) refused to allow it on the ground that no proof was given of the signature of the power of attorney."

In *Macubbin v. Lovell* (1804) 1 Cranch C. C. 184, Fed. Cas. No. 8,928, the plaintiff, "hav-

ing proved that on a note filed in another case the plaintiff had confessed judgment, prayed the court to suffer the jury to compare a receipt purporting to be signed by the plaintiff with the said note, and from thence to infer that the signature was in his handwriting;" which was properly refused there being no proof of the standard, so far as appears.

But where "the defendant offered in evidence an account said to be in the plaintiff's handwriting, and . . . a witness testified that he saw the plaintiff sign a certain receipt, and that, by comparing the account with the signature to the receipt, he believed the account to be in the plaintiff's handwriting," the court admitted the evidence. *Hopkins v. Simmons* (1805) 1 Cranch C. C. 250, Fed. Cas. No. 6,691. Apparently, however, the comparison was not in court.

Smith v. Fenner (1812) 1 Gall. 170, Fed. Cas. No. 13,046, indicates the survival of what we have observed to have been the early practice in England, comparison by the jury with specimens, whether relevant or not, which have been the sources of knowledge of ordinary witnesses who have testified as to the disputed handwriting, and is unassailable in principle although probably overruled by the later decisions. The plaintiff offered witnesses acquainted with the handwriting of the scribe who drafted the will in question, to prove that an altered word was not in his handwriting, and, to rebut this evidence, the defendant offered witnesses who swore to the scribe's handwriting, and that certain deeds which they produced to the jury were in the handwriting of the scribe and contained the peculiarities observed in the will, and that they had frequently known the scribe to write in this manner. The court (Story, J.) overruled the objection to the production of these deeds to the jury on the ground that it was a mere comparison of handwriting, and said: "Nothing is clearer than that this is not a mere comparison of hands. The witnesses swear as to facts and peculiarities of handwriting, and produce the best possible proof of their own accuracy. The evidence goes completely to rebut the testimony on the other side, and it rests on the same basis as the admission of witnesses to prove handwriting in ordinary cases."

But an expert was not allowed to testify by comparison, with a letter not relevant to any issue, although admitted to be his by the person

against whom it was offered; the reasons given for this exclusion, were, however, that a mere comparison of handwriting was not evidence, and that it was "an established rule of evidence that handwriting cannot be proved by comparing the paper in dispute with any other papers acknowledged to be genuine," the fact of the proposed standard being in evidence not being at this time considered the important consideration. *Turner v. Foxall* (1822) 2 Cranch C. C. 324, Fed. Cas. No. 14,255, Followed by *Elliot v. Hayman*, 2 Cranch C. C. 678, Fed. Cas. No. 4,388.

So on a trial for forgery, the prosecution was not allowed to show to the jury, for comparison with the forgery, a signature written by the prisoner in the presence of the marshal, nor to submit the papers to an expert for comparison. *United States v. Prout* (1833) 4 Cranch C. C. 301, Fed. Cas. No. 16,094.

The decision in *United States v. Larned* (1833) 4 Cranch C. C. 312, Fed. Cas. No. 15,565, bears a close relation to that in *Smith v. Fenner* (1812) 1 Gall. 170, Fed. Cas. No. 13,046; although, in *United States v. Larned* the comparison in question was made before the trial, the opinion is broader than the facts. A witness swore that he was acquainted with the handwriting of the prisoner, and that he took the paper in question to the books of record written by the prisoner, and that, from the comparison and a similarity and peculiarity of the form of his capital letters, he believed the paper to be in the prisoner's handwriting. The court said that, since the witness's belief was founded in part on his general knowledge of the prisoner's handwriting and in part on his having compared it with the writing of the prisoner, the evidence must go to the jury with an instruction that, so far as the witness's opinion was founded upon the comparison, it was not evidence. But the court, upon consideration of the authorities, said that they were satisfied that, where the witness has acquired a knowledge of the handwriting of the prisoner by having often seen him write, etc., it is competent for him to compare the paper in question with the genuine handwriting of the prisoner, and to state his belief resulting from both sources. This decision, however, would seem to have been overruled, with *Smith v. Fenner*.

Strother v. Lucas (1832) 6 Pet. 763, 8 L. ed. 573, sometimes referred to as a leading case, denies the admissibility generally of the evidence of witnesses by comparison, and upon this point has been apparently overruled by *Blewett's Case*, 10 Ct. Cl. 235, and *United States v. Chamberlain*, 12 Blatchf. 390, Fed. Cas. No. 14,778 (*infra*). Certain depositions were offered in evidence to prove the signature of a witness to a deed by comparison of it with the handwriting of entries in a register of marriages and interments alleged to have been made by the witness. The depositions, so far as they went to prove the handwriting of the witness to the deed by comparison, were objected to. The court said that it was a general rule that evidence by comparison of hands was not admissible, where the witness has had no previous knowledge of the handwriting, but is called upon to testify merely from a comparison of hands.

In *Luco v. United States* (1850) 23 How. 515, 16 L. ed. 545, where witnesses were allowed to compare the handwriting of what was alleged to be a grant of land by a Mexican governor of California with the handwriting of the same

governor appearing on papers taken from the archives, there was apparently no objection to the proceeding on the ground that comparison was not competent; and the court also compared the handwritings.

In a prosecution for piracy, where the prosecution, in order to prove that a transfer of the ship was made to a fictitious person, offered to show by an expert that two different signatures on the registry, one of the supposed fictitious owner and the other of the captain, who was not the defendant, to a bond and a manifest, were in fact made by the same person under different names, but no offer was made to show that any certain person signed both papers, in which case, it was admitted by the prosecution, it would be necessary to produce an admitted writing of that person; it was held that the evidence was competent, though the testimony was of a rather dangerous character, and not much to be relied upon. *United States v. Darnaud* (1855) 3 Wall. Jr. 143, Fed. Cas. No. 14,918.

In *Medway's Case* (1870) 6 Ct. Cl. 421, referred to above in connection with the case of *Dunlop v. Silver*, the defendants offered in evidence, for comparison with the original petition of the claimant and its signature, a letter purporting to have been written by her showing facts fatal to her case, and no direct testimony was offered to prove the handwriting. This letter was compared by the court with the petition, found to be in the claimant's hand, and admitted. The court declared that comparison of handwriting might be made by courts and juries without the intervention of witnesses, if the comparison be restricted to established writings previously and properly in the "case" for other purposes, and not put in for the mere purpose of comparison.

This decision is a radical, though inconspicuous, departure from the rule, from which it was supposed to have been taken, limiting jury comparison to specimens already in "evidence" for other purposes. The real reason for that rule, as has been seen from the opinion of Lord Chief Justice Denman in *Doe ex dem. Perry v. Newton*, 1 Nev. & P. 1, 5 Ad. & El. 514, W. W. & D. 403, 6 L. J. K. B. 1, is necessity, since comparison by the jury of writings already in evidence for other purposes cannot be prevented by any "human power." Here, however, the rule has been extended to documents not in evidence, although on the record, and so in the "case." A strong dissent was voiced by one of the judges; but the case as a whole was expressly followed in *Blewett's Case* (1874) 10 Ct. Cl. 235, on precisely the same facts, the court ignoring the distinction: "The weight of authority seems clearly to be that where other writings admitted or proved to be genuine are already in the case, and not put in for the purpose of instituting comparison, the jury may, with or without the aid of experts, compare the handwriting of documents offered in evidence therewith, and determine their genuineness by such comparison."

In *United States v. Chamberlain* (1874) 12 Blatchf. 390, Fed. Cas. No. 14,778, it is laid down that it is competent for the jury to compare the handwriting of documents properly in evidence, "proved" to have been written by a party, with the handwriting of papers in dispute, to ascertain their origin; also that, standard specimens of the party's handwriting being in evidence, an expert might point out to the

jury features in the writing identical with those displayed by the papers in question.

But this rule was apparently modified by *Moore v. United States* (1875) 91 U. S. 270, 23 L. ed. 346, which is the leading case in the Federal courts. The principle laid down seems to change the requirement that the standard writing in evidence should be "proved," to one that it should be "admitted," and in this respect is another departure from the English rule. In a suit in the court of claims the defendants offered in evidence a certificate of sale, by the petitioner, of the property whose value was sought to be recovered, and it was proved in court by a comparison made by the judges of the court of the handwriting and signature with the handwriting of the petitioner in another paper in evidence for other purposes. It was held that this was not error. Bradley, J., said: "The general rule of the common law, disallowing a comparison of handwriting as proof of signature, has exceptions equally as well settled as the rule itself. One of these exceptions is that, if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper in question may be compared with it by the jury. It is not distinctly stated in this case that the writing used as the basis of comparison was admitted to be in the claimant's hands, but it was conceded by counsel that it was in fact the power of attorney given by him to his attorney in fact, by virtue of which he appeared and presented the claim to the court. This certainly amounted to a declaration on his part that it was in his hands." This is followed by *United States v. Jones* (1882) 20 Blatchf. 235, 10 Fed. 460; *United States v. McMillan* (1886) 29 Fed. 247; *United States v. Mathias* (1888) 36 Fed. 892; *Hickory v. United States* (1894) 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. Rep. 334, and *Stokes v. United States* (1895) 157 U. S. 187, 39 L. ed. 667, 15 Sup. Ct. Rep. 617.

But on the question of the genuineness of the signature of a party, when three checks bearing what was conceded to be his genuine signature were offered in evidence, the court admitted them for the purpose of comparison with the signature in controversy, since they were treated as genuine, and relied upon by both parties. *Briggs v. United States* (1894) 29 Ct. Cl. 178.

Alabama.

In Alabama the case of simple jury comparison with irrelevant writings was disposed of in *Little v. Beazley* (1841) 2 Ala. 703, 36 Am. Dec. 431, the court declaring broadly that "comparison of handwriting by submitting different writings having no connection with the matter in issue is not permitted by law. The present case presents the naked question whether signatures proved to be in defendant's writing can be given in evidence to the jury to enable them to determine by a comparison with the disputed signature whether the latter is genuine or otherwise. In our opinion this was not competent evidence." In accord are *Bishop v. State* (1857) 30 Ala. 34; *Williams v. State* (1878) 61 Ala. 33; and *Griffin v. State* (1890) 90 Ala. 596, 8 So. 670.

But where there was no other evidence than comparison, although that comparison was with writings already in evidence for other purposes, it was held two years later that "comparison of papers by a jury is not allowable in the absence

of all other proof, for the purpose of determining whether that about which there is a controversy is true or false. Where there is other evidence, and the jury are in doubt, it is, perhaps, proper that they should, for the purpose of satisfying their minds, refer to writings which have been offered as proof in the cause.

No evidence having been given independently of the writings, tending to show that the note was forged by the defendant, it follows that the instructions of the court to the jury that this question might be determined by a mere comparison of handwriting was incorrect." *State v. Givens*, 5 Ala. 747.

And in the same case it was laid down that "witnesses," if without knowledge of the handwriting in question, were not competent to testify by comparison with writings, although admitted by the person against whom the evidence was offered to have been written by him, and already admitted in evidence as a necessary part of the case; such testimony "was the result of a mere comparison without having an exemplar in the mind derived from previous knowledge to which, as a test, they could refer."

Upon a trial for murder, where the prosecution, in order to identify the defendant with the murderer, offered in evidence the registers of three hotels each containing a different name, with credible and partly unimpeached evidence that the names were written by the defendant, which were allowed to go to the jury without any objection on the part of the defendant, it was held that the jury, being thus possessed of the writings, could not be deprived of the privilege of comparing them with each other in order to aid them in coming to a conclusion as to their authorship; the court adopting the language of *Greenleaf on Evidence*, § 578: "Where . . . the jury are entitled to look at such writings for one purpose it is better to permit them, under the advice and direction of the court, to examine them for all purposes, than to embarrass them with impracticable distinctions to the peril of the cause." *Crist v. State* (1852) 21 Ala. 137.

The decision in *Kirksey v. Kirksey* (1868) 41 Ala. 626, was doubtless intended to cover the whole field of comparison of handwriting, in the statement of the following rules: "1. That it is not allowable for witnesses or juries to compare the handwriting of papers not in evidence for other purposes with the disputed writing or signature in evidence, with the object of arriving at a conclusion as to the genuineness of the latter. 2. That in this respect there is no distinction between the competency of a witness who has seen the party write and an expert who has never seen him write. 3. That the jury may institute a comparison between writings or signatures in evidence before them for other purposes, proved to be genuine, and the disputed one, in order to arrive at a conclusion as to the genuineness of the latter." This was followed as to the first rule, excluding comparison of irrelevant writings by witnesses, in *Snider v. Burks* (1887) 84 Ala. 53, 4 So. 225, and *Curtis v. State* (1897) 118 Ala. 125, 24 So. 111.

The case of comparison, by expert or nonexpert witnesses, of writings already in evidence was not covered by the rules laid down in *Kirksey v. Kirksey*, but that point was determined in *State v. Givens*, 5 Ala. 747, deciding that "witnesses," if without knowledge of the handwriting, could not compare, even with relevant and admitted writings. But this rule has

plainly been overridden by several later cases, none of which, however, expressly overrules *State v. Givens*.

So in *Moon v. Crowder* (1882) 72 Ala. 79, it is said: "To legalize such testimony [proof of handwriting by witness comparison] the witness must be first shown to be an expert; that is, accustomed to, and skilled in the matter of, handwritings, genuine and spurious. These may institute comparisons between writings of unquestioned genuineness and the writing in dispute, and may give their opinions where both were written by one and the same person." In *Griffin v. State* (1890) 90 Ala. 590, 8 So. 670, the court says: "Only experts, persons accustomed to, and skilled in the matter of, handwriting may institute comparison between writings of unquestioned genuineness and the writing in dispute, and give an opinion."

Extraneous papers may not be presented before the jury or court, or shown to a witness, that he may institute a comparison between such papers, although admitted to be genuine, and the one in controversy; but, where both parties introduced extraneous writings for comparison without objection, the evidence was properly considered by the court. *Moon v. Crowder* (1882) 72 Ala. 79.

And where, in an action on a promise sent by telegraph, its execution was not denied by the pleadings, so that proof of the genuineness of the telegram was outside the issues, and the genuine signature of the person who sent the telegram was admitted to enable the jury, by comparison, to determine by whom it was written, the proof was immaterial, related to no issue in the cause, and could not possibly have done any injury. *Bestor v. Roberts* (1877) 58 Ala. 331.

Arizona.

Section 2544 of the Arizona Revised Statutes of 1901, providing for comparison of handwriting, is a literal reproduction of the English act of 1854 (*supra*, II. b).

Arkansas.

It was decided in *Miller v. Jones* (1877) 32 Ark. 337, that it was error to allow papers not already in the case to be handed to the jury for a comparison with those read in evidence, although proof of handwriting might be made by a comparison of the writing to be proved with other writings, admitted to be genuine and already in the case.

But, if the specimen writing is admitted, it may be used for comparison, at any rate by witnesses. On a prosecution for forgery of a school warrant, where a letter, identified by the defendant as written by him, was introduced, and experts testified that the handwriting in the forged instrument was written by the same person who wrote the letter, "the court did not err in permitting the expert testimony on the comparison of handwriting. The letter offered as exemplar was identified by appellant, and no collateral issue could be raised concerning its genuineness." *McDonnell v. State* (1893) 58 Ark. 242, 24 S. W. 105.

But where a jury had irregularly obtained possession of an affidavit signed by the defendant, the court properly refused their request for a disputed letter, said to be in his handwriting, for comparison. *Phillips v. State* (1896) 62 Ark. 119, 34 S. W. 539.

California.

Although the California statute (§ 1944, Code Civ. Proc.), providing that "evidence respecting 62 L. R. A.

the handwriting may also be given by a comparison, made by the witness or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge," does not expressly limit the evidence of "witnesses" to experts, it has been held that a witness without knowledge of the handwriting in question, who is not an expert, is incompetent to compare handwriting under the statute. *Goldstein v. Black* (1875) 50 Cal. 462.

And upon an application for a new trial by the contestant of the probate of a will, based upon newly discovered evidence shown by the affidavits of the applicant and eight other persons, none of whom, except the applicant, knew the deceased or his handwriting, stating that they had made comparison of some documents alleged to have been signed by the deceased with the signature to the alleged will, and that from such comparison they believed the will to have been forged, it was held that, on these facts, such persons could not be permitted to testify by comparison, since the contestant had not brought his case within §§ 1943, 1944, of the Code of Civil Procedure; it not appearing that the deceased had acted or been charged upon the writings, or that the writings had been admitted or treated as genuine by the parties against whom they were attempted to be used. *Cartery's Estate* (1880) 56 Cal. 470.

Under this statute, in order to prove the authorship of a letter of which only a press copy is in evidence, the testimony of an expert witness from comparison of the press copy with genuine specimens of the handwriting of the alleged author of the letter is not admissible; it is essential that the document whose genuineness is sought to be proved should itself be produced, and it would be adding very much to the danger of such evidence to permit evidence to be given from a comparison of genuine writings with a press copy of the writing whose genuineness is disputed. *Spottiswood v. Weir* (1885) 66 Cal. 525, 6 Pac. 381.

And in an action to recover damages for personal injuries it was error to permit the plaintiff to write his name in the presence of the jury for the avowed purpose of having the jury compare, and then to permit them to compare, his signature, written in their presence, with his signature to a release signed by him about the time of receiving his injuries, in order to show the nervous condition of the witness at the time of the accident. The court said: "We know of no rule which would sanction a comparison of handwritings for such a purpose. Besides, if there was a material difference between the handwriting of the plaintiff at the different dates, there was at least a liability that some of the jurors might have been led to doubt the genuineness of the signature to the release, which was not denied." *Gulzoni v. Tyler* (1883) 64 Cal. 334, 30 Pac. 981. Apparently *contra* is *McLeod v. Bullard* (1881) 84 N. C. 515, *infra*.

Colorado.

The only case in this state upon the general question is *Wilber v. Elcholtz* (1880) 5 Colo. 240, and it was held (expressly following *Vinton v. Peck*, 14 Mich. 287), not to be error in the trial court to permit the jury in an action on a note the execution of which was denied to compare it with the signature to affidavits filed in the cause, but not in evidence; either witnesses or jurors might make the comparison, when the

papers offered for the purpose constituted a part of the record in the cause, and were undisputed. The court said: "Where the papers belong to the files in the cause, or have been previously received in evidence, and are admitted to be genuine, the objections urged against this class of testimony, that the writings sought to be used for comparison may have been specially selected as a standard, or that their introduction may cause collateral issues to spring up as to their genuineness, do not obtain."

This doctrine, it will be observed, was a departure from the English rule before the statute, which limited this kind of proof to papers already in evidence.

In 1893, however (Laws 1893, p. 264, § 1; 3 Mills's Anno Stat. § 1746c), the provision of the English common-law procedure act, § 27, was incorporated verbatim into the Colorado statutes.

The only other Colorado case is *Bradford v. People* (1896) 22 Colo. 157, 43 Pac. 1018, deciding that one accused of forgery, who has offered himself as a witness in his own behalf, may be required, on cross-examination, to write in the presence of the jury a copy of the instrument forged in order that the jury may compare it with the writing in dispute. This case also decided that the rule of evidence under the Colorado statute was the same in criminal and civil cases.

Connecticut.

That the practice of jury comparison came from England and survived in Connecticut is indicated in *State v. Nettleton* (1701) 1 Root, 308. The report is: "Information for a forgery. In this case the handwriting of Hall, in whose name the instrument was forged, was given to the jury."

The case immediately preceding this, *State v. Brunson* (1789) 1 Root, 307, may have been one of real comparison. There "it was determined that comparison of handwriting of the party is admissible evidence in a criminal prosecution, and, like all other evidence, to be left to the triers to weigh and consider."

But in *Lyon v. Lyman* (1831) 9 Conn. 55, the rule was settled. Witnesses who had seen the defendant write, and swore they believed the paper in question to be in the handwriting of the defendant, but not that they could determine it to be his without comparing it with writings proved to be genuine, were allowed to compare it; and cashiers of banks who had never seen the defendant write, but had compared the paper in question with writing proved to be his, were allowed to testify that they were written by the same hand, and that the paper in question was written in a disguised hand; and the other writings proved to be genuine were allowed to go to the jury for them to compare with the paper in dispute. The court said: The objection that an unfair selection for comparison might be made was not valid, since no advantage would thereby be given to one party over the other; the objection that it would open the door to collateral evidence applied to all opinion evidence; and that the principal objection made in England, the ignorance of the jury, did not apply in Connecticut.

And later the rule in Connecticut was stated to be to allow the disputed signature to be compared with signatures admitted or proved to be genuine. The triers may compare and judge for themselves, and experts may, upon comparison, give their opinion. But the signature used as a standard of comparison must not only be

genuine, but must be admitted or proved to be such before it can be used. *Tyler v. Todd* (1869) 38 Conn. 218. Here it was said: "No case has come to our knowledge in which the signature written by another party, or a disputed signature, has been used for any such purpose." So "the auditor did right in refusing to allow the signature written by the plaintiffs' counsel to be used in the cross-examination of the witness."

Delaware.

In a Delaware case, where a receipt bore evidence of alteration, with which the defendant was charged, the jury were instructed that they might, in considering the testimony of the witnesses as to whether the alteration was in the handwriting of the defendant, also compare the handwriting in which it had been made with the handwriting of other receipts which they had before them in evidence, and which were not disputed, but admitted to be genuine receipts of the defendant. *Welch v. Coulborn* (1869) 3 Houst. (Del.) 647.

And in an action on a promissory note a witness not qualified as an expert was allowed to prove the signature of the defendant to the note after comparing it with her signature to her affidavit of defense filed in the action, taken before him as a justice of the peace; whereupon the jury, on the authority of *Welch v. Coulborn* (where, however, the writings were actually in evidence, not merely on the record, or "in the case"), were allowed to compare the note and the affidavit. *McCafferty v. Heritage* (1876) 5 Houst. (Del.) 220. Here are exhibited comparison by a nonexpert witness, having knowledge of the handwriting from having seen the defendant write; and an exact reproduction of the early English practice of jury comparison; proof of the handwriting by a person who had seen the person write; and, later, comparison by the jury with the writing which formed the basis of the knowledge of the witness. But the reason for the ruling is a misconception of the English rule as reproduced in several states in this country: the unconscious extension of the rule, admitting comparison with writings "in evidence," to writings merely on the record or "in the case."

District of Columbia.

In *Keyser v. Pickrell* (1894) 4 App. D. C. 198, is found another departure from the English rule: The estoppel, of the party against whom it is offered to deny the genuineness of a writing offered as a standard, validating it for the purpose of comparison. In an action on a note against the executor of the alleged indorser it was proper, in order to prove forgery of the indorsement by the maker, by comparison with the disputed signature by witnesses and the jury, to admit the signatures of the defendant's testator to his will and to letters introduced by the plaintiff, over the objection of the plaintiff that these writings were not in evidence in support of, or relevant to, any issue of the cause, and, therefore, were not admissible or capable of being used as standards of comparison; since, though answering no practical purpose as evidence, the will upon which the plaintiff had sued the defendant as executor was nevertheless the foundation of the plaintiff's right, and he was estopped to deny the genuineness of the signature; and since the letters, although they had no relevancy to the case, had not been objected to by the defendant, and had been first exhibited

by the plaintiff, he by so doing affirmed their genuineness, and could not now be heard to cast doubt upon it.

In such a case it was proper to allow an expert to compare the body of the note, previously proved to have been written by the maker, with the indorsement, and to express the opinion that both were in the same handwriting though executed with different ink; and afterwards, for the plaintiff to submit to his expert witnesses and to the jury, for comparison with the disputed indorsement, letters of the maker already in evidence for the purpose of showing the business relations between the plaintiff and the maker, to show that the letters and the indorsement were not in the same hand. *Ibid.*

But letters allowed by the court to be used in the cross-examination of defendant's experts, to which use there was no objection, having no relevancy to the matters involved in the litigation, were properly excluded when offered by the plaintiff as standards of comparison for use by the plaintiff's experts. *Ibid.*

Florida.

The Revised Statutes of Florida (1892) contain a provision (§ 1121), enacted in 1861, which is an exact counterpart of the English act (*supra*, II. b), except for the addition that the evidence and writings may be submitted "to the court, in case of a trial by the court," as well as to the jury in the ordinary case.

Georgia.

It was decided in 1854 that on an issue between two inconsistent deeds with the same signature the jury might compare the signatures of the two deeds, which were properly in evidence, to see whether they were both made by the same person. *Doe ex dem. Henderson v. Roe*, 16 Ga. 521.

And the Georgia Code of 1863 (§ 3763) provided for comparison by the jury, in these words, which have been repeated in all subsequent Codes (§ 5247, of the present Code of 1895): "Other writings, proved or acknowledged to be genuine, may be admitted in evidence for the purpose of comparison by the jury. Such other new papers, when intended to be introduced, shall be submitted to the opposite party before he announces himself ready for trial."

Under this provision, the jury in a criminal trial were allowed to compare a letter alleged to have been written by the defendant with another letter proved to have been admitted by him to be in his hand. *Boggus v. State* (1866) 34 Ga. 275.

But under the same statute (§ 3787 of the Code of 1868) it is inadmissible to prove a copy of a letter, the original of which is not in court, by a witness who is shown papers admitted to be genuine and already in evidence and then asked whether the original letter is not in the same handwriting as the writings shown him. The court said, in such circumstances: "This is not the case of permitting a witness, an expert, to testify from a comparison of papers all present before the jury. This is a simple case of educating the witness in the presence of the court up to the point of competency. He is asked if certain papers now before the court do not satisfy him that another paper not before the court was in the [same] handwriting." *Bruce v. Crews* (1869) 39 Ga. 544, 99 Am. Dec. 467.

Evidence as to proof of handwriting by comparison offered by a party who did not comply with the requirement of the statute (§ 3840 of 92 L. R. A.

the Code of 1873) by submitting it to the opposite party before announcing himself ready for trial is inadmissible. *Georgia Masonic Mut. L. Ins. Co. v. Gibson* (1874) 52 Ga. 640. In accord are *Kelly v. Keese* (1897) 102 Ga. 700, 29 S. E. 591; and *Axon v. Belt* (1898) 103 Ga. 578, 30 S. E. 262.

But it is no error to admit in evidence an envelope on which is writing proved to be in the handwriting of a party, it not appearing in the record that its admission was objected to on the ground that it had not been submitted to that party before trial. *Thomas v. State* (1877) 59 Ga. 784.

And it was proper to submit to experts, in order to test their skill, incomplete and mutilated writings, and ask them by whom they were written, without submitting them to the opposing counsel; neither the expert nor the party calling him was entitled to know whether such papers were genuine or not. The whole object of the test would have been defeated had proof been required that the documents were genuine before they were used; and it was proper for the court to grant to counsel a wide and liberal discretion in the use of methods testing the qualifications of the witnesses upon cross-examination. *Travelers' Ins. Co. v. Sheppard* (1890) 85 Ga. 751, 12 S. E. 18.

It was held in *Piedmont & A. L. Ins. Co. v. Lester* (1877) 59 Ga. 812, that it was error to admit in evidence papers simply upon proof by a witness not shown to have knowledge of the handwriting in question, by comparison with the signatures of affidavits used in the case. But this error was cured by the introduction of another witness afterwards, who proved the handwriting of the papers in question from his own knowledge. The objection here was, apparently, that the papers were proved by comparison by a witness, and not simply proved by a witness having knowledge of the handwriting. There is no sign of the objection that the witness was not an expert.

But later the rule as to experts was more assimilated to the rule elsewhere, and it was held that a witness not shown to be an expert, although he saw a paper written by a person whose handwriting was in dispute, is not competent to testify as to his opinion in regard to the authorship of the disputed writing from comparison with the writing which he saw written as a standard; and he cannot testify generally as to the authorship of the disputed writing in spite of having seen the genuine signature executed, unless he swears that, for that reason, he would recognize the handwriting of the person who executed it, under § 3839 of the Code (of the present Code, § 5246), providing that "any witness is competent to testify as to his belief, who will swear that he knows or would recognize the handwriting." The source of his knowledge is a question for investigation, and goes entirely to the credit and weight of his evidence. *Wimblish v. State* (1892) 89 Ga. 294, 15 S. E. 325.

And it has been decided that the disputed signature of a marksman who is dead may be compared with papers found among his effects; and that it is not absolutely essential to show by direct proof that the marks upon such papers were actually made by the deceased; their execution could be shown by circumstantial evidence. *Little v. Rogers* (1895) 99 Ga. 95, 24 S. E. 856.

Illinois.

In *Pate v. People* (1846) 8 Ill. 644, on a trial for forgery, after the prosecuting witness had denied the authorship of the forged papers, pointing out instances wherein the style of writing and spelling differed from his own, and the prisoner, for the purpose of contradicting him, introduced other papers written and signed by the witness which corresponded in these particulars with the documents alleged to be forged, the prosecution then had the right to rebut this testimony, and to show, by calling a witness who qualified as an expert, that the papers introduced by the prisoner, which, by the evidence, had been traced to his possession previous to the trial, were originally written as stated by the prosecuting witness, but had since been made to resemble the forged writings by alterations and erasures. It was insisted on the argument that the question whether there had been erasures was one to be determined by the jury on an inspection of the papers without the aid of other testimony; but the court said: "It can hardly be supposed that the jurors were as competent to form a correct opinion on this subject as a witness peculiarly qualified by years of practical experience. Erasures might be easily discovered and pointed out by such a witness which would otherwise escape the observation of men unaccustomed to detecting them. The court was right in allowing the minds of the jury to be enlightened by the opinion of a witness possessing this superior knowledge."

But on a trial for murder, where it was sought to prove the forgery of a letter by the defendant, the writing of the person purporting to have written the letter and a letter written by the defendant were held to have been improperly admitted in evidence for the purpose of comparison by the jury with the disputed writing. Here, the court said: "The rule that the genuineness of handwriting cannot be proved or disproved by allowing the jury to compare it with the handwriting of the party proved or admitted to be genuine obtains in criminal, as well as in civil, cases. . . . We shall not stop now to discuss the propriety or reason of this rule. It is sufficient that it is well settled and universally observed." *Jumpertz v. People* (1859) 21 Ill. 375.

This decision seems to conflict in principle with *Pate v. People*, 8 Ill. 644, and the emphatic dissent of Breese, J., is based upon this earlier case. Certainly the declaration of the law was too broad, and it was later limited.

Similarly, it was decided that, where experts were called by the plaintiff in an action on notes, it was error to allow them to state whether the signatures to the notes and to certain affidavits made by the defendant and on file in the cause were by the same person, the court saying that it must be considered the law of the state that the genuineness of a signature could not be proved by comparing it with another signature admitted to be genuine. *Kernin v. Hill* (1865) 37 Ill. 209.

But on a criminal trial where the prosecution, for the purpose of proving where the defendant was at the time of the commission of the crime, introduced in evidence the registers of two hotels, and then called two experts who gave it as their opinion that the names on the two registers were in the same handwriting, and then proved by two other witnesses, not experts, who had seen the prisoner sign his name to the recognizance entered into by him for his appearance, 62 L. R. A.

that the names on the hotel registers and the signature to the recognizance were in the prisoner's hand, it was held by the court, in the opinion by Breese, J. (whose dissent has been noted in the case of *Jumpertz v. People*, 21 Ill. 375), that the admission of this evidence over the objection of the defendant that it was proof by comparison was proper. The proof made by the nonexperts was not by comparison of hands, but by having actually seen him write; they were at liberty to refresh their recollection by looking at the signature to the recognizance and then give their opinion as to the entries on the hotel registers. The experts were not introduced to prove the handwriting of the prisoner by comparison, but only to prove that the names upon the registers were written by the same person, and the evidence of experts was always received for such a purpose; neither of these experts pretended to say by whom the names were written, but merely that they were written by the same person. *Cross v. People* (1868) 47 Ill. 152, 95 Am. Dec. 474.

The usual distinction between writings in evidence, and outside writings, as affecting their competence, appears first in this state in *Brobston v. Cahill* (1872) 64 Ill. 356. In an action before a court without a jury it was proper for the court to compare receipts, admitted by the plaintiff to be genuine, and properly in evidence, with another receipt the genuineness of which he denied (limiting *Jumpertz v. People*, 21 Ill. 407). The court said: "When it is claimed that an instrument has been altered, and it is in evidence, all know that a jury may examine and compare the handwriting of the portion claimed to have been altered with the writing of the body of the instrument, as well as the color of the ink, and all particulars connected with it. But other instruments having no connection with the case cannot be introduced to be compared with the instrument claimed to be altered." This has been followed in *Snow v. Wiggin* (1886) 19 Ill. App. 542; *Rogers v. Tyley* (1892) 144 Ill. 652, 32 N. E. 393; *Northfield Farmers' Twp. Mut. F. Ins. Co. v. Sweet* (1892) 46 Ill. App. 598; *Himrod v. Gilman* (1893) 147 Ill. 293, 35 N. E. 373, affirming *Himrod v. Bolton*, 44 Ill. App. 516; *Greenebaum v. Bornhofen* (1897) 167 Ill. 640, 47 N. E. 857; and *Martin v. Leslie* (1900) 93 Ill. App. 44. That the same rule applies in the case of comparison by experts is decided in *Gitchell v. Ryan* (1887) 24 Ill. App. 372; *Rogers v. Tyley* (1892) 144 Ill. 652, 32 N. E. 393; and *Groff v. Mutual L. Ins. Co.* (1900) 92 Ill. App. 207.

That the rule excluding comparison with irrelevant papers extended to papers in the case, although not in evidence, was definitely laid down in *Frank v. Taubman* (1889) 31 Ill. App. 592; and the rule was held (distinguishing *Brobston v. Cahill*, 64 Ill. 356, following *Snow v. Wiggin*, 19 Ill. App. 542) to apply even to the appeal bond signed by a party and on file in the cause.

But in *Massey v. Farmers' Nat. Bank* (1882) 104 Ill. 327, it was held that on the cross-examination of a witness who had seen the defendant write the signature to the affidavit to his plea, and who gave his opinion that the signature in question was genuine, the court might properly allow the witness to be shown the affidavit, and asked to look at the capital letters and see if they were like the ones on the note in dispute; and whether it was not true that cer-

tain capitals in the signature to the note differed widely from the same capitals in the signature to the affidavit.

Indiana.

The case of *Clark v. Wyatt* (1860) 15 Ind. 271, 77 Am. Dec. 90, was the first attempt in Indiana to lay down the law in regard to proof of handwriting by comparison; but the decision was several times limited, until it was practically overruled.

In that case a witness who had been somewhat acquainted with the writing of the person whose signature was in dispute, but could not say that he was acquainted with it at the time of the trial, and compared with the signature the signatures to two affidavits filed in the cause, was held to be incompetent to judge of the signature in question, the court declaring that evidence founded on a mere comparison of hands by witnesses was not allowed, but that, if the witness had previous knowledge of the hand from having seen the person write or from authentic papers received in the course of business, he might, in corroboration of his testimony, compare the writing in question with other signatures known to be genuine (Following *McNair v. Com.* 26 Pa. 388).

Under this rule, on an issue as to the genuineness of a note signed only with a mark, other similar notes, with proof that they were signed by the same person in the usual course of business, were not admissible in evidence for the jury to compare them with it. *Shank v. Butsch* (1867) 28 Ind. 19.

A unique, but clear, rule was laid down in 1870 in *Chance v. Indianapolis & W. Gravel Road Co.* 32 Ind. 472. Witnesses, not experts, who had never seen the person write whose signature was in dispute, and who were not otherwise acquainted with his handwriting, were held to have been improperly permitted to examine his signatures admitted to be genuine, and, from a comparison of them with the signature in question, to give their opinion as to the genuineness of the latter. The court says in this case that the general rule as to comparison was not correctly stated in *Clark v. Wyatt*, but that, while it is true that a witness who is not an expert must speak from his knowledge of having seen the person write, or from authentic papers received in the course of business, it is equally true that, contrary to *Clark v. Wyatt*, an expert may give his opinion from mere comparison. But this comparison by experts must be confined to other writings admitted to be genuine; and, where other writings admitted to be genuine are already in the case, the jury may, with or without the aid of experts, make the comparison; but if they are not papers in the case the evidence competent to go to the jury must be that of witnesses, so as to afford the benefit of a cross-examination. Hence, it was error to permit the jury to take with them in their retirement to consider their verdict the instrument sued upon. The last point, it will be noticed, was overruled in *Huston v. Schindler* (1874) 46 Ind. 38.

An expert witness might compare signatures, conceded to be genuine although not in evidence for some other purpose, with the disputed signature, and from such comparison state whether the disputed signature was genuine or simulated, under the rule in *Chance v. Indianapolis & W. Gravel Road Co.*; and the decision in *Clark v. Wyatt* was expressly disapproved. *Burdick v. Hunt* (1873) 43 Ind. 381. To the 62 L. R. A.

same effect is *Swales v. Grubbs* (1890) 126 Ind. 106, 25 N. E. 877.

And cases excluding offered standards because not admitted by the other side are: *Walker v. Steele* (1889) 121 Ind. 436, 22 N. E. 142, 23 N. E. 271, and *Merritt v. Straw* (1892) 6 Ind. App. 360, 38 N. E. 657.

But the rule (in Indiana) permitting the comparison of a disputed signature with papers not read in evidence, but admitted to be genuine, is limited to the case where the admission is made by the person against whom the papers are sought to be used, whether he is or is not the maker of the papers; a claim that a signature is genuine by a party who seeks to use it is no admission at all. *Shorb v. Kinzie* (1881) 80 Ind. 500.

And it was incompetent upon a trial for murder to submit to an expert, for comparison with a writing containing threats, a written instrument unconnected with the facts of the cause, not admitted by the defendant on the trial to be in his handwriting, but proved by a witness to have been admitted by the defendant to be written by him; and to admit the first writing in evidence against the defendant upon proof by the expert that both papers were in his opinion written by the same person. The court distinguished the case from *Chance v. Indianapolis & W. Gravel Road Co.* on the ground that the genuineness of the papers which formed the basis of comparison was not admitted by the appellant, but simply evidence of his admission was offered; and that they were not relevant to the case on trial. *Jones v. State* (1877) 60 Ind. 241.

In *Forgey v. First Nat. Bank* (1879) 66 Ind. 123, comparison by experts of the handwriting of the disputed signature to the note in suit, with admitted specimens of the handwriting of the person whose signature is in dispute, is held to be permissible, although formerly inadmissible under *Clark v. Wyatt*; but the witnesses making it must be experts,—that is, persons experienced in judging of handwriting; and of the competency of those offered to testify as experts, the court trying the cause is the judge.

Only such papers as properly belong in the case, and which the party is, therefore, estopped from denying, or those that are admitted to be genuine, so that no collateral issue can be raised by attempting to prove the genuineness of any paper for the purpose of using it for comparison alone, can be used as standards of comparison; and under this rule, before papers other than those legitimately in the case can be used by experts in comparison with a disputed signature in the case, they must be admitted to be genuine, and over an objection they cannot be proved to be genuine by the testimony of the party objecting, or of any other person. Hence, it was not error in the court to refuse to require a defendant under oath to answer as to the genuineness of the papers to be used by the experts in comparison with the disputed signature. *Hazzard v. Vickery* (1881) 78 Ind. 64.

So a plaintiff may not prove by the defendant the genuineness of the defendant's signature to tax-assessment lists purporting to have been made by him, for the purpose of comparing the signatures upon them with the signature upon the instrument sued upon. *Bowen v. Jones* (1895) 13 Ind. App. 193, 41 N. E. 400. It may be added that this would seem practically to limit comparison to writings in evidence.

Distinguishing between comparison by experts and comparison by the jury, it was held in *Huston v. Schlindler* (1874) 46 Ind. 38, that while papers admitted to be genuine, although not properly admitted for some other purpose, may be submitted to experts for the purpose of comparison by them with the signature in dispute; and while they may give to the jury an opinion based upon such comparison,—such papers cannot, because not in evidence in the case, be submitted to the jury to enable them to make a comparison between the admitted genuine signatures and the one alleged to be a forgery; but it was held, contrary to the decision in *Chance v. Indianapolis & W. Gravel Road Co.*, that it was proper to submit to the jury, in connection with the evidence bearing upon the genuineness of the signature in question, the paper bearing such controverted signature.

And that a verified reply is, under the Indiana rule, sufficiently "in evidence" to be used by the jury, for comparison of its signature, appears from *Tucker v. Hyatt* (1895) 144 Ind. 635, 41 N. E. 1047. On cross-examination of a witness for the defendant in an action to which the defense was a release by the plaintiff, it was proper for the plaintiff to submit to such witness the plaintiff's affidavit for change of venue and the verified reply, and have the witness compare the plaintiff's signatures to those papers with the signature of the release; and the verified reply, being a part of the record, was also properly submitted to the jury for such comparison; it was not necessary to introduce it, it being already in evidence, and it might, therefore, be commented on by counsel and inspected by the jury.

The fact that a witness who has seen the person write whose signature is in dispute has also examined and compared signatures alleged to be of that person does not disqualify him as a witness, or constitute a valid objection to his testimony. *Miller v. Coulter* (1901) 156 Ind. 290, 59 N. E. 853; *Morell v. Morell* (1901) 157 Ind. 179, 60 N. E. 1092. Iowa.

The Iowa Code of 1851, § 2404, provided that "evidence respecting handwriting may be given by comparison made by experts or by the jury with writings of the same person which are proved to be genuine;" and under this statute a deed duly acknowledged before the clerk of the court, but not otherwise proved to have been signed by the person on whose behalf it was offered, was not sufficiently "proved to be genuine." *Hyde v. Woolfolk* (1855) 1 Iowa, 159.

Baker v. Mygatt (1862) 14 Iowa, 131, simply affirms the same general rule to exist under the Code Revision of 1860, § 3997; and *State v. Calkins* (1887) 73 Iowa, 128, 34 N. W. 777, under the Code of 1873, § 3655 (now § 4620, Code of 1897).

Under this statute, it is error to allow witnesses not qualified as experts to testify by comparison as to the genuineness of handwriting. *Mixer v. Bennett* (1886) 70 Iowa, 329, 30 N. W. 587.

So it is not error to allow expert witnesses to testify as to the characteristics of different signatures in evidence, including that in dispute, their comparative size and length, whether written on or above or below the lines designed for them, the differences in certain letters, and other facts of like character, merely because the facts to which this evidence was directed did not require the testimony of an expert, but 62 L. R. A.

could have been determined by the jury itself; since the examination was confined to the signature in controversy and to others admitted to be genuine, and was, therefore, authorized by § 3655 of the Code. *Riordan v. Guggerty* (1888) 74 Iowa, 688, 39 N. W. 107. In accord is *Patton v. Lund* (1901) 114 Iowa, 201, 86 N. W. 296.

On the trial of a chancery cause where the evidence is all before the supreme court to be examined *de novo*, the court may, as a jury, compare a disputed signature with writing of the same person which is proved to be genuine. *Morris v. Sargent* (1864) 18 Iowa, 90.

And the determination of the court upon the genuineness of a disputed signature upon the evidence of experts by comparison of handwriting is entitled, on appeal, to the same consideration as the verdict of the jury. *Lay v. Wissman* (1873) 36 Iowa, 305.

Where the defendant, in order to prove that the signature to the note in question was not in his hand, offered in evidence, to be considered by the jury, the signature upon his answer in the cause over the objection that the evidence should be excluded on the same principle that, if the plaintiff should prove statements or admissions made by the defendant, the defendant would have no right to disprove them by introducing counterstatements of his own made at another time, the evidence was held competent. And the fact that the signature was made by the defendant *post litem motam* did not render it incompetent under the statute (§ 3655 of the Code of 1873) which did not prescribe the time when the offered writing should be made; and the signature was properly allowed to go to the jury for what it was worth. *Singer Mfg. Co. v. McFarland* (1880) 53 Iowa, 540, 5 N. W. 739.

Where the plaintiff, in order to prove title, introduced an instrument apparently conveying property to her, it was competent for the defendant, for the purpose of showing that such instrument had originally been signed by the plaintiff's husband and the signature afterwards altered so as to make it appear to be that of the wife, to call expert witnesses to compare the admitted signatures of the plaintiff's husband with the unaltered part of the disputed signature upon the contract in question purporting to be the signature of the plaintiff. The court said that, under the statute (Iowa Code 1897, § 4620) authorizing comparison between the handwriting the genuineness of which is in controversy and writings "of the same person" which are proved to be genuine, it would, apparently, not be competent to introduce in evidence signatures of other persons than of the person whose pretended signature was in question, for the purpose of showing by such comparison that the signature was not the genuine signature of such person, but was the signature of someone else (citing *Peck v. Callaghan*, 95 N. Y. 73); but in this case it was proper for the defendant to show that the property in question belonged to the husband, and, as affirmative evidence of that fact, to prove that the disputed instrument was originally executed to him, and that it was subsequently altered by fraud. *Coppock v. Lampkin* (1901) 114 Iowa, 664, 87 N. W. 685.

The decision in *Wilson v. Irish* (1883) 62 Iowa, 260, 17 N. W. 511, while doubtless correct in excluding as a standard for comparison a letter as to which the only proof was that the witness received it through the mail, and that

he presumed that he had a conversation with the person purporting to have written it as a result of receiving it, is a curious declaration of the law. The opinion says that the modern English decisions are clearly opposed to the admission of papers for the mere purpose of furnishing a standard of comparison; and, wholly ignoring the fact of there being an Iowa statute permitting the admission of writings "proved to be genuine," decides the offered letter to be incompetent, not because not "proved to be genuine," but because not within the rule that writings can be offered in evidence to the jury for comparison only when conceded to be genuine, or such as the other party is estopped to deny, or papers belonging to the witness who was himself previously acquainted with party's handwriting and exhibits them in confirmation and explanation of his own testimony.

Kansas.

The Kansas rule was laid down in 1872 in a comprehensive opinion by Valentine, J., in which he disposed of one by one of the stock objections (mentioned *supra*, I.) to this kind of evidence, where the genuineness of the standard is admitted. On an issue as to the genuineness of the signature of a note purporting to have been signed by the defendant, it was held that an expert who had no knowledge of the defendant's handwriting might testify as to the genuineness of the signature in dispute, by comparison with two letters written and signed by the defendant and introduced in evidence to show what he had said in regard to the note; and also by comparison with signatures admitted by the defendant to be genuine, and introduced in evidence for the mere purpose of comparison; and the jury might also make the same comparison. *Macomber v. Scott*, 10 Kan. 335. This was followed by *Joseph v. First Nat. Bank* (1876) 17 Kan. 256; *Abbott v. Coleman* (1879) 22 Kan. 250, 31 Am. Rep. 186; and *Ort v. Fowler* (1884) 31 Kan. 478, 47 Am. Rep. 501, 2 Pac. 580.

In *State v. Zimmerman* (1891) 47 Kan. 242, 27 Pac. 999, where the defense to an indictment for forgery was that the instrument in question was genuine, another instrument admitted by both parties to have been signed by the party whose signature was charged to have been forged was competent evidence to be examined by the jury and compared with the instrument disputed.

In *Holmberg v. Johnson* (1891) 45 Kan. 197, 25 Pac. 575, the Kansas rule was first liberalized so as to include as proper standards proved writings, without regard to admission by the other side as genuine. Where the court, over objection, permitted a party to introduce evidence of the genuineness of the signatures to other papers executed by the same person as the contract sued upon, it was held that it was the established law of the state to permit proof of the genuineness of the disputed signature by comparison with other signatures on other instruments in writing admitted, or proved, to be genuine.

And now, papers produced by a party as standards for comparison with the signature alleged by the other party to be his are sufficiently established as such by his testimony that he wrote them. *Gaunt v. Harkness* (1894) 53 Kan. 405, 36 Pac. 739.

So in the case of the prosecuting witness in a trial for forgery. *State v. Stegman* (1901) 62 Kan. 476, 63 Pac. 748.

But in an action involving the genuineness

of a mortgage it is improper to allow proof of the genuineness of letters not admitted by the other party to be genuine, to be used by experts as standards of comparison with the signature of another paper involving a collateral issue, and to allow experts to give their opinions as to the genuineness of the signature to such other paper merely from a comparison with the signatures to the letters. In such a case, where the second disputed writing is merely evidence of a collateral fact, and is offered only for the purpose of proving fraud on the part of persons not parties to the action, the signatures used as a basis for comparison should be such as are confessedly genuine; for, in trying the question of the genuineness of the signatures to the letters offered, the jury would be taken away from the main issue and have their attention directed to a collateral matter having no direct bearing whatever on the case in hand. *Gilmore v. Swisher* (1898) 59 Kan. 172, 52 Pac. 426.

Kentucky.

Before the statute of 1886, which changed the rule of proof of handwriting, the Kentucky decisions had established a narrow rule. In *Woodard v. Spiller* (1838) 1 Dana, 179, 25 Am. Dec. 189, proof of the genuineness of specimens of handwriting offered in evidence for comparison was held to have been properly rejected; this was followed in *McAllister v. McAllister* (1847) 7 B. Mon. 269, a decision excepting the two cases of ancient writings and writings already in the case, which the jury might compare.

Witnesses, however, were allowed, in *Hawkins v. Grimes* (1852) 13 B. Mon. 257, to point out apparent differences on the face of a disputed will, between letters and words in different parts of the will, indicating erasures and alterations, on the ground that the pointing out of such discrepancies did not necessarily imply any opinion as to the writing. But the opinion of the witnesses that words apparently inserted were not in the same handwriting as other parts was then inadmissible.

This decision was apparently overruled later in a case (*Northern Bank v. Buford* [1864] 1 Duv. 335) deciding that a witness, not an expert, but having a previous knowledge of the handwriting, might compare the disputed signature with the signature to pleadings on the record.

But in *Fee v. Taylor* (1885) 83 Ky. 259, the rule was laid down that experts without personal knowledge of the handwriting could not compare with proved or admitted genuine specimens.

The statute of 1886, which changed this rule, is § 548 of the General Statutes of 1887, § 1649 of the Statutes of 1899, and § 604 of the Civil Code Practice. It provides that, "upon a dispute as to the genuineness of the handwriting of a person, other handwritings of such person, though not in the case for any other purpose, may be introduced for the purpose of comparison by witnesses with the writing in dispute; and such writings, and the testimony of witnesses respecting them, may be submitted to the court or jury as evidence concerning the genuineness of the writing in dispute: Provided, that: (1) The genuineness of such writings shall be proved, to the satisfaction of the judge, by other than opinion evidence. (2) It must be proved, to the satisfaction of the judge, that they were written before any controversy arose as to the genuineness of the writing in dispute, and no fraud was practised in their selection. (3) A party proposing to introduce such

writings must give reasonable notice of his intention to the opposite party, or his attorney, with reasonable opportunity to examine them before the commencement of the trial. (4) The judge may limit the number of such writings."

Under this statute, it is not competent to submit to witnesses spurious signatures prepared by an expert and mingled with genuine signatures, and to ask the witnesses to select the genuine. *Andrews v. Hayden* (1889) 88 Ky. 453, 11 S. W. 428.

And it was error to allow a witness to the genuineness of a signature, from his knowledge from having seen the person write, whose signature was in dispute, to testify that he had examined the note in dispute several months before with a view to having it discounted by the bank with which he was connected; that he had then compared that signature with the signature of the same person to other papers which he knew to be genuine, but which other papers he had now lost and was unable to produce; and that he had sent that note with those other papers to a bank expert in Cincinnati for the purpose of having him compare the signatures; and that, after this investigation, his bank had actually discounted the note. *Kendall v. Collier* (1895) 97 Ky. 446, 30 S. W. 1002.

The party offering expert witnesses to testify by comparison is entitled to have such witnesses state the grounds upon which their opinion was based, and to point out and explain to the jury the differences which they detected and which induced disbelief on their part; to withhold it from the jury would be to deprive them to a large extent of the very facts best calculated to enable them intelligently to weigh and determine the value of the opinion experts. *Ibid.*

On appeal in an equitable action, the finding of the trial court, based upon conflicting and irreconcilable evidence from comparison of handwriting, as to the genuineness of a signature, will not be disturbed where the disputed signature and the genuine signatures with which it is compared are not brought to the appellate court. *Hughes v. Wood* (1898) 20 Ky. L. Rep. 977, 48 S. W. 152.

Under the provision of the statute for reasonable notice of intention to produce writings to be used for comparison, where there is no contention that this provision had been complied with, or any reasonable opportunity given to examine the writings offered in evidence, the court did not err in refusing to allow them to be introduced. *Bogard v. Johnstone* (1899) 21 Ky. L. Rep. 965, 53 S. W. 651.

But a notice, given a month before the trial of an equity cause, that the plaintiff "will submit for inspection and comparison certain writings and signatures of the defendant," was sufficient notice of what writings were to be submitted, and gave a reasonable opportunity to examine the writings before the commencement of the trial. *Birchett v. Bank of Shelbyville* (1902) 24 Ky. L. Rep. 66, 67 S. W. 371.

And where the parties selected and agreed on a list of genuine signatures, which were produced at the taking of the depositions of witnesses some months previous to the trial, both parties had sufficient opportunity to investigate their genuineness, even though they had not agreed upon it, which made it unnecessary to prove their genuineness to the satisfaction of the court, and was a waiver of the notice of their intended production. *Storey v. First Nat. 62 L. R. A.*

Bank (1903) 24 Ky. L. Rep. 1799, 72 S. W. 318.

Louisiana.

The early Civil Code of Louisiana (of 1808), p. 306, art. 226, provided: "A signature may be proved by at least one credible witness declaring positively that he knows the signature, as having seen the obligation signed by the person from whom, or from whose heirs, the payment or execution of it is demanded; and, if there be no such deposition, the signature of the person must be ascertained by two persons having skill to judge of handwriting, appointed by the judge before whom the cause is pending, which two persons shall report on oath, whether the signature appear to them to be that of the person whose it is alleged to be, on their having compared it with papers acknowledged to have been signed by him."

And, under this Code, a bond filed in the clerk's office was a good standard for comparison, having become a matter of record, and the witness to it need not be brought to prove it, since it could not be disputed. *Sauve v. Dawson* (1812) 2 Mart. (La.) 202.

But in an action on notes against a bank, a note neither proved to have the signature of the president or cashier, nor acknowledged by them, could not be laid before the experts as a basis for comparison. *Conrad v. Louisiana Bank* (1822) 10 Mart. (La.) 700.

The proof by experts must be resorted to in the first instance; but the party offering this kind of testimony is not thereby precluded from producing any other kind of legal evidence, either in aid of, or to contradict, the report of the experts. *Clark v. Cochran* (1814) 3 Mart. (La.) 353.

But where two experts appointed by the court to compare a disputed signature with others acknowledged to be genuine disagreed, and, by consent of the parties, a third person was appointed as an expert to settle the difference, but that person, not being able to ascertain by the mere comparison of handwriting whether the signature was genuine, went about collecting the other circumstances of the case and reported that he was convinced of the genuineness of the signature from that inquiry,—it was held that the report should be set aside; the persons appointed to judge by comparison were not referees to whom the examination of the case was intrusted. *Lecarpentier v. Delery* (1816) 4 Mart. (La.) 454.

Without such consent, however, the trial court cannot appoint a third expert for comparison of handwriting when the two disagree; and the Civil Code requires the contested signature to be tested with a comparison of papers acknowledged to have been signed by the party; and nothing in it authorizes the court to proceed on a single one as a standard. *Barfield v. Hewlett* (1827) 6 Mart. N. S. 78.

By the amending Code of 1825 (La. Code, art. 2241; art. 2245, Rev. Civil Code) the principle of comparison as a means of arriving at truth was preserved, but with an enlarged applicability. *Temple v. Smith*, 7 La. Ann. 562. This provided that, "If the party disavow the signature, or the heirs or other representatives declare that they do not know it, it must be proved by witnesses or comparison, as in other cases."

This provision was modified or superseded by art. 325 of the Code of Practice, which was subsequently adopted, and remains in the same form at present.

Under this article, "If the defendant deny his signature in his answer, or contend that the same has been counterfeited, the plaintiff must prove the genuineness of such signature, either by witnesses who have seen the defendant sign the act, or who declare that they know it to be his signature, because they have frequently seen him write and sign his name. But the proof by witnesses shall not exclude the proof by experts, or by a comparison of the writing as established by the Civil Code."

Decisions made under, and affirming, these provisions are: *Bell v. Norwood* (1834) 7 La. 95; *Pilque v. Labranche* (1836) 9 La. 539; *Ball v. Ball* (1840) 15 La. 173; *Davis v. Police Jury* (1841) 10 La. 533; *Whitney v. Bunnell* (1853) 8 La. Ann. 429; *McDonogh's Succession* (1866) 18 La. Ann. 419; *State v. Barrow* (1879) 31 La. Ann. 691; *Galnes's Succession* (1886) 38 La. Ann. 123.

It was not assignable as error that the court did not appoint experts to determine the genuineness of a disputed signature without being moved to do so by the party. *City Bank v. Foucher* (1836) 9 La. 405.

When a signature is disavowed, the Civil Code requires it to be proved by witnesses or comparison of handwriting; and proving the signature of the subscribing witnesses satisfies neither of these requirements. *Harris v. Paten* (1847) 2 La. Ann. 217.

And where a witness, called to prove the signature of his name as attesting witness upon a document, denied it, the party calling him was entitled to have experts appointed by the court to contradict him and to establish the signature by comparison with admitted signatures of witness, although this was recognized as clearly an exception to the ordinary rule that a party cannot contradict his own witness. *Olinde v. Salzan* (1855) 10 La. Ann. 153.

In *Temple v. Smith* (1852) 7 La. Ann. 562, the clerk of the court was called as an expert to prove a disputed signature by comparison with specimens not "acknowledged," but proved, to be genuine; and in affirming the admission of such evidence the court declared that, under the Louisiana statutes, it was the practice to prove signatures by means of comparison with other documents signed by the party against whom the proof was to be made, whether such other documents are authentic (in the sense of proving themselves) or their genuineness is first satisfactorily proved.

This apparent enlargement of the rule was accompanied by a similar decision that the rule allowing comparison of disputed signatures applies, not only to cases where the instrument to be proved is the immediate basis of the action, as in the case of a suit upon a promissory note or a bond signed by the defendant, who denies his signature, but also where the documents to be proved are introduced as matters of evidence upon incidental questions. *Ibid.*

The Louisiana statutory rule provided expressly only for comparison to be made by experts appointed by the court. So on a prosecution for forging an order for the delivery of goods, when the district attorney was permitted to introduce and offer to the jury another paper or writing irrelevant to the issue for the purpose of instituting a comparison of handwriting and thereby proving that the order alleged to be forged was in the handwriting of the defendant, the court, without any reference to the statute; and reviewing the rules in England and 62 L. R. A.

the United States, decided that this was error, saying: "We are not aware that the question has heretofore been presented to this court for adjudication." *State v. Fritz* (1871) 23 La. Ann. 55.

Maine.

Hammond's Case (1822) 2 Me. 33, 11 Am. Dec. 39, shows that the Massachusetts rule, allowing comparison by a jury with a standard acknowledged or proved to be genuine, and set forth in *Homer v. Wallis*, 11 Mass. 312, 6 Am. Dec. 109, obtained in Maine after the separation. *Chandler v. LeBarron* (1858) 45 Me. 534, lays down the same rule. The principal point decided in the earlier case was that a witness who had carefully examined certain checks admitted by one indicted for forgery to have been in his handwriting and to have been since destroyed, might testify to the similitude between those signatures and the forgery, and to his belief that the forged signature was in the handwriting of the prisoner.

Page v. Homans (1837) 14 Me. 478, added the limitation that a nonexpert witness, having no previous knowledge of the handwriting in question, who had not been in a situation to acquire a peculiar degree of skill in regard to handwriting, was not competent to testify in relation to disputed handwriting merely from comparison with specimens of signatures produced at the trial.

So witnesses who by study, occupation, and habit had become skilful in marking and distinguishing the characteristics of handwriting might compare a handwriting in question with other writings admitted or fully proved to be written by the person whose signature was in dispute. *Sweetser v. Lowell* (1851) 33 Me. 446.

In *Woodman v. Dana* (1860) 52 Me. 9, the whole rule as to witness comparison was stated. No witness, except an expert, is competent to give an opinion simply by comparison of hands by juxtaposition, and this is done by the production of the standard in open court; nonexperts can only give opinions in cases where they have had previous acquaintance and knowledge of the handwriting by which the genuineness of the controverted specimen is to be tested, and, in this case, the standard would not be present. The expert need have no previous acquaintance or knowledge of his standard to authorize him to express an opinion by comparison. The non-expert cannot express an opinion without such previous acquaintance or knowledge.

In an action on a promissory note it was held admissible, in order to prove that the note was fraudulent in its inception, and that the design of the payee was not to deliver the property sold, to introduce writings made in similar transactions about the same time, in which transactions the property was not delivered, showing by comparison of the handwriting of the different papers the identity of the person engaged in the different transactions. *Nichols v. Baker* (1883) 75 Me. 334.

Maryland.

In an early Maryland case it was held to be error to allow a nonexpert witness to compare a paper which he had seen written, and which was shown to him in order to refresh his memory, with the disputed writing. *Smith v. Walton* (1849) 8 Gill, 78.

In *Armstrong v. Thruston* (1857) 11 Md. 148, comparison by such a witness was denied, and the papers offered were held to have been improperly submitted to the jury.

Williams v. Drexel (1859) 14 Md. 566, apparently established the rule in Maryland that the jury might compare with papers admitted or clearly proved to be genuine, and already in the case.

But *Tome v. Parkersburg Branch R. Co.* (1873) 39 Md. 38, 17 Am. Rep. 540, declared that an expert witness whose only knowledge on the subject of the handwriting in question was derived from a previous examination of signatures which had been put in his hands to enable him to testify was incompetent to testify as to the genuineness of the disputed signature by comparison with such other signatures which were actually in evidence; or that the genuineness of handwriting cannot be "established by the opinions of a witness whose belief is founded upon a mere naked comparison of papers submitted for his examination *post litem motam*." The strong dissenting opinion of Alvey, J., however, showed that this decision was in conflict with *Williams v. Drexel*. 14 Md. 566. In accord with this case are *Niller v. Johnson* (1867) 27 Md. 6, and *Herrick v. Swomley* (1881) 56 Md. 439.

The Maryland rule, however, was changed by the passage, in 1888, of an act providing: "Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury, or the court, as the case may be, as evidence of the genuineness or otherwise of the writing in dispute." Maryland Code, art. 35, § 6.

Massachusetts.

As Massachusetts is historically the leading American state which clung to the ancient practice of jury comparison, the decisions of its courts are of especial interest and importance.

The use of this kind of evidence first appears in *Hall v. Huse* (1813) 10 Mass. 39. In an action on a note, the defendant offered several witnesses to prove from their acquaintance with his handwriting, that the signature was not genuine, and also offered what was proved to be a genuine signature. The evidence was admitted, over objection, and the jury were instructed that, if they believed from the evidence that the signature was not genuine, they should find for the defendant.

But *Homer v. Wallis* (1814) 11 Mass. 309, 6 Am. Dec. 169, is the leading case. There the plaintiff in an action on a note, in order to prove the signature to be the defendant's, produced another note proved to have been signed by the defendant by a witness who saw him sign it, and it was permitted to go to the jury under objection. Upon appeal this was held proper evidence for the jury, Parker, Ch. J., delivering the opinion of the court: "Whatever doubts there may now be in England as to this species of evidence,—for in former times it was holden admissible, and has never yet, to our knowledge, been absolutely settled otherwise,—we have no doubt that it has become, by long and invariable usage in this state, competent evidence here. It has been once or twice questioned at nisi prius, in consequence of an observation in Peake, but has never been made a serious question of. Indeed we have no doubt that a comparison, by the jury, of the contested signature with other writings proved to be genuine is, by the common law of this commonwealth, proper evidence. It may frequently be unsatisfactory, but some-

times it may be decisive. At any rate, like all other evidence, it is to be weighed with discretion by the jury."

Following this, in an action on bank notes alleged to be forged, the plaintiffs not having gone into proof by comparison of hands of the signature of the bank's president upon the notes, the court charged the jury that they might presume that such comparison would be unfavorable to the plaintiffs, saying that the law was perfectly settled in the commonwealth that comparison of hands was proper evidence to be submitted to the jury. This charge was held proper upon appeal. *Salem Bank v. Gloucester Bank* (1820) 17 Mass. 1, 9 Am. Dec. 111.

In *Moody v. Rowell* (1835) 17 Pick. 490, 28 Am. Dec. 317, however, the whole question of comparison was settled, and the rule extended to comparison by experts. Shaw, Ch. J., said in that case: "It is competent, in order to prove that a handwriting in question is genuine or fabricated and forged, to give in evidence another signature of the same person, to a paper not otherwise competent evidence in the cause, to enable the court and jury, by an examination and comparison of the genuine specimen with the controverted one, to form an opinion whether the latter be or be not genuine."

. . . The point has been settled by a long course of practice and judicial decision, and we are not at liberty to depart from it. Some of the reasons given for the adoption of a contrary rule in England are now obsolete, and certainly do not apply here; the leading one is that jurors may not be able to write or read, and so would not be competent to decide upon such evidence. . . . The rule is now, it must be admitted, settled otherwise in England." And that it was competent to call a witness professing to have knowledge in handwriting and skill in detecting forgeries to give an opinion to the jury founded on a comparison, without any personal knowledge of the actual handwriting of the person whose signature was in controversy, the chief justice thought equally settled by the case of *Homer v. Wallis*.

Later, in an action upon a note, where, in order to determine whether an indorsement of part payment, but not signed, was in the plaintiff's handwriting, other papers proved to have been written by the plaintiff were admitted in evidence to enable the jury to judge of the genuineness of the paper in question by comparison, Shaw, Ch. J., said: "We consider it a settled rule in this commonwealth that such evidence is admissible; and that there is no difference in this respect between proof of a signature and proof of other handwriting." *Richardson v. Newcomb* (1838) 21 Pick. 313.

In an action upon a note against an indorser, the defense being that the indorsement was forged, it was held that the guaranty of the defendant, signed by the defendant, and indorsed on the same note, and admitted by the defendant to be genuine, was competent evidence from which the jury might draw such inferences as to the genuineness of the first indorsement as they might think reasonable. There was no mention of comparison in the opinion; but, as the admitted act and signature of the defendant, it was competent evidence against him; if any instruction was desired as to its legal effect, it should have been asked for. *Cabot Bank v. Russell* (1855) 4 Gray, 167.

But nothing but original signatures can be used as standards of comparison by which to

prove other signatures to be genuine. *Com. v. Eastman* (1848) 1 Cush. 189, 48 Am. Dec. 596.

And collateral issues, tending to distract the minds of the jurors from the precise question before them, must be avoided. *Bacon v. Williams* (1850) 13 Gray, 525.

Michigan.

Vinton v. Peck (1866) 14 Mich. 287, established the rule in Michigan. This decides that, when papers offered as a means of comparison with the disputed signatures are a part of the records of the cause, as an appeal bond and affidavit on file, and so admitted to be genuine by the party against whom they are offered, the jury may compare them, and "a witness" may also use them to form an opinion concerning the handwriting.

So the testimony of an expert witness that the word "eight" in a promissory note had not been altered to "eighty" since its execution was proper; and, although the jury may examine the papers for themselves, and opinions are not usually admissible where the jury can form their own conclusions unaided, it would not be safe to adopt a rule which assumes such a degree of knowledge and skill among the jurors. Even reasonably expert writers may obtain valuable aid from opinions on such questions, and, as neither law nor custom requires a standard of education, to exclude such aid would lead to absurd results. *Ibid.*

The same rule was applied in a prosecution for forgery, where a diary which, although taken from the prisoner when he was arrested, was not in itself, or as to the writing contained in it, in any way connected with the case, was offered simply to furnish a standard for comparison with the forgery; it was not admissible, being a disputed paper not belonging to the case. *Van Sickle v. People* (1874) 29 Mich. 61.

And it is error on the trial of an indictment for forgery to introduce even the records of a probate court, for the express purpose of putting a will in evidence in order that the signature to it may be compared with the signature alleged to have been forged; but it was held proper to allow the bail bond of the prisoner and his codefendant, deposited as security for their appearance, and his affidavit for a continuance in the case, to be admitted in evidence, and to be used in making comparisons of the handwriting. They were part of the files in the cause, and, as such, belonged to the case to be used for any material and relevant purpose therein. *People v. Parker* (1887) 67 Mich. 222, 34 N. W. 720. To the same general effect, are *Re Foster* (1876) 34 Mich. 21; *First Nat. Bank v. Robert* (1879) 41 Mich. 709, 3 N. W. 199; *Howard v. Patrick* (1880) 43 Mich. 121, 5 N. W. 84; *Wiedman v. Symes* (1898) 116 Mich. 619, 74 N. W. 1008.

Other examples of the use of papers already in evidence in the cause for comparison with the disputed writing are: *Cameron v. Culkins*, 44 Mich. 531, 7 N. W. 157; *Regents of University v. Rose*, 45 Mich. 254, 4 N. W. 738, 5 N. W. 674, 7 N. W. 875.

Upon the question as to the genuineness of a signature, where it was claimed that the signature was first outlined with a pencil and that outline followed by the use of a pen and ink, the supreme court made an examination of the signature with a magnifying glass, comparing it with another admitted to be genuine and in evidence, and decided that the disputed signature was a forgery, the two signatures being 62 L. R. A.

too evenly alike to be both genuine. *Day v. Cole* (1887) 65 Mich. 129, 31 N. W. 823.

And on a prosecution for forgery, where certain genuine signatures of the person whose name the defendant was accused of forging were submitted without objection, so that the jury might compare them with the alleged forgery, a charge to the jury that they were expected to apply their own judgment to ascertain the evidentiary effect of a comparison of the signatures, and not entirely rely on the testimony from it of experts, was proper. *People v. Gale* (1883) 50 Mich. 237, 15 N. W. 99.

There was in several cases, however, a marked divergence from the principles laid down in *Vinton v. Peck* and the cases following it.

Worth v. McConnell (1880) 42 Mich. 473, 4 N. W. 198, is apparently, although probably not actually, within the meaning of *Vinton v. Peck*. In an action on a promissory note the validity of which was not denied by the defendant, the defense being a counterclaim for breach of warranty, where the defendant testified, for the purpose of preventing a comparison by experts of the signature to the note with letters, alleged by the plaintiff to have been written by the defendant and expressing satisfaction with the performance of the contract, that the signature of his name upon the note in suit was not in his hand, it was held that it was proper to allow a witness, not an expert, who testified that he had seen the defendant write his name, to compare a note in his possession which he had seen the defendant sign with the note in suit, and to give his opinion therefrom that the latter was genuine, and to make a like comparison of the note in suit with the letters, and to give his opinion therefrom that they were written by the same person. *Worth v. McConnell* (1880) 42 Mich. 473, 4 N. W. 198.

It was said by the court in this case that "this comes clearly within what was said, and the authorities cited, in *Vinton v. Peck*;" and that seems to be the fact, in regard to the second comparison, between the letters and the note in suit. The note in suit was in evidence, but the witness who compared it with the letters was not an expert; and the words of *Vinton v. Peck* actually do legitimize the comparison by "witnesses" (without regard to expertness) with specimens already in the case,—whatever the intention of the court in *Vinton v. Peck* may have been in regard to such a proposition, which is unique. But the establishment of the note in suit, as a standard of comparison with the letters, by comparison by a nonexpert witness with another standard not itself in the case, seems to be wholly unsupported by authority, Michigan or other. The evidence of the witness, from his own knowledge of the handwriting of the defendant, would be enough to have a document read in evidence in ordinary circumstances, but not enough to establish it as a standard for comparison, and certainly not enough, anywhere, against the direct oath of the alleged author that he did not write it.

In *Dietz v. Fourth Nat. Bank* (1888) 69 Mich. 287, 37 N. W. 220, it was held that, on the cross-examination of the plaintiff in an action to recover the amount of certificates of deposit from a bank which alleged that the plaintiff had indorsed them to a third person, it was error in the court to refuse to allow several documents which, when shown to him, he admitted bore his genuine signature, to go to the jury for the purpose of comparison with his al-

leged indorsement; the rule in Michigan that such comparison cannot be made with papers not legitimately in the cause for some other purpose is principally based upon the danger of raising new and unexpected issues against a party, who cannot be expected to be prepared to meet them; but when the party himself is on the stand, and denies his own signature when it is shown to him, it is open to his opponent to use any reasonable test of cross-examination on his own acts, and, if he admits signatures which it is claimed are identical in character, that fact would be of great importance. He could not be taken by surprise by papers which he admitted to be genuine, and such admitted signatures would form the best basis of comparison. Witnesses of handwriting are themselves allowed to form an opinion from what they have seen of papers which they know to be genuine. If the plaintiff had denied his signature to those documents, it would have raised an immaterial and foreign issue; but, he having admitted it, nothing was left but a comparison between the admitted signatures and the one in issue, which was denied. In such a case the chief value of cross-examination would be destroyed, unless the jury should be allowed to compare what the witness admitted he signed with what he denied. This decision, however, is a radical departure from the established rule.

It was also held in this case that when the plaintiff denied that certificates had ever been in his possession, an inventory of an estate sworn to by him and introduced simply to contradict him was a proper means of comparison with his signature, which was disputed, and should have been allowed to go to the jury. *Ibid.*

In a prosecution involving forgery by the prisoner of a mortgage with its accompanying note, which were assigned to the complainant, testimony of an expert, by comparison, that the handwriting of the signature of the assignment and of the indorsements upon the note were by the same person who wrote the body of the mortgage, and that the signatures were forged, it not being shown that any one of the writings compared was done by the defendant, is incompetent as not being sufficient to connect the accused with the offense. *People v. Cline* (1880) 44 Mich. 290, 6 N. W. 671.

Minnesota.

The case of *Morrison v. Porter* (1886) 35 Minn. 425, 59 Am. Rep. 331, 29 N. W. 54, established the Minnesota rule to be that, upon the trial of an issue as to the genuineness of handwriting, other writings admitted to be genuine, and offered for no other purpose, may be received in evidence for the purpose of comparison by experts and the jury. The court said that the authorities were so at variance that they were at liberty to adopt the rule of evidence which seemed to be most consistent with reason and conducive to the best results. The opinion adds: "In general and from necessity the authenticity of handwriting must be subject to proof by comparison of some sort, or by testimony which is based upon comparison, between the writing in question and that which is in some manner recognized or shown to be genuine. This is everywhere allowed, through the opinions of witnesses who have acquired a knowledge, more or less complete, of the handwriting of a person, as by having seen him write, or from acquaintance with papers authenticated as genuine. In such cases the con-

ception of the handwriting retained in the mind of the witness becomes a standard for comparison, by reference to which his opinion is formed and given in evidence. It would seem that a standard generally not less satisfactory, and very often much more satisfactory, is afforded by the opportunity for examining, side by side, the writing in dispute and other writings of unquestioned authenticity; and this, we think, is in accordance with the common judgment and experience of men." **Mississippi.**

In 1874 the Mississippi rule was first stated to be to allow experts to testify whether a disputed signature was by the same hand as another signature, written before the controversy arose, admitted to be genuine and offered for the mere purpose of enabling the jury to judge by comparison. *Wilson v. Beauchamp*, 50 Miss. 24.

The limitation to writings made "before the controversy arose," however, does not appear in any other Mississippi case. Except for this, the case of *Roy v. First Nat. Bank* (1903; Miss.) 33 So. 494, exactly follows *Wilson v. Beauchamp*.

The other limitation, mentioned in that case, —to admitted writings,—had disappeared in the meantime, as is seen from *Garvin v. State* (1876) 52 Miss. 207, and *Coleman v. Adair* (1898) 75 Miss. 660, 23 So. 369, which extended the rule to writings "admitted or proved" to be genuine.

Missouri.

Before the statute of 1895, which changed the Missouri rule to conform to the modern practice, the decisions in this jurisdiction underwent considerable change in the direction of liberalization.

In *Dow v. Spenny* (1860) 29 Mo. 386; *State v. Clinton* (1878) 67 Mo. 380, 29 Am. Rep. 506; *Pourcelly v. Lewis* (1880) 8 Mo. App. 593; *Rose v. First Nat. Bank* (1886) 91 Mo. 399, 60 Am. Rep. 258, 3 S. W. 876; *Edmonston v. Henry* (1891) 45 Mo. App. 346; *First Nat. Bank v. Stanley* (1891) 46 Mo. App. 440; *State v. Minton* (1893) 116 Mo. 605, 22 S. W. 808; and *Doud v. Reid* (1893) 53 Mo. App. 553,—other papers having no connection with the case were held generally not to be proper to be introduced in evidence simply for the purpose of comparison with the disputed writing; on the ground that to admit such writings would lead to an indefinite number of collateral issues.

But the indorsement on a disputed check proved by an eyewitness to have been written by the supposed drawer was proper for comparison. *State v. Scott* (1870) 45 Mo. 302.

And on a murder trial the testimony signed by the defendant at the inquest over the body of the murdered person, filed with the clerk and produced and read by him in court, was proper for comparison, as evidence in the cause. *State v. David* (1895) 131 Mo. 380, 33 S. W. 28.

Pleadings signed by parties were also proper, when the signatures were proved to be genuine. *Corby v. Weddle* (1874) 57 Mo. 453; *Lachance v. Loehlein* (1884) 15 Mo. App. 460.

This principle included an affidavit previously filed in the probate court by a claimant against an estate, in an action on the claim. *Elsenrath v. Kallmeyer* (1895) 61 Mo. App. 430.

But in an action on a note to which the plea was *non est factum*, the signature of the defendant to this plea was not proper for comparison, since the defendant might have disguised the

hand intentionally. *Springer v. Hall* (1884) 83 Mo. 693, 53 Am. Rep. 595.

Later appeared the extension of the rule to writings which the party against whom they were offered conceded to be genuine, or whose genuineness he was estopped to deny. *State v. Thompson*, 13^o Mo. 301, 34 S. W. 31; *DeArman v. Taggart* (1896) 65 Mo. App. 82.

As to the concession of genuineness, it was not error in the court to refuse a request made by the defendant, to charge the jury to disregard so much of the evidence of expert witnesses called by the plaintiff as was given from comparison of the signature in dispute with the signature to a promissory note and a receipt admitted by the defendant's attorney to be in her hand. It was conceded that the receipt and note were signed with the genuine signature of the defendant, and no reason was perceived why they were not proper standards of comparison by which to test the genuineness of the disputed signature. *Singer Mfg. Co. v. Clay* (1893) 53 Mo. App. 412.

But a party could not offer evidence of the admission of the other party that signatures offered were genuine. *Edmonston v. Henry* (1891) 45 Mo. App. 346.

And an admission by a party in a deposition would not prevent his denial of genuineness at the trial. *McCombs v. Foster* (1895) 62 Mo. App. 303.

He might be compelled to answer, on cross-examination, however, whether the writings offered were signed by him; but the other party would be bound by his answer. *Ibid.*

The "concession" of genuineness, also, if made by the party offering the writings, was no concession, avoiding an issue. *Doud v. Reid* (1893) 53 Mo. App. 553.

The rule as to estoppel applied to a case where a defendant was estopped to deny the genuineness of the signature to notes which he had transferred. No collateral issue could be raised. *State v. Tompkins* (1880) 71 Mo. 613. So as to the defendant's answer, in *Lachance v. Loeblein* (1884) 15 Mo. App. 460.

The rule which excluded extrinsic papers and signatures was substantially the same in direct and cross-examination. *Rose v. First Nat. Bank* (1886) 91 Mo. 399, 60 Am. Rep. 258, 3 S. W. 876.

And the rule allowing comparison by witnesses under these limitations was further limited to experts, in *State v. Owen* (1881) 73 Mo. 440.

In a prosecution in the Federal court, for false registration by a registration officer, experts were allowed, under the Missouri rule, to express their opinion that the names of certain fictitious persons appearing in the registration book, and the defendant's own signature to his oath of office (which does not appear to have been put in evidence for any other purpose, or to have been admitted to be genuine), were in the same handwriting. *United States v. Pendergast* (1887) 32 Fed. 198.

Under the rule that no collateral issue must be raised in regard to an offered standard, a copy of a document, as to which there could be any question of the exact reproduction of the original, could not be used. *Geer v. Missouri Lumber & Min. Co.* (1896) 134 Mo. 85, 34 S. W. 1099.

The statute of 1895 (Mo. Rev. Stat. 1899, § 4679), is a literal copy of the provision of the English common-law procedure act of 1854, chap. 125, § 27, (*supra*, II., b), and is presumed 62 L. R. A.

to have been enacted with the meaning and construction given it by the courts of England. *St. Louis Nat. Bank v. Hoffman* (1898) 74 Mo. App. 203.

So, following *Cresswell v. Jackson*, 2 Fost. & F. 24, under this act (Burn's Fr. Code 1896, § 1398), allowing the comparison of a disputed handwriting with "any writing" proved to the satisfaction of the judge to be genuine, in an action against a defendant whom the plaintiff charged with forging a promissory note paid by the plaintiff, other writings of the person alleged to have forged the note are admissible for comparison with the note, as well as other writings of the person whose hand was alleged to have been forged. *Ibid.*

But the statute does not authorize the introduction of signatures of a person who is not charged with being connected in any way with the forgery. *Cook v. Strother* (1903; Mo. App.) 75 S. W. 175.

Montana.

The testimony, by comparison, as to the genuineness of papers alleged to have been forged, of a county clerk who had never seen the person purporting to have executed them write, was held incompetent in *Davis v. Fredericks* (1878) 3 Mont. 262, following *Strother v. Lucas*, 6 Pet. 767, 8 L. ed. 575, as a controlling authority.

But the Montana Code of Civil Procedure of 1895 now provides: "§ 3235: Evidence respecting the handwriting may also be given by comparison made by the witness or jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge.

"§ 3236: Where a writing is more than thirty years old, the comparisons may be made with writing purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing the fact." *Nebraska.*

The Nebraska Code of Civil Procedure, adopted at the admission of the state, provides, § 344 (Comp. Stat. 1901, § 5918), that "evidence respecting handwriting may be given by comparisons made by experts, or by the jury, with writings of the same person which are proved to be genuine."

So a witness who was not shown to be an expert in judging handwriting or in the comparison of hands, and had no knowledge whatever of either the handwriting or the signature of the person whose signature was in dispute, was held not to be competent, under the most liberal rule adopted by the courts of any of the states, to give his opinion as to the genuineness of the signature in question by comparing it with the signatures of the same person attached to the pleadings in the case. *First Nat. Bank v. Llerman* (1876) 5 Neb. 247.

And under this provision writings used by experts for comparison with the disputed signature should also be regularly admitted in evidence upon proof of genuineness for the purpose of permitting the jury to make the same comparison. *First Nat. Bank v. Carson* (1896) 48 Neb. 763, 87 N. W. 779.

In *Capital Nat. Bank v. Williams* (1892) 35 Neb. 410, 53 N. W. 202, an equitable action to foreclose a mortgage, in which the making of the note and mortgage was denied by the defendant, the court on appeal compared the signature to the note with genuine signatures used similarly by the court and jury below.

Other cases of comparison under the Code are: *Huff v. Nims* (1881) 11 Neb. 363, 9 N. W. 548; *Grand Island Bkg. Co. v. Shoemaker* (1890) 31 Neb. 124, 47 N. W. 696; *Norfolk Nat. Bank v. Job* (1896) 48 Neb. 774, 67 N. W. 781. *New Hampshire*.

The general rule in *New Hampshire* as to the comparison of handwriting as finally developed in the principal case, *UNIVERSITY OF ILLINOIS V. SPALDING*, needs little amplification.

The doctrine laid down in *Myers v. Toscan* (1824) 3 N. H. 47, that comparison by the jury with purely irrelevant papers not in evidence for some other purpose was allowable, but only when used in corroboration of other and direct evidence by witnesses from knowledge of the handwriting in question, is not without support,—in the Pennsylvania courts, for example.

Bowman v. Sanborn (1852) 25 N. H. 87, seemed deliberately to change this rule, while acknowledging, as the opinion does, that the "practice" was not to rely upon the comparison until evidence of belief in the handwriting derived from knowledge of it had been introduced. This decision limited the requirement of introductory direct evidence to cases where the standard offered was put in evidence solely for the purpose of comparison. When it was already in evidence, no such preliminary evidence was necessary.

In *Reed v. Spaulding* (1860) 42 N. H. 114, the opinion probably was not intended, in the phrase limiting comparison to "signatures admitted to be genuine, and which are in evidence before the jury," to exclude comparison with any writing not already in evidence for some other purpose. The objection here was that the standard of comparison was not in evidence at all, not being in existence. The other decided point limited comparison by witnesses to experts.

State v. Shaborn (1866) 46 N. H. 497, 88 Am. Dec. 224, was not a case of actual juxtaposition in court, the disputed signatures not being produced; but was treated as subject to the same rule. This case was a criminal prosecution, and an expert in handwriting was properly allowed to testify, for the purpose of proving entries upon two hotel registers to have been made by the defendant, that they were in the handwriting of the person who wrote certain other signatures which were produced and proved on the trial or admitted to be the defendant's hand, although these registers were not before the jury, it being found by the court that they had been destroyed by the defendant for the purpose of suppressing the evidence; and the fact that, in the absence of the registers, the jury had no opportunity for an actual comparison of the handwriting, in order to test the opinion of the expert, was a fact of which the defendant, who destroyed them, could not complain; and, in addition, in the case of a non-expert who testifies from a knowledge of an individual's handwriting derived from once seeing him write, the signature which he saw made is not ordinarily received for the purpose of comparison, but such witness speaks from a comparison of the signature in question with the exemplar in his own mind, and the jury have no means of testing the accuracy of his comparison.

That *State v. Hastings* (1873) 53 N. H. 452, was not a satisfactory case upon which to found any "departure from the common law and from the earlier *New Hampshire* cases" seems 62 L. R. A.

to be established in *UNIVERSITY OF ILLINOIS V. SPALDING*. Certainly that part of the decision in *State v. Hastings* which declares that "the jury are to be instructed that they are first to find, upon all the evidence bearing upon that point, the fact whether the writing introduced for the purpose of comparison, or sought to be used for that purpose, is genuine," is without authority, although apparent support is found in an overruled Vermont case,—*State v. Ward*, 39 Vt. 225, *infra*.

The other two cases, *State v. Clark* (1874) 54 N. H. 456, and *Carter v. Jackson* (1877) 58 N. H. 156, are inconclusive as to the main question of the admission in evidence, for the mere purpose of comparison, of writings not admitted to be genuine.

The result attained in *UNIVERSITY OF ILLINOIS V. SPALDING* is entirely satisfactory, and the difficulty observed by some courts, in considering the judicial establishment of such a rule, that, without a statutory interposition, the trial court could not assume to itself the power to determine for itself, without the help of the triers of fact, the jury, the fact of the genuineness of offered standards of comparison, is boldly overcome.

New Jersey.

The early rule in *New Jersey* excluded comparison with irrelevant papers not in evidence in the cause for any other purpose. *West v. State* (1849) 22 N. J. L. 212. Following, in part, *Crisman v. Schoonover* (1809) 3 N. J. L. 525.

But the Revision of 1877, p. 381, § 19 (now 2 Gen. Stat. 1895, p. 1400, § 19), provided "that in all cases where the genuineness of any signature or writing is in dispute, comparison of the disputed signature or writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses; and such writings, and the testimony of witnesses respecting the same, may be submitted to the court or jury as evidence of the genuineness or otherwise of the signature or writing in dispute: *Provided, nevertheless*, that where the handwriting of any person is sought to be disproved by comparison with other writing made by him, not admissible in evidence in the cause for any other purpose, such writings, before they can be compared with the signature or writing in dispute, must, if sought to be used before the court or jury by the party in whose handwriting they are, be proved to have been written before any dispute arose as to the genuineness of the signature or writing in controversy."

And decisions under this statute are: *Mutual Ben. L. Ins. Co. v. Brown* (1878) 30 N. J. Eq. 193; *Black v. Black* (1878) 30 N. J. Eq. 215; *Yeomans v. Petty* (1885) 40 N. J. Eq. 495, 4 Atl. 631; and *Wheeler & W. Mfg. Co. v. Buckhout* (1897) 60 N. J. L. 102, 36 Atl. 772. *New Mexico*.

In *Staeb v. Jaramillo* (1883) 3 N. M. 1, 1 Pac. 170, it was decided that a paper not otherwise properly in evidence in the case could not be introduced for comparison of handwriting. *New York*.

The earliest case, *Titford v. Knott* (1801) 2 Johns. Cas. 211, declared that a witness without previous knowledge of the handwriting in question could not testify as to its genuineness from comparison in court. The same decision was made in *Wilson v. Kirkland* (1843) 5 Hill, 182.

As to writings not in evidence for another

purpose, the jury were refused permission in very early cases to compare the disputed writing with admitted signatures, even after the clashing of parol proof of genuineness. *Haskins v. Stuyvesant* (1809) Anthon N. P. 97; *Hutchins' Case* (1819) 4 N. Y. City Hall Rec. 119.

Yet, in *People v. Hewit* (1823) 2 Park. Crim. Rep. 20, Walworth, J., held that, when the ordinary evidence of genuineness was so contradictory as to leave the question doubtful, evidence by comparison with papers produced for the purpose might be given.

Later, however, the English rule, excluding from the consideration of the jury papers offered simply for comparison by juxtaposition, was adopted. *Jackson ex dem. Parker v. Phillips* (1828) 9 Cow. 94; *Goodyear v. Vosburgh* (1872) 63 Barb. 154; *Glover v. New York* (1876) 7 Hun, 232; *Merritt v. Campbell* (1880) 79 N. Y. 625. And so it was improper to admit such an irrelevant paper merely for the purpose of showing to the jury "the general character" of the signature. *Van Wyck v. McIntosh* (1856) 14 N. Y. 439.

This applied also to writings proved to have been admitted to be genuine (*Hynes v. McDermott* [1879] 7 Abb. N. C. 98; Affirmed in 82 N. Y. 41, 37 Am. Rep. 538); and to writings admitted on the trial to be genuine (*Randolph v. Loughlin* [1872] 48 N. Y. 456).

Cases deciding that writings already properly in evidence for some other purpose might be compared by the jury with the disputed writing are: *Hardy v. Norton* (1873) 66 Barb. 527; *Bronner v. Loomis* (1878) 14 Hun, 341; *Hunt v. Lawless* (1879) 7 Abb. N. C. 113 (compared by a referee); *Re Merchant* (1864) 1 Tucker, 151 (by the court); *Re Rollwagen* (1874) 48 How. Pr. 289, Affirmed in 3 Hun, 121, 63 N. Y. 504 (by the court).

The law in this state as to comparison by witnesses (as distinguished from jury comparison) suffered two complete changes, even before the statute.

In *Rogers v. Shaler* (1809) Anthon N. P. 109, it was held that any witness, whether or not he had seen the person write whose handwriting was disputed, might compare the disputed writing with others in evidence in the case, the jury not being competent to make such a comparison. This was an apparent conflict with *Titford v. Knott* (1801) 2 Johns. Cas. 211.

So in *Jackson ex dem. Van Dusen v. Van Dusen* (1809) 5 Johns. 144, 4 Am. Dec. 330, evidence that the initials of a witness to a will were similar to another signature of the same initials in the possession of a witness was not inadmissible under the rule of comparison of hands.

And in *Finch v. Gridley* (1841) 25 Wend. 469, a diploma was proved to be genuine by a nonexpert witness who had himself obtained a diploma from the same institute and so had means of becoming familiar with the signatures of the officers of the institute, by comparison of the seal and signatures upon the diploma in dispute with those upon his own.

But in *Phoenix F. Ins. Co. v. Philip* (1834) 13 Wend. 81, a handwriting expert was not allowed to give his opinion whether certain accounts written in a book were written at the same time.

From 1845 on, however, the cases went to the extreme in exclusion of expert evidence by comparison. On an indictment for forgery an ex-

pert was entirely precluded from comparing. *People v. Spooner* (1845) 1 Denio, 343, 43 Am. Dec. 672.

In *Ellis v. People* (1861) 21 How. Pr. 356, experts were declared not to be properly allowed "to take the place and usurp the functions of the jury," by comparing the disputed signature with other writings already in evidence; and to the same effect are *Re Merchant* (1864) Tucker, 151, and *Frank v. Chemical Nat. Bank* (1874) 5 Jones & S. 26.

Dubois v. Baker (1864) 30 N. Y. 353, marked the beginning of a second change, so as to accord with the usual American limited rule. In that case, in order to prove that the body of a promissory note was written above a blank signature of the apparent maker, it was competent to ask an expert whether the body and the signature were written with the same ink; whether an apparent erasure in the note was made after the body of the note was written, and also whether, by comparison of the body of the note with other writings of the payee already in evidence, it was more crowded, and the words were more cramped and confined than his usual writing.

After this, in *Johnson v. Hicks* (1869) 1 Lans. 150; *Roe v. Roe* (1875) 8 Jones & S. 1; *Miles v. Loomis* (1877) 10 Hun, 372, Affirmed in 75 N. Y. 288, 31 Am. Rep. 470; *Haughey v. Wright* (1877) 12 Hun, 179; *Merritt v. Campbell* (1880) 79 N. Y. 625; and *Sarvent v. Hestra* (1880) 5 Redf. 47,—the rule was settled in regard to experts, that they might compare the disputed writings with writings properly in evidence to prove other facts; but they might not compare photographic copies, the originals of which were not in evidence, under the rule that there could be no comparison at all, by either witness or jury, unless the writings from which comparison was to be made were properly in evidence in the case for some other purpose. *Hynes v. McDermott* (1880) 82 N. Y. 41, 37 Am. Rep. 538, Affirmed 7 Abb. N. C. 98.

On a trial for forgery, when the prosecution had put in evidence, without objection, a promissory note on which was the genuine indorsement of the complainant, and an account book of the defendant, in which the defendant had written the complainant's name and the items of an account between the complainant and himself, it was held proper to allow witnesses for the prosecution to compare the genuine indorsement of the complainant with the signatures of the notes alleged to have been forged, and to give an opinion based on such comparison as to the genuineness of the latter; also to allow a comparison of these signatures with the handwriting of the defendant in the account book and in the body of one of the notes alleged to have been forged, which he testified was written by him. It was within the discretion of the court to allow particular marks of resemblance or dissimilarity, as the case might be, between the several pieces of handwriting, to be pointed out to the jury, and to allow the jury to take into their hands the writings proved in the case, and examine and compare them. *Pontius v. People* (1880) 21 Hun, 328, Affirmed in 82 N. Y. 339.

But an expert witness might not give a detailed and minute description of both the disputed writing and irrelevant writings not in evidence, since the object of the testimony was to lay a basis for a comparison of the handwritings by the jury (or in this case the referee).

Morey v. Safe Deposit Co. (1871) 2 Jones & S. 154.

Chapter 36 of the Laws of 1880 provided as follows: "Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses in all trials and proceedings, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."

The evidence of genuineness of the offered standard, under this statute, is addressed to the court to whose satisfaction it must be proved. Hall v. Van Vrankin (1882) 64 How. Pr. 407.

But the statute of 1880, although allowing comparison by "witnesses," apparently generally, did not change the rule requiring proof by comparison of handwriting to be made by experts; and a witness not an expert, permitted to give his opinion as to the genuineness of handwriting based merely on comparison, would be usurping the duty of the jury. McKay v. Lasher (1886) 42 Hun, 270.

And in Peck v. Callaghan (1884) 95 N. Y. 73, its effect was further limited. "Any writing proved to the satisfaction of the court to be genuine," was there limited to such writings as purport to be the writing of the person the genuineness of whose signature is disputed and which is the subject of controversy in the action; and was held to exclude specimens of the handwriting of a person alleged to have forged the signature in dispute. This was followed in Bruyn v. Russell (1889) 52 Hun, 17, 4 N. Y. Supp. 784. (The *dictum* of the court to the effect that "the disputed writing referred to in the statute relates only to the instrument which is the subject of controversy in the action" was overruled in People v. Molineux, 168 N. Y. 264, 62 L. R. A. 103, 61 N. E. 286, *infra*.)

This defect, however, was cured by the passage of chapter 555 of the Laws of 1888, providing that "comparison of a disputed writing with any writing proved to the satisfaction of the court to be the genuine handwriting of any person claimed on the trial to have made or executed the disputed instrument or writing shall be permitted, and submitted to the court and jury in like manner. But nothing within contained shall affect or apply to any action or proceeding heretofore commenced or now pending."

Under chapter 36 of the Laws of 1880, the submission of a writing to a jury for the purpose of comparison with a disputed writing must follow, and be in connection with, the testimony of expert witnesses, from such comparison, in regard to the authorship of the writing; and, independent of the examination of witnesses, the jury cannot institute an arbitrary comparison, but only in aid of the testimony of witnesses in reference to the authorship of the handwriting in question. People v. Plinckney (1893) 67 Hun, 428, 22 N. Y. Supp. 118.

And in a case in a Federal court under the same statute, where checks proved to the satisfaction of the court to be genuine were submitted to the jury, but without comparison of them with the disputed signature by any witness, it was held that the statute does not literally warrant the submission to the jury of the genuine writing, unless a comparison with the disputed writing has been made by witnesses. The "evidence" respecting the genuine writings which is to be submitted to the jury cannot be 62 L. R. A.

the evidence of their genuineness, for that is addressed solely to the court, who is to determine that question to his satisfaction without interference by the jury. And no other "evidence" respecting these genuine signatures is competent except such as the statute provides for, a "comparison by witnesses." It is such evidence, therefore, which the statute couples with "such writings" as proof proper to submit to the jury. Glenn v. Roosevelt (1894) 62 Fed. 550. These decisions, it will be seen, are not in accord with the construction of the English statute in Cresswell v. Jackson, 2 Fost. & F. 24.

Under chap. 555 of the Laws of 1888, amending § 2 of chap. 36 of the Laws of 1880 in these words, "so as to read as follows, etc.," which amending statute contains the provision that "nothing within contained shall affect or apply to any action or proceeding heretofore commenced or now pending," the earlier statute was not repealed, and comparison of signatures allowable under the earlier statute was proper in an action pending at the time of the passage of the later statute. Mortimer v. Chambers (1892) 63 Hun, 345, 17 N. Y. Supp. 874, Affirming 27 Abb. N. C. 289.

And in an action on an account, the defense being an accord and satisfaction, which was alleged by the plaintiffs to have been forged by one of the defendants, when an admitted specimen of the genuine handwriting of the person charged with the forgery was received in evidence without objection, and not solely for the purpose of comparison, it was held that under these circumstances, without regard to the statute, a comparison might be made between the disputed accord and satisfaction and the genuine handwriting of the supposed forger in order to allow the plaintiff to establish the forgery affirmatively. The defendants contended, as in Mortimer v. Chambers, 63 Hun, 335, 17 N. Y. Supp. 874, that the act of 1880 was superseded by the act of 1888, and that the saving clause of the later act excepted the case at bar, proceedings in which were begun before it; but the court held that neither statute was necessary to the plaintiff's contention, since, before the act of 1880, comparison might be instituted with writings properly admitted as evidence in the case upon the issues involved, and not solely for the purpose of comparison. Shaw v. Bryant (1895) 90 Hun, 374, 35 N. Y. Supp. 909.

Where a witness called as an expert, having no knowledge of the defendant's handwriting from having seen him write, testified that he had seen papers which he believed were in the defendant's handwriting, and had compared the writing in question with them, and expressed an opinion that the handwriting in question was that of the defendant, his testimony should have been excluded, since an opinion based upon comparisons with standards not produced in court and not shown to be genuine, but merely believed by the witness to be genuine, is incompetent. People v. Dorthy (1900) 50 App. Div. 44, 63 N. Y. Supp. 592.

In People v. Molineux (1890) 27 Misc. 79, 58 N. Y. Supp. 155 (supreme court) it is declared that the decision of the court admitting papers as standards for comparison is not binding upon the jury. When the writings and the evidence are before them, the jury may then disagree with the court, determine that the standards submitted are not genuine, and refuse to use them for the purpose of comparison with the disputed handwriting.

Accordingly, the statutes of 1880 and 1888, providing for the comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine "in all trials and proceedings," extend to hearings before the grand jury; and the objection that there is no "court" to determine what writings are proved to its satisfaction does not prevent their application to such proceedings, since the jury are in the end the sole judges of the facts, including the question of genuineness of writings. *Ibid.*

Two years later it was finally laid down, in *People v. Molineux* (1901) 168 N. Y. 264, 62 L. R. A. 193, 61 N. E. 286, that, under the statutes of 1880 and 1888, the disputed writing which is allowed to be compared with other writings proved to the satisfaction of the court to be genuine is any writing which one party upon a trial seeks to prove as the genuine handwriting of any person, and which is not admitted to be such; and the comparison is not limited to the instrument which is the subject of controversy in the action; so expressly overruling the *dictum* of *Ruger, Ch. J.*, in *Peck v. Callaghan*, 95 N. Y. 73, *supra*, and *People v. Kennedy* (1901) 34 Misc. 101, 69 N. Y. Supp. 470.

Perpendicular marks with pen and ink, drawn across the letters of a signature of a will, and apparently intended to cancel it, are not "writings," within the meaning of chap. 36 of the Laws of 1880 and chap. 555 of the Laws of 1888, so as to permit comparison of them by experts with similar genuine marks. *Re Hopkins* (1902) 172 N. Y. 361, 65 N. E. 173, Reversing 73 App. Div. 559, 77 N. Y. Supp. 178.

But where the date of a writing was disputed, the month, which was abbreviated, being written "Jay" or "Juy," it was proper to allow an expert to testify, from examination and comparison with other specimens of the handwriting of the same person, whether the word was intended for January or July. Since the jury might compare the paper in question with other writings in the case to determine the date, it was proper that they should be aided and enlightened, as they might be analogous cases of the genuineness of handwriting, alterations, and assimilations, by men who have made the subject of handwriting a study, and have obtained skill and proficiency in that branch of knowledge. This was, however, not a case of "disputed handwriting" under the statutes of 1880 and 1888. *Dresler v. Hard* (1891) 127 N. Y. 235, 12 L. R. A. 456, 27 N. E. 823.

Similarly, in an action against the indorsers of a note, and upon an issue as to whether it was due in two or four months, it being difficult to say from an inspection of the note whether the written word before the word "months" was "two" or "four," it was competent for the defendants to introduce in evidence, for inspection by the jury, checks drawn by the maker of the note on the plaintiff and containing those words, to show the plaintiff's knowledge as to the maker's peculiar way of writing the word "two" as distinguished from the word "four." This, also, was not a case of "disputed writings" under the statute. *State Bank v. Postal* (1895) 12 Misc. 546, 34 N. Y. Supp. 18.

Chap. 36 of 1880 and chap. 555 of 1888, authorizing comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine, are not unconstitutional because in conflict with art. 1, § 2, of the Constitution of New York, which provides that "trial by jury in all cases in which it has been heretofore

used shall remain inviolate forever;" since the judge, who is only part of the "court," has not necessarily the final decision concerning the genuineness of the writings offered as standards of comparison. The sufficiency of the proof given of the genuineness of the papers offered as standards is only a preliminary point to be determined in the first instance by the judge before permitting the papers to go to the jury; if the judge adjudge the papers genuine, it then becomes the duty of the jury, in its turn, before making comparison of the disputed writing with the standards, to examine the testimony respecting the genuineness of the standards, and to decide for itself, under proper legal instructions from the court, whether their genuineness has been established. *People v. Molineux* (1901) 168 N. Y. 264, 62 L. R. A. 193, 61 N. E. 286. *North Carolina.*

A witness experienced in handwriting, who had never seen the person write whose signature was in dispute, but had acquired a knowledge of his handwriting from papers proved to be genuine, was allowed to compare the letter in question with an instrument also proved to be genuine but not in evidence for any other purpose. This was held in *Pope v. Askev* (1840) 23 N. C. (1 Ired. L.) 16, to be error, largely upon the authority of *Doe ex dem. Mudd v. Suckermore*, 5 Ad. & El. 703, 2 Nev. & P. 16, W. W. & D. 405, 7 L. J. Q. B. N. S. 33, the court saying: "Testimony as to handwriting, founded on what is properly termed comparison of hands, seems to be now generally exploded. The testimony now received is that of the belief of a witness as to the identity of character between the writing in question and the exemplar of the party's handwriting in the mind of the witness, which exemplar has been formed upon previous sufficient means of observation;" and the only "sufficient means of observation" was from having seen the individual write, or from a correspondence with him on matters of business, or from transactions between them, such as having paid bills of exchange for him for which he had afterwards accounted; and any other testimony was altogether too uncertain, or necessitated a number of collateral issues embarrassing the jury and surprising the parties.

The unique rule of North Carolina in regard to comparison by the jury first appeared in *Outlaw v. Hurdle*, (1853) 46 N. C. (1 Jones L.) 150. There it was held that, on the probate of a will, the execution of which was denied, a party might prove that the deceased always in writing contracted the words "it is" so as to make them "tis," but might not put the letters of the deceased into the hands of the jury for comparison, although admitted in evidence for other purposes; and it was error in the court to tell the jury that, as they had a right to look at the letters for one purpose, there was no help for it, and that they might make a comparison of the handwriting; except in a few cases, under special statutes, all evidence was to be heard by the jury, and not to be seen by them, and writings were not properly submitted to a jury's inspection, but they should be read.

So under this peculiar rule it was proper to refuse to allow a witness to examine bonds, not in evidence, of a person whose signature was in dispute, to prove a particular habit in signing the name, and to exclude such instruments from the sight of the jury. If they could be used in the manner proposed it would necessarily lead to a violation of the rule that a jury cannot de-

cide by a comparison of handwriting, and the jury not being themselves experts, supposition would take the place of facts, upon which alone a verdict ought to be founded. Writings in general could not properly be submitted to the inspection of the jury; but if used on the trial of a case they might be read to them. *Otey v. Hoyt* (1858) 48 N. C. (3 Jones L.) 407.

In an action of assumpsit an account drawn upon by the plaintiff which was not competent evidence, and could not have been read to the jury in the presence of the court, was improperly given to the jury to take with them to their room, since "the jury ought to make up their verdict upon evidence offered to their senses, *i. e.*, what they see and hear in the presence of the court, and should not be allowed to take papers which have not been received as competent evidence into the jury room." *Watson v. Davis* (1859) 52 N. C. (7 Jones L.) 178.

And so a judge cannot properly deliver to the jury a paper containing a statement of the plaintiff's claim for damages, against the wish of the defendant. *Burton v. Wilkes* (1872) 66 N. C. 604.

In *Yates v. Yates* (1877) 76 N. C. 142 it was held that, under the decision in *Outlaw v. Hurdle*, it was permissible to allow a witness to compare a disputed signature with a signature of the same person upon a deposition introduced in evidence and admitted to be genuine; but the jury were not permitted to compare.

After evidence had been given by experts that the signature to the promissory note sued upon and certain signatures of the same person proved to be genuine and in evidence were not in the same handwriting, the court, following *Yates v. Yates*, properly refused to allow the papers used as standards of comparison with the disputed signature to be exhibited to the jury for their inspection. *Fuller v. Fox* (1888) 101 N. C. 119, 7 S. E. 589.

And where it was sought to be proved that a record of the court had been fraudulently altered by interlineations, the paper could not be handed to the jury for the purpose of comparison by them of the interlineations with the body of the record, since such comparison is never permitted to be done by the jury in North Carolina. *Forbes v. Wiggins* (1893) 112 N. C. 122, 16 S. E. 903.

The North Carolina rule is now definitely laid down to the effect that an expert, in the presence of the jury, may be allowed to compare the disputed paper with other papers in the case, whose genuineness is not denied, and also with papers which the party whose handwriting gives rise to the controversy concedes to be genuine, or such that he is estopped to dispute their genuineness; but no comparison by the jury is permitted. And this rule was applied in a case where, in order to prove the signature upon a deed, another signature of the same person in evidence, which had been already proved, but which had no connection with the case, was offered for a standard of comparison, and it was held that it was erroneous to admit it in evidence for comparison by the witness. The genuine writing must have been put in for another purpose than comparison. *Tunstall v. Cobb* (1891) 109 N. C. 316, 14 S. E. 28. (The dissenting opinion, however, of Clark, J., follows the rule stated in 1 Wharton, Ev. § 713, admitting for comparison writings proved to be genuine, and already in evidence.) This decision is followed in the latest case in North Carolina, 62 L. R. A.

Ratliff v. Ratliff (1902) 131 N. C. 425, 42 S. E. 387.

In an action against executors on an instrument purporting to have been executed by the decedent, the plaintiff was estopped to deny the genuineness of the will under which the defendants have qualified; and the signature to the will was properly admitted for comparison by a witness with the signature principally in question. *Croom v. Sugg* (1892) 110 N. C. 259, 14 S. E. 748.

And expert witnesses are allowed to compare an incriminating letter which is disputed with an affidavit made in the cause by the prisoner. *State v. De Graff* (1893) 113 N. C. 686, 18 S. E. 507.

So a bail bond executed by the defendant in a criminal case, and constituting part of the record, may be compared with the signature which he is charged with forging, the presumption being that the signature upon the bond is genuine. *State v. Noe* (1896) 119 N. C. 849, 25 S. E. 812.

In an action by one claiming under a will against one claiming under a deed of the same person, the defendant was compelled to state whether the will was genuine, so that the two instruments might be compared. *Kornegay v. Kornegay* (1895) 117 N. C. 242, 28 S. E. 257.

It was held in *McLeod v. Bullard* (1881) 84 N. C. 515, that the testimony of experts to the effect that the signature upon a disputed instrument differed from the natural and ordinary signature of the same person as affixed to an affidavit filed in the cause, was competent for the purpose of corroborating direct evidence that the person executing the instrument was drunk at the time. This is to be contrasted with *Gulzoni v. Tyler* (1883) 64 Cal. 334, 30 Pac. 981, *supra*.

North Dakota.

Where letters purporting to have been written by one on trial for murder were offered in evidence by him for the express and sole purpose of comparison with disputed and incriminating writings, it was not error in the trial court and territorial court of subordinate jurisdiction to exclude them. Writings not in evidence for other purposes cannot be compared with disputed writings under the rule adopted by the Supreme Court of the United States, and the trial court was bound by the Federal precedents; but the state supreme court declared that, if the same question should arise in a case begun after the state was admitted into the Union, they should feel at liberty to establish a more liberal rule if they should then deem it expedient to do so. *Territory v. O'Hare* (1890) 1 N. D. 30, 44 N. W. 1003.

Ohio.

The Ohio rule is liberal. The disputed signature to a note could be proved by comparison by an expert with the signature of the alleged signer to a bond and affidavits which properly belonged to the files in the case. (Following 2 Greenl. Ev. § 578.) The court could see no danger in extending the rule which allows a person who has seen another write once to prove his hand, so far as to permit experts to testify upon actual comparison, from which there was certainly more probability of arriving at truth. *Hicks v. Person* (1850) 19 Ohio, 426.

The testimony of experts having no previous knowledge of it, as to the genuineness of the disputed handwriting, by comparison with other papers previously proved by direct and positive

testimony to have been made by the person alleged to be the author of the disputed paper, was held to be competent in *Calkins v. State* (1863) 14 Ohio St. 222. In this case, although the specimens were "previously proved," the opinion treats the question as one whether specimens might be introduced for the sole purpose of comparison, so that the decision is broader than the facts, which are similar to those in *Hicks v. Person*.

But where a plaintiff offered to show facts in regard to a note offered as a standard of comparison, which might tend to estop the defendant from denying that the signature upon it was his, but produced no direct proof of genuineness, it was held that the specimen must be proved, beyond a reasonable doubt, to be the genuine signature of the defendant. *Bragg v. Colwell* (1869) 19 Ohio St. 407.

In order to "prove the identity of one person with a person passing under a different name, it is proper to introduce in evidence papers purporting to be in the handwriting of a person bearing the name of the first person, but without direct proof of such certainty as is required to establish standards of comparison, that they are in the hand of the first person, for the purpose of comparison with other writings admitted or proved beyond a reasonable doubt as standards of comparison to have been written by the person passing under the other name. Between such writings comparison may be made, and experts may express an opinion thereupon as to the identity of their writers. *Bell v. Brewster* (1887) 44 Ohio St. 690, 10 N. E. 679.

Later, it was held that the standard writing offered for the purpose of comparison with the disputed signature must be proved by positive and direct testimony; and this meant that it must be proved by someone who had seen it written. *Sperry v. Tebbs* (1888) 20 Ohio L. J. 181.

Oklahoma.

In an action on a surety bond which the defendant denied having executed, the trial court admitted in evidence, for comparison with the signature to the bond, an affidavit appearing upon one inside page of the double sheet of paper on which the bond was written, and apparently signed by the defendant, in which he made oath that he executed the within bond, and followed by the jurat, signature, and seal of the notary, as to which affidavit some opinion evidence was introduced to prove the genuineness of the signature. This was error, although there was sufficient evidence to make at least a prima facie case against the defendant, and the affidavit was competent to go to the jury for two other purposes: First, as constituting a written admission against the defendant that he had signed the bond; and, second, for the purpose of proving an estoppel; since, even if the defendant had never signed the bond, his name in fact appeared to it as a surety, and if he made an affidavit that he had duly executed the bond, and this was relied upon by the persons who accepted it, he would not be permitted to question the signature, but, after the affidavit was allowed in evidence for either of these purposes, it still had not been sufficiently proved to be the basis of comparison with the signature principally in question; for "the law requires that the signature used as a basis of comparison by experts shall be either an admitted or proved signature," and this means that it should be proved by direct or positive evidence. *Archer v.* 62 L. R. A.

United States (1900) 9 Okla. 569, 60 Pac. 268. **Oregon.**

Hill's Anno. Code, § 765 (§ 777 of the Codes of 1902), provides that "evidence respecting the handwriting may also be given by a comparison made by a witness skilled in such matters, or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered."

And where parties objected to the admission of deeds offered in evidence merely for the purpose of comparison with the principal writings in question, they were admissible for this purpose without the aid of the statute because admissible for the purpose of showing facts inconsistent with the claims of the other party, although it might not, under the pleadings, be actually necessary to introduce such evidence. The court said that the genuineness of handwriting, whenever called in question by the one whose handwriting it purports to be, must, of necessity, be determined by comparison of some kind. If the opinion of the genuineness of the handwriting is not based upon the comparison of it with some writing in juxtaposition, it must be based upon the conception of the handwriting which the witness has retained in his mind. In most cases it is far more satisfactory to allow the witness to compare the writing in issue with other writings of unquestioned authenticity, than it is to compare it with the standard which he may have formed or retained in his mind. Expert testimony is admissible, and often necessary, in cases of this character in order to bring out the essential traits and characteristics of a person's handwriting, which might not otherwise be noticed by the untrained eye of the ordinary judge or juror. *Green v. Terwilliger* (1892) 56 Fed. 384.

It was held in the *United States Supreme Court* that, under this statute, papers might be introduced, although not otherwise competent, for the purpose of enabling the jury to make a comparison of handwriting; although it does not appear anywhere in the reported case that the writings admitted for this purpose were "admitted or treated as genuine" by the opposite party. *Holmes v. Goldsmith* (1893) 147 U. S. 150, 37 L. ed. 118, 13 Sup. Ct. Rep. 288.

And a ruling of the court excluding, as having no reference to the matter in controversy, letters admitted to be genuine by the party against whom they were offered, was error. *Munkers v. Farmers' & M. Ins. Co.* (1896) 30 Or. 211, 46 Pac. 850.

Where the record on appeal did not show that the party against whom a standard of comparison was offered had admitted or treated it as genuine, the judgment of the lower court was reversed. *State v. Tice* (1897) 30 Or. 457, 48 Pac. 367.

Pennsylvania.

The peculiar rule in Pennsylvania before the statute of 1895 was first exemplified, on the side of the question involving comparison by the jury, in a decision involving only a collateral point. In an action for libel against the owner of a newspaper the plaintiff offered to prove the authorship of the libelous issues, which had been only partially proved, by introducing in evidence another paper of the same date as one of them proved to have been purchased from the defendant's shop, for comparison by the jury of the types and devices; and, against the defendant's contention that this method of proof was wrong because proof by comparison of hand-

writing was not legal and, *a fortiori*, proof by comparison of types, etc., was not, the court (Tilghman, Ch. J.) said: "After evidence has been given in support of a writing it may be corroborated by comparing the writing in question with other writing concerning which there is no doubt," and, on the same principle, the foundation being first laid, the jury may be permitted to compare types, etc., of newspapers. In general such evidence would not be very strong, but cases might occur in which a comparison would be decisive. *M'Corkle v. Binns* (1812) 5 Binn. 340, 6 Am. Dec. 420.

In order to prove the signature of the defendant to a note the plaintiff, after offering the testimony of a witness who had seen the defendant write, then produced in evidence an administration account, and proved by the register of wills that it was signed by the defendant; and it was also admitted by the defendant to be his handwriting. It was held that this was competent evidence for consideration by the jury, and that it was more satisfactory to submit a genuine paper as a standard, and let the jury compare it with the paper in question and judge of the similitude, than the evidence continually received of allowing a witness who has seen the party write once to compare the disputed paper with the feeble and transient impression which the writing might have made; it was the law of Pennsylvania to receive such evidence in civil cases after other evidence had been given in support of the writing. *Farmers' Bank v. Whitehill* (1823) 10 Serg. & R. 110.

That comparison by the jury was admissible only in corroboration of other evidence, and not as independent proof, appears from many cases. *Callan v. Gaylord* (1834) 3 Watts, 321; *Baker v. Haines* (1841) 6 Whart. 284, 36 Am. Dec. 224; *Depue v. Place* (1848) 7 Pa. 428; *Leslie v. Heald* (1858) 3 Phila. 55; *Haycock v. Greup* (1868) 57 Pa. 438; *Aumick v. Mitchell* (1876) 82 Pa. 211.

And the evidence, to be admissible, must be actually corroborative, and not contradictory, of the direct proof. *Haycock v. Greup* (1868) 57 Pa. 438.

Other cases admitting such comparison by the jury as corroboration are: *Guffey v. Deeds* (1857) 29 Pa. 378; *Udderzook v. Com.* (1874) 76 Pa. 340; *Sheets v. Whitaker* (1880) 14 Phila. 11; *Shull v. Croft*, 1 Del. Co. Rep. 387; *York Trust, R. E. & Deposit Co. v. Kindig* (1894) 7 York Legal Record, 149.

But, following what has before been observed to have been historically the true (although not the accepted) rule in England, witness comparison was rejected, while jury comparison was permitted, in Pennsylvania, from the case of *Lodge v. Philpher* (1824) 11 Serg. & R. 333. There, in order to prove that a receipt had been forged, papers proved to be in the writing of the supposed forger were shown, for the purpose of comparison by him, to a witness admitted as an expert who knew nothing of the handwriting of the supposed forger or of the person whose name was forged. It was held that it was going far enough to receive in evidence the opinion of a man whose business it was to detect forgeries whether a certain writing shown to him was in a natural or an imitated hand.

On the point that experts were not to be allowed to compare, *Lodge v. Philpher* was followed by *Vickroy v. Skelley* (1826) 14 Serg. & R. 372; *United States v. Craig* (1827) 4 Wash. C. C. 729, Fed. Cas. No. 14,883 (a criminal 62 L. R. 4.

case); *Bank of Pennsylvania v. Haldeman* (1829) 1 Penr. & W. 161; *O'Connor v. Layton* (1853) 2 Am. L. Reg. 120; *Norton v. Breitenbach* (1855) 1 Pearson (Pa.) 467; *McNair v. Com.* (1856) 26 Pa. 388; *Clayton v. Slebert* (1860) 3 Brewst. (Pa.) 176; *Aumick v. Mitchell* (1876) 82 Pa. 211; *Berryhill v. Kirchner* (1880) 96 Pa. 489; *Foster v. Collner* (1884) 107 Pa. 305; *McKinney v. Nolf* (1887; Pa.) 9 Cent. Rep. 804, 11 Atl. 111; *Com. v. Stokes* (1892) 4 York Legal Record, 187; *Rockey's Estate* (1893) 155 Pa. 453, 26 Atl. 656.

There is, however, a declaration in *Guffey v. Deeds* (1857) 29 Pa. 378, to the effect that parties are entitled to call experts to aid the jury in the comparison, by giving their opinion.

And in *Travis v. Brown* (1862) 43 Pa. 9, 82 Am. Dec. 540, the law of Pennsylvania was declared to be that neither expert nor nonexpert witnesses might compare handwriting, and that evidence of genuineness might be corroborated by comparison by the jury between the paper in issue and other writings of the same person established by the most satisfactory evidence, and that experts might be examined to prove forged or simulated writings and to give the conclusions of skill in such cases; but this examination of experts refers simply to the question whether the disputed writing appeared to be in a feigned or natural hand, without comparison. And to this effect is *Burkholder v. Plank* (1871) 69 Pa. 225.

The exclusion of experts, offered to compare the writings, extended to an offer to prove by an expert the character, the general uniformity of execution and the peculiarities, of the genuine signature and the minute structure of certain parts of it. This would not assist the jury to compare two things, throwing an artificial light upon one and leaving the other in darkness. *Gentner v. Ulmer* (1862) 15 Phila. 233, Affirmed in 3 Pennyp. 453.

And so, *a fortiori*, where the offer was to have the expert examine both the disputed and the genuine writings, and give a similar explanation of both. *Miles's Will* (1895) 4 Pa. Dist. R. 179.

An exception to the rule excluding expert comparison was established in *Fulton v. Hood* (1859) 34 Pa. 365, 75 Am. Dec. 664. Experts were allowed to prove that, in their opinion, the whole of a disputed instrument was written by the same hand, with the same pen and ink and at the same time, in corroboration of the positive evidence of the scrivener to the same effect.

To the same general effect are: *Ballentine v. White* (1874) 77 Pa. 20; *Reese v. Reese* (1879) 90 Pa. 89, 35 Am. Rep. 634; *Graham v. Spang* (1888) 1 Monaghan (Pa.) 167, 16 Atl. 91; *Rockey's Estate* (1893) 155 Pa. 453, 26 Atl. 656. To the contrary effect, however, was *Glassen's Estate* (1883) 13 W. N. C. 79.

The statement in *Bank of Pennsylvania v. Haldeman* (1829) 1 Penr. & W. 161 (*supra*), to the effect that a nonexpert witness who had seen the person write whose handwriting was disputed might compare it with writings which he had seen the person write, whereupon the jury were to compare, apparently found no later support.

The act of May 13, 1893 (P. L. 69, § 1), allows proof of handwriting by experts; and §§ 2 and 3 of the same act provide:

"§ 2. It shall be competent for experts in giving their testimony, under the provisions of this act, to make comparison of documents and

comparison of disputed handwriting, with any documents or writing admitted to be genuine, or proved to the satisfaction of the judge to be genuine; and the evidence of such experts respecting the same shall be submitted to the jury as evidence of the genuineness or otherwise of the writing in dispute.

"§ 3. It shall be competent for experts, in formulating their opinions to the court and jury, to place the genuine and disputed writings in juxtaposition, and to draw the attention of the jury thereto; and it shall, furthermore, be competent for counsel to require of an expert a statement of the principles on which he has based his work, the details of his work, and his opinion that the results are important to the point at issue, or the reasoning, analysis, and investigation by which he has arrived at his opinion."

Under this statute, proof that a paper offered for comparison with a disputed signature looked like the signature of the person whose handwriting was in dispute was insufficient to justify its admission in evidence for any purpose,—especially for the purpose of being used as a test paper; although it was apparently proved to be genuine "to the satisfaction of the judge." *Fullam v. Rose* (1897) 181 Pa. 138, 87 Atl. 197.

Rhode Island.

In *Kinney v. Flynn* (1852) 2 R. I. 819, it was laid down that a witness who was acquainted with the handwriting in question, but was not an expert, was not competent to testify from mere comparison of two writings that one was in the same handwriting as the other; this kind of testimony supposed the absence of knowledge of the hand.

In a later case the rule was apparently stated to be to allow witness comparison. It was said that the rule was well settled that no one is competent to swear to handwriting being either genuine or forged who is not acquainted with it from seeing the writer write; or from frequently seeing specimens of it in the usual course of business; or, which is an American extension of the sources of such knowledge by no means universal, from a comparison before the jury of the questionable handwriting with specimens of it produced, admitted, or at least fully and clearly proved, to be, not only genuine, but not got up for the occasion. *State v. Brown* (1857) 4 R. I. 528, 70 Am. Dec. 168.

The provision of Gen. Stat. 1872, chap. 204, § 42 (Gen. Laws 1896, chap. 244, § 44), is a literal reproduction of the English common-law procedure act, chap. 125, § 27.

South Carolina.

A comparison of the signature of a promissory note in an action before a justice of the peace was held, in *Richardson v. Johnson* (1812) 3 Brev. 51, not to be sufficient to justify a decision as to its genuineness, in the absence of other evidence.

In *Boman v. Plunkett* (1823) 2 McCord L. 518, an action on a bond, evidence having been offered on both sides as to the genuineness of the handwriting of a subscribing witness who was dead, leaving the proof doubtful, an offer on the part of the plaintiff to introduce two other papers acknowledged by the defendant to be signed by him, with a view to assist the jury in forming an opinion of the fact by comparing them with the bond, was properly admitted, and the opinion of the constitutional court said: "As a circumstance in aid of doubtful proof, com-

parison of handwriting is admissible, but *per se* is so feeble as to be unsafe to act upon; and that, in the absence of any other proof, it would be inadmissible because it proved nothing." This was followed in *Desbrow v. Farrow* (1832) 3 Rich. L. 382.

An expert witness in an action on notes proved certain other notes which were handed to him to be in the genuine handwriting of the defendant, and was then allowed to point out to the jury the difference between the defendant's signature to those notes and the signatures of the disputed notes, whereupon the jury were allowed to take the bundle of notes with them so that they might compare the handwriting with a view to testing the accuracy of the witness's testimony; since the witness's testimony was admissible, under the rule in *Boman v. Plunkett*, there was no reason why the notes should not be sent to the jury, for it was the usual practice to send all written or documentary evidence to the jury unless there were some confusion likely to mislead. *Robertson v. Miller* (1840) 1 McMill. L. 120; *Bird v. Miller* (1840) 1 McMill. L. 123.

Comparison as an original means of ascertaining the genuineness of handwriting is not permitted in South Carolina, but in aid of doubtful proof it is allowed. This testimony, however, is not entitled to any very high respect or consideration; its relative weight must be determined by the rules which are applied to testimony of every kind, and its efficacy will be judged and estimated by the proportionate effect of its impression; and this comparison may be made, not only by the jury, but by an expert witness entirely unacquainted with the handwriting of the person whose signature is disputed. *Bennett v. Mathewes* (1874) 5 S. C. N. S. 478.

Comparison by witnesses who are not professional experts, one of them being merely a book-keeper in a bank and the other a notary public, is competent when offered, not as original evidence, but in aid of doubtful proof, or when it is conflicting, the value of the comparison depending in each case upon the intelligence, skill, and experience of the witness in such matters. *Benedict v. Flanigan* (1882) 18 S. C. 506, 44 Am. Rep. 583.

The presiding judge must determine, in the first instance, when the evidence is so doubtful or conflicting as to admit this supplemental testimony. His decision is subject to review, as it is not a question entirely of discretion with him; but the case should be a very strong one, and the error of the judge very patent, to warrant the overruling of his judgment. *Ibid.*

So where a son of the person whose signature was disputed had testified in chief that in his opinion the signature was not hers, but afterwards stated that he would take the signature to be hers, without comparing it with the other acknowledged signatures presented to him, but upon comparing them he would deny the signature to be hers, this raised a doubt as to the value of his testimony, which made a case for the introduction of supplementary testimony. *Ibid.*

Where a plaintiff had raised a doubt as to the genuineness of her signature she could not object to the admission to the jury of papers containing her admitted signatures, on the ground that comparison is not permitted as an original means of proving handwriting, but is only allowed in aid of doubtful proof already offered.

Rose v. Winnsboro Nat. Bank (1893) 41 S. C. 191, 10 S. E. 487.

And the judgment was affirmed where there was no patent error in the determination of the trial court that there was such doubtful proof as authorized a resort to a comparison of handwriting. Graham v. NeSmith (1883) 24 S. C. 285.

The South Carolina rule has been laid down to the effect that, while comparison of handwriting is inadmissible as an original means of ascertaining the genuineness of a signature or other writing, yet it may be admitted in aid of doubtful proof; that the trial judge must decide, in the first instance, whether sufficient doubt has been raised to authorize the comparison, subject, however, to review on appeal; that the witnesses making the comparison need not be technical experts; that the papers by which the comparison is to be made must be either admitted, acknowledged, or otherwise proved to be in the same handwriting. State v. Ezekiel (1890) 33 S. C. 115, 11 S. E. 635.

So on an appeal from a conviction for forgery, where it appeared that a paper offered for comparison "was put in evidence over the defendant's objection, he not denying it," and, as to a second paper offered for the same use, merely that it was put in evidence over the defendant's objection, neither was admitted, acknowledged, or established by any affirmative testimony to be genuine so as to be the means of a comparison. *Ibid.*

An exception to a ruling of the court refusing to admit the testimony of witnesses other than experts to prove the genuineness of the signature by comparison did not avail where the exclusion was not because the witnesses were not experts, but because they were not at all familiar with handwriting, and therefore were incompetent to compare handwriting. Weaver v. Whilden (1890) 33 S. C. 190, 11 S. E. 686.

In a prosecution in a Federal court for criminal use of the mails, since, following Moore v. United States, 91 U. S. 270, 23 L. ed. 346, *supra*, it was permissible in such courts to allow the jury to compare with admitted writings in the record, and, in the absence of a decision in the United States Supreme Court as to whether experts might compare with such writings, decisions of the state courts are to be followed, and in South Carolina the rule is to admit evidence from comparison in aid of doubtful testimony, it was proper to allow an expert in handwriting to compare the letter, with mailing which the accused was charged, with another letter already in evidence and admitted by the accused to have been written by him; although this kind of testimony, resting upon opinion, is not of a high order, and cannot control the jury, and must (contrary to the South Carolina rule) be confined to experts. United States v. Mathias (1888) 36 Fed. 892.

But in an earlier case in the same court in South Carolina, comparison by the jury with writings not a part of the record was rejected, under the rule in the Federal courts. United States v. McMillan (1886) 29 Fed. 247. Tennessee.

It was early determined in Tennessee that it was not permissible to submit to a witness other writings than the one in question, even though previously proved to be genuine. Fogg v. Dennis (1842) 3 Humph. 47.

So it was error to submit such writings to the jury and witnesses for comparison, and to leave 62 L. R. A.

it to the jury to determine their genuineness. Clark v. Rhodes (1870) 2 Helst. 206.

Where the parties consented to the production of such writings to the jury, the jury might compare. Kannon v. Galloway (1872) 2 Baxt. 230.

But writings not in the case could not be introduced merely for the purpose of comparison by the jury or witnesses. Wright v. Hessey (1873) 3 Baxt. 42.

The Tennessee statute now provides for comparison, however. Chapter 22 of the Laws of 1889 (Code 1896, § 5560) provides: "In all the courts of this state comparison of disputed writing or signatures with any writing or signature proved to the satisfaction of the judge to be genuine shall be permitted to be made by expert witnesses, and such writing or signatures, and the evidence of expert witnesses respecting the same, shall be submitted to the court, or courts, and jury as evidence of the genuineness, or otherwise, of the writing or signature in dispute."

Under this act, it was still incompetent to allow expert witnesses to compare letters written by the proponent of a will and admitted to be genuine, with the disputed will, and say from such comparison whether the writer of such letters had forged the will; the statute was in derogation of the common law, and should, therefore, be strictly construed; and, although it authorizes a comparison of disputed writing with the genuine writing of the reputed writer of the disputed paper, it does not authorize such comparison to be made with writings introduced for that purpose as the genuine writings of any person other than the reputed writer. The Tennessee statute is almost a literal copy of the New York statute of 1880 on the same subject, and the same construction of that act was made in Peck v. Callaghan, 95 N. Y. 73, *supra*. Franklin v. Franklin (1891) 90 Tenn. 44, 16 S. W. 557. Followed in Powers v. McKenzie (1891) 90 Tenn. 167, 16 S. W. 559.

And the same statute, in making it the duty of the judge to pass upon the genuineness of the writings to be used as a standard of comparison, as a preliminary question, is not an invasion of the province of the jury under the Constitution, and so unconstitutional; it is a legislative adaptation to the subject-matter of the settled rule of the common law that, as a general proposition, it is the province of the court to say what is evidence in cases, and the province of the jury to decide upon its efficacy. Powers v. McKenzie (1891) 90 Tenn. 167, 16 S. W. 559. Texas.

The earliest Code of Texas provided (O. C. § 667) that, in criminal trials, "it is competent in every case to give evidence of handwriting by comparison made by experts or the jury; but proof by comparison only shall not be sufficient to establish the handwriting of a witness who denies his signature under oath." This has been reproduced in the subsequent Codes of Criminal Procedure (White's Code Crim. Proc. [1900] art. 794).

Cases simply affirming this general rule as to criminal cases are: Watson v. State (1880) 9 Tex. App. 237; Caldwell v. State (1890) 28 Tex. App. 566, 14 S. W. 122.

And the introduction, for the purpose of its use as a standard of comparison, of an affidavit made by the defendant for a continuance, did not violate the rule which excludes a confession of a defendant made while in jail or other place

of confinement. *Williams v. State* (1889) 27 Tex. App. 466, 11 S. W. 481.

But this general rule of criminal procedure has never applied to civil trials in Texas, although several of the cases leave the question in considerable uncertainty as to the exact limitations of the civil rule in this state.

In 1866 what was supposed to be the English rule, and also the rule in the United States Supreme Court and many of the state courts, excluding comparison by the jury of disputed writing with papers not connected with the cause, was formally adopted; the opinion, however, seems to include in this exclusion comparison with any writings, whether in the case or not. *Hanley v. Gandy*, 28 Tex. 211, 91 Am. Dec. 315.

And a letter was properly excluded the only proof of which was that the signature to it, in the opinion of witnesses (not experts) who were not acquainted with the handwriting of the person whose signature it purported to be resembled a signature of the same person admitted to be genuine; the witnesses not being able to state that they were made by the same writer. *Ballard v. Perry* (1866) 28 Tex. 347.

In 1877 it was held that papers apparently signed by the person whose signature was alleged to have been forged, and testified to as being genuine, in the opinion of the witnesses, were not admissible for the jury to compare them; because the offered standards, the court said, must be "found to be genuine," or "established by the most satisfactory evidence," so that no collateral issue could arise. *Eborn v. Zimpelman*, 47 Tex. 503, 26 Am. Rep. 315.

Papers in evidence for other purposes were always allowed to be used for this purpose (*Smith v. Chiles* [1881] 1 Tex. App. Civ. Cas. [White & W.] § 124, p. 49; *Howard v. Russell* [1889] 75 Tex. 171, 12 S. W. 525; *Bell v. Hutchings* [1897; Tex. Civ. App.] 41 S. W. 200); especially when introduced by the party objecting to their use (*Kennedy v. Upshaw* [1885] 64 Tex. 411; *Smyth v. Caswell* [1887] 67 Tex. 567, 4 S. W. 848); and when the standard and the disputed signature are upon the same paper (*Wagoner v. Rupy* [1888] 69 Tex. 700, 7 S. W. 80).

But from the remaining cases the exact limits of admission and exclusion do not clearly appear.

In *Sartor v. Bollinger* (1883) 59 Tex. 411, it was decided that it was not necessary in that case to pass upon the question whether or not handwriting can be proved in a civil cause by a comparison made at the trial, of the instruments offered in evidence, with papers shown to be in the handwriting of the person whose signature is in question; but in such cases it must be made to appear in a satisfactory manner that such papers are in the genuine handwriting of such person, or they are not admissible; and this proof was not made by testimony merely showing that such papers were written by a person of the same name as his whose signature was in dispute.

In *Matlock v. Glover* (1885) 63 Tex. 231, extraneous writings of a plaintiff suing upon notes were excluded, simply as immaterial, when offered by the defendant for the purpose of allowing the jury to compare the handwriting and spelling of words which were incorrectly spelled in the letters with the handwriting and spelling in the notes appearing in the plaintiff's petition.

Williams v. Conger (1888) 125 U. S. 307, 31 62 L. R. A.

L. ed. 778, 8 Sup. Ct. Rep. 933, was an appeal from Texas. A paper was introduced in evidence by one party, the genuineness of which the other party was estopped to deny, and the court permitted it to go to the jury as a standard of comparison with the handwriting of the instrument principally in question. It was held that this was not error. The case was assimilated to that of *Moore v. United States*, 91 U. S. 270, 23 L. ed. 346, which was also one of estoppel to deny the genuineness of the standard offered; and the court said that the evidence establishing the specimen was such as abundantly to satisfy "the condition that the paper referred to as a standard of comparison must be clearly proved to be genuine."

But *Cannon v. Sweet* (1894; Tex. Civ. App.) 28 S. W. 718, left the rule in considerable uncertainty. In this case, an action to try title, an objection to a bill bond shown to have been signed by the common grantor and offered for comparison with the disputed deed, on the ground that it was not shown to be in the custody of the clerk, and not filed in the cause, was held to have been properly overruled, the court saying that it was competent to use any signature shown to have been made by the owner of the land, as a standard for comparison; and it was declared that it was not necessary that the paper containing such signature should have come from any particular custody, nor that it should have been previously filed. But upon a rehearing of the same case ([1895; Tex. Civ. App.] 29 S. W. 947), where it appears that the instrument filed as a standard was proved by the evidence of one who saw it signed and executed, the statement of the former opinion that it was competent to use any signature shown to have been made by the owner of the lands, as a standard for comparison, was held not necessary to a decision of the question, and might have been too broad. The common-law rule of exclusion of writings as standards which are not competent evidence upon some other issue in the case, it is said, does not apply where the paper offered is admitted to be genuine. In this case genuineness was clearly shown by evidence not objected to, and no evidence was offered to the contrary; so under these circumstances, the court's ruling was correct, for the writing was established with almost as much certainty as if it had been admitted.

However, it has been since held that it had never, in Texas, "been held admissible to offer papers as a basis of comparison which were irrelevant to the issue, and not papers in the case. It has been directly held that a paper not already in evidence, and having no connection with the issue to be tried, cannot be introduced to establish a signature, in order that it may be compared with a signature the genuineness of which is controverted." *Cook v. First Nat. Bank* (1896; Tex. Civ. App.) 33 S. W. 998.

And upon an issue as to who wrote the word "Paid" on a check it was held to be error in the court to permit a witness to testify that he had written the word "Paid" on a note which had no connection with the issues involved, and was not in evidence, and then to admit the note in evidence for the purpose of comparison of the two. "This mode of proving handwriting," the court says, "where objection is made, is not permissible." *Sheppard v. Love* (1902; Tex. Civ. App. 71 S. W. 87).

A review of these cases upon the civil side of the courts shows that papers in evidence were

always competent for comparison; that writings whose genuineness the party against whom they were offered was estopped to deny are competent; that the test of admissibility formerly (as shown in *Ebourn v. Zimpelman*, *Williams v. Conger*, and *Cannon v. Sweet*) was establishment as genuine by the most satisfactory evidence, so that no collateral issue could arise, or clear proof of genuineness, equivalent to an admission; but that at present no writing not in evidence and having no connection with the issue to be tried can be introduced for the purpose of comparison, in a civil case.

Utah.

Where the defendant in an action on a note admitted certain letters to be in his own handwriting, and they were then offered in evidence apparently for the purpose of comparison, it was proper to allow expert witnesses to institute a comparison of the signature upon the note with the other writings. *Durnell v. Sowden* (1887) 5 Utah, 216, 14 Pac. 334.

So it was held in *Tucker v. Kellogg* (1892) 8 Utah, 11, 28 Pac. 870, that experts are properly admitted to testify to the genuineness of disputed writing by comparison with writings admitted to be genuine, whether or not they are already in evidence for other purposes. Under such circumstances no collateral issue can arise in regard to them.

Vermont.

The Vermont rule allowing comparison of handwriting, generally, was first laid down in an unreported case, *Rutler v. Dixon*, decided in the supreme court in 1832, and mentioned in *Adams v. Field* (1849) 21 Vt. 256.

Where the execution of a bill of sale was in question the trial court allowed a receipt admitted by the defendant to be in his handwriting to go to the jury with the bill of sale, for them to determine its genuineness by comparing it with the handwriting to the receipt. Upon appeal it was held: "As this court has decided that the handwriting to an instrument may be found by the jury on comparison of handwritings, I see no reason why it could not be done in this case." *Gifford v. Ford* (1833) 5 Vt. 532. It does not appear whether the receipt was already in evidence, but no importance was attached to that fact.

Documents which are proved to be genuine, and which are not otherwise in evidence, are permitted to go to the jury for the purpose of comparison of hands; but the genuineness of the document which goes to the jury for the purpose of comparing the contested document with it must either be admitted or established by clear, direct, and positive testimony. *Adams v. Field* (1849) 21 Vt. 256.

In *State v. Ward* (1867) 39 Vt. 225, the principle was stated that, where witnesses are offered to prove the identity of handwriting by comparison, it is the duty of the court to determine whether they possess sufficient skill to entitle them to give an opinion as experts, before they are admitted to give evidence to the jury, and it is for the jury to determine what weight should be given such evidence upon the main issue; and in a criminal trial the prisoner should have the benefit of any reasonable doubt in the minds of the jurors as to the competency of such experts precisely as in their determination in respect to the sufficiency of any other testimony in the case.

And, similarly, it was laid down that the sufficiency of the proof given of the genuineness

of the papers offered as standards was the preliminary point addressed to, and in the first instance to be determined by, the court before permitting the papers to go to the jury; and in a criminal trial the court having adjudged the papers genuine, it then became the duty of the jury, before making comparison of the disputed writing with them, to examine the testimony respecting their genuineness, and decide whether it was established beyond a reasonable doubt; and in such cases the court should instruct the jury that, if they did not find that the papers offered as standards were beyond a reasonable doubt genuine, they should not be used as evidence against the prisoner. *Ibid.*

This case, however, was later disapproved by the same court. Where the judge, without deciding whether the signatures offered as standards for comparison were genuine, admitted them in evidence, and let them go to the jury, stating that, if the jury were satisfied upon examination of all the proof that the papers were not genuine, the comparison would go for nothing, this was error. The court said upon appeal that it was a better rule that the court should determine the question of genuineness of the standards as a preliminary one, and not perplex the jury with so many questions as would arise where a party wished to use a great many signatures by way of comparison. There is no different rule to guide the court in determining the genuineness of the standard from that which obtains in the disposition of any other question which the court or jury are called to pass upon, either in the admission, or in the amount, of testimony required. The court should be satisfied by a fair balance of testimony—the usual rule in civil cases—that the signature is a genuine one before it permits it to be used as such. *Rowell v. Fuller* (1887) 59 Vt. 688, 10 Atl. 853.

Virginia.

This state is of unusual interest in this discussion, because, without the aid of the legislature, the courts made a complete reversal of the prevailing rule.

In *Rowt v. Kile* (1829) 1 Leigh, 216, it was decided that, on a plea of *non est factum*, it was not competent to submit to the jury irrelevant papers proved to have been written by the person whose handwriting was in contest, so that the jury by a comparison of those papers with the instrument before them might decide whether it were genuine or forged.

And on a prosecution for forgery a receipt, signed by the defendant, produced by a witness for the prosecution on cross-examination, was not admissible in evidence on the part of the defendant for comparison with the instrument alleged to have been forged. *Burress v. Com.* (1816) 27 Gratt. 834.

But the rule excluding irrelevant writings from comparison with disputed writings, established by the earlier cases, was overridden in a carefully considered decision, *Hanriot v. Sherwood* (1884) 82 Va. 1, largely upon the ground that the great preponderance of authority in the United States now admits this kind of evidence, and that "the common law of England is . . . the law of this commonwealth, except so far as it has been altered by statute, or so far as its principles are inapplicable to the state of the country. It adapts itself to the situation of the society, being liberalized by the courts according to the circumstances of the country and the manner and genius of the people."

ple, so as to effect a reasonable and substantial, rather than a literal, compliance with its principles"; and also upon the ground that the court must keep in view the main object, which is the attainment of truth and the ends of justice. And expert testimony was admitted by comparison with writings proved to be genuine. This was followed in *Sprouse v. Com.* (1886) 51 Va. 374.

Washington.

In *Crane v. Dexter Horton & Co.* (1893) 5 Wash. 479, 32 Pac. 223, conceded genuine signatures were admitted in evidence for comparison with the disputed one; but there is no discussion of the general rule.

But in a later case writings, also conceded to be genuine, were admitted as standards of comparison, and the supreme court, in affirming the judgment, goes the whole length of the rule, citing Massachusetts, Ohio, Connecticut, and Pennsylvania cases, and seems to approve of the admission of writings for the express purpose of comparison, if proved to be genuine, whether admitted by the other party to be so, or not. *Moore v. Palmer* (1896) 14 Wash. 134, 44 Pac. 142.

West Virginia.

Clay v. Robinson (1874) 7 W. Va. 348, establishes a curious exception to the usual common-law rule allowing comparison with writings already in evidence. In an action on a bond, the defense being payment, to establish which a paper purporting to be a receipt in full by the plaintiff was offered in evidence, when the plaintiff had been permitted by the court without objection to prove to the jury that the body of the bond already in evidence was in his own handwriting, it was held to be an error to allow a witness who was an expert, but who was not acquainted with the plaintiff's handwriting, to state his opinion, from comparison of the handwriting of the body of the bond with the signature to the receipt, that the two were not written by the same hand; since it did not appear that it was admitted by the defendant that the body of the bond was in the handwriting of the plaintiff, or that the defendant was estopped in any way from denying it, or that the bond belonged to the witness who had been himself previously acquainted with the plaintiff's handwriting.

And on the second trial of the same cause, when the plaintiff offered in evidence, for comparison with the disputed receipt alleged by the defendant to have been signed by the plaintiff, another receipt signed by the defendant's intestate, and it was proved on the cross-examination of the plaintiff's witness that the body of it was in the plaintiff's hand, and the court thereupon certified that the body of the instrument was thus proved to be in the handwriting of the plaintiff, but the defendant's counsel refused to admit it, and the receipt was admitted in evidence, it was held that it was not competent to allow comparison of the two instruments by an expert witness, since there was no material difference in principle in the question from that determined before in the same case. (1877) 10 W. Va. 49.

Yet it was not error to allow witnesses not experts, who had testified to the genuineness of the signature alleged to have been forged by the defendant, to write the initial letter of the prosecuting witness's name as they thought the prosecuting witness wrote it, and to show it to the jury, and to allow the jury to compare such

letter, written by each of these witnesses, with the corresponding initial in the alleged forgery. It was held that it was true that it was not allowable to lay fully proved, but not admitted, specimens of handwriting before the jury for the purpose of permitting them to judge by comparison with the signature in question whether the latter was genuine, but no such thing was permitted here. The jury was not asked to compare different signatures of the prosecuting witness with his name signed to the alleged forgery; it was the same thing as permitting witnesses to make, in the presence of the jury, a diagram of a place in order to give the jury a better understanding of the witnesses's testimony. *State v. Henderson* (1886) 29 W. Va. 147, 1 S. E. 225.

Since, however, comparison by the jury with other writings not admitted at the trial to be genuine is not admissible, it was clearly proper to exclude the evidence of a witness who testified that he had compared the disputed writing with another writing admitted at the time by the person whose signature was in dispute to be his own, and that the two were almost exactly alike, so that one could not be distinguished from the other. *Ibid.*

On a trial for forgery, an expert witness having stated that whoever wrote the signature to the alleged forged order had, in making one initial, tried to imitate that letter in the prosecuting witness's genuine signature, the prosecuting witness, at the request of the prosecuting attorney, wrote his name upon a piece of paper, and the paper was then offered to the jury for the express purpose of ascertaining, from a comparison of that initial in the signature charged to have been forged and the same initial in the name upon the piece of paper, that the person who wrote the signature to the disputed paper attempted to imitate the handwriting of the prosecuting witness as to that initial. The court, in admitting the paper, committed reversible error, although it was stated by it at the time that the paper was admitted for the sole purpose of ascertaining, by a comparison of the two initials, whether the person who signed the disputed order attempted to imitate the signature of the prosecuting witness as to that initial, and not for the purpose of comparing the genuine signature, or any part of it, with the one charged to be forged, upon the question of its genuineness. *State v. Koontz* (1888) 31 W. Va. 127, 5 S. E. 328. (It is to be noted in this case that the decision, although based largely upon the Virginia cases, makes no mention whatever of the earlier decision of *Hanriot v. Sherwood*, 82 Va. 1, *supra*, which reversed the Virginia rule on the question of comparison.)

In West Virginia it is settled law that the genuineness of an instrument cannot be proved or disproved by comparison with other writings; but a note, the subject of the suit, and the pleas of the defendant, the alleged maker of the note, both being part of the record, the jury may unquestionably compare the note with the pleas, and, if the papers are such as to allow a comparison, the evidence of experts from comparison of them is admissible, for it is better that the jury should have the aid of experts to make the comparison, as few persons are competent to do so with success. *Tower v. Whip* (1903; W. Va.) 44 S. E. 179.

Wisconsin.

What was stated to be the "English rule" was definitely adopted, following the implication of

the court in *Pierce v. Northey* (1861) 14 Wis. 9, in *Hasleton v. Union Bank* (1873) 32 Wis. 84, to the effect that comparison of hands by a juxtaposition of two writings is wholly inadmissible, either as primary and sufficient or as corroborating evidence, except when the writings are of such antiquity that they cannot be proved in the ordinary way, or where the other writings clearly proved are already in the case and before the jury for some other purpose. This was followed in *Smith v. Ehner* (1879) 47 Wis. 479, 3 N. W. 26, and *State v. Miller* (1879) 47 Wis. 530, 3 N. W. 31.

The Wisconsin rule, however, was changed by statute in 1881, chap. 226; and, as amended (in Wis. Stat. of 1898, § 4189a), by an addition taken from the New York act of 1888 (chap. 555), now provides: "Comparison of a disputed writing with any writing proved to the satisfaction of the court to be the genuine handwriting of any person claimed on the trial to have made or executed the disputed instrument or writing shall be permitted to be made by witnesses, and such writings and evidence respecting them may be submitted to the court or jury."

But under the statute of 1881, which reproduced the English act, a comparison of handwriting written at the time of the trial by an adult witness, with the disputed handwriting said to have been written by the same person when a mere child, was not of sufficient importance to make it proper to compel the witness to write at the trial at the instance of the party seeking to prove the disputed writing a forgery. *Williams v. Riches* (1890) 77 Wis. 569, 46 N. W. 817. Canada.

The criminal procedure act of Canada, passed in 1869 (32 & 33 Vict. chap. 29, § 67; Rev. Stat. 1886, § 233), contains a literal re-enactment of the English act, except that under it the standard must be proved to the satisfaction of the "court," instead of the "judge," and it extends only to criminal trials. *Queen v. Tower* (1880) 4 Pugsley & B. (N. B.) 168, applies this provision to comparison by an expert.

The common-law procedure act of Upper Canada (Ontario), passed in 1855 (19 Vict. chap. 43, § 164; Rev. Stat. Ont. 1887, chap. 61, § 51), has the same provision as the English act.

Cases decided under this statute are: *Royal Canadian Bank v. Brown* (1867) 27 U. C. Q. B. 41; *King v. King* (1870) 30 U. C. Q. B. 26; *Thompson v. Bennett* (1872) 22 U. C. C. P. 393.

IV. Comparison of ancient writings.

Ancient writings, by which is ordinarily meant writings more than thirty years old, are universally capable of proof by means of comparison,—by the jury at all events,—with other and authentic documents of the same person, without regard to the relevancy of the latter.

This practice probably dates back at least to a decision of Hardwicke, L. Ch., in 1746, found in *Buller's Nisi Prius*, at p. 236.

As to the exact age when a document acquires the right to be treated with the special consideration accorded to an ancient writing, it seems that "no particular period of antiquity has been assigned for the introduction of evidence of this description." *Erie, J.*, in *Doe ex dem. Jenkins v. Davies*, 10 Q. B. 314.

Such writings are to be distinguished from documents which from their nature and the 62 L. R. A.

custody from which they are produced, as, for instance, the possession of persons claiming an interest under them, require no further proof than these facts; proof of their handwriting is not necessary, and this note is not concerned with them.

The proof of the handwriting of old documents has formed an exception, since *lex non cogit ad impossibilia*, to the common-law rule of exclusion of comparison of handwriting. *Moore v. United States*, 91 U. S. 270, 23 L. ed. 346.

As to ancient documents, the necessity of the case and the difference of circumstances have introduced a different rule of evidence. One cannot call a witness who has seen the person write or corresponded with him, nor is there much danger, in resorting to comparison, of an unfair selection of specimens; further, it is obvious that in ancient documents comparison often becomes a pure question of skill, the character of the handwriting varying with the age, and the discrimination of it would be materially assisted by antiquarian studies. *Coleridge, J.*, in *Doe ex dem. Mudd v. Suckermore*, 5 Ad. & El. 703, 2 Nev. & P. 16, W. W. & D. 405, 7 L. J. Q. B. N. S. 33.

In England, however, the cases have not been entirely uniform. In *Brookhard v. Woodley* (1770) Peake, N. P. Cas. 20, note (*supra*, II. a, 1), official entries by a rector long dead were rejected as standards for comparison by the jury.

And in a similar case one who had been familiar from signatures in a book with the handwriting in question, which was fifty years old, was asked to compare them, and, upon objection that the book was not evidence itself and so could not be looked at for any purpose whatever, the disputed writing was rejected. *Reg. v. Barber* (1844) 1 Car. & K. 434.

But in *Morewood v. Wood* (1791) 14 East. 325, note, 4 T. R. 157, an ancient signature was "proved [probably by witnesses] to tally with the subscription" to a will; and the same thing was done in *Roe ex dem. Brune v. Rawlings* (1806) 7 East, 279, 3 Smith, 254, 8 Revised Rep. 632, and *Taylor v. Cook* (1820) 8 Price, 650.

In the English cases there appears, several times, the admission of comparison of ancient writings by nonexpert witnesses, who, however, were familiar with the writing in question.

Where an ancient paper was offered without any proof of the handwriting, and was objected to, *Abbott, L. Ch. J.*, "directed the person producing the paper to compare it with the handwriting . . . in other papers, . . . and to say upon oath whether he believed the writings were by the same person. His lordship said he recollected Mr. Justice Lawrence on a trial at Worcester directing a Mr. Benjamin Price, then accidentally in court, to compare an ancient writing with other papers purporting to be written by the same person, and to have given his opinion on the identity of the writings." *Doe ex dem. Tilman v. Tarver* (1824) Ryan & M. 141.

And the handwriting of a copy of a marriage register, purporting to be that of a curate who had been in office eighty years before, was sufficiently proved by the testimony of one who had been for seven years parish clerk, that the same signature appeared in several places in the original register, which he produced, although no proof was given of the curate's death. *Doe ex dem. Jenkins v. Davies* (1847) 10 Q. B. 314, 16 L. J. Q. B. N. S. 218, 11 Jur. 607.

An inspector of franks, called to prove the handwriting of a pedigree, signed in the name of one who had been dead ninety-two years, swore that he had inspected certain documents, one of which was in evidence in the case, and all of which were produced before him, and considered that from this inspection he was so familiar with the handwriting that he could say without any immediate comparison whether any other document produced was or was not in the handwriting of the same person, but was not allowed to express an opinion, because his knowledge was acquired for the purpose of giving evidence upon it; but a solicitor who had become familiar with the same handwriting through acquaintance with a great number of documents which he had had occasion to examine from time to time, in the course of business, for his client, was permitted to prove the handwriting. *Fitzwalter Peerage Case* (1843) 10 Clark & F. 193.

In the United States, in courts where the old limited common-law rule as to comparison generally has always obtained, there seems to have been practical unanimity as to the proof of ancient writings. So the signature of a surveyor, made forty years before, was proved by a witness not an expert, who compared it with his signature attached to the surveys which were issued during the period of his office; for, when a writing is offered in evidence so antiquated as to render it difficult, if not impossible, to present a witness who has ever seen the person write whose signature is attached to the writing, justice would be defeated if a comparison of handwriting were not permitted. *Cantey v. Platt* (1822) 2 McCord L. 260.

And where the daughter of a person alleged to have executed a disputed deed produced from among the papers of her father, certain instruments executed and recorded, six and nineteen years old at the time when the disputed deed purported to have been executed, and testified that the papers bore the genuine signature of her father, and were the only ones in her possession bearing his signature, these were properly admissible in evidence for comparison by the jury. *Mardes v. Meyers* (1894) 8 Tex. Civ. App. 542, 28 S. W. 603.

So the opinion of an expert, familiar with land-office archives, formed from a comparison before the trial, was admissible. *Pope v. Anthony* (1902; Tex. Civ. App.) 68 S. W. 521.

Other cases stating the same rule are: *Clark v. Wyatt* (1860) 15 Ind. 271, 77 Am. Dec. 90; *West v. State* (1849) 22 N. J. L. 212; *United States v. Ortiz* (1900) 176 U. S. 422, 44 L. ed. 520, 20 Sup. Ct. Rep. 406; (comparison by experts).

In Pennsylvania, however, it seems that the rule admitting witness comparison was limited to the "case of public officers, who have been so long dead that better proof could not be expected." *Vickroy v. Skelley* (1826) 14 Serg. & R. 372.

But actual juxtaposition was not always necessary.

When a witness was called to prove the handwriting of an old survey, who had been in the habit of inspecting ancient surveys, and thus had become acquainted with surveys made by the supposed author; and it was objected that this would be introducing comparison of hands in an improper manner, and that the papers from which the witness had formed his opinion ought to be produced to the jury so that they

might make comparison for themselves.—It was said that testimony like this had been received in the courts without producing the papers which had enabled the witness to draw his inference. *Jackson ex dem. Kip v. Murray* (1809) Anthon N. P. 105.

And evidence of the handwriting of ancient documents by witnesses who have become acquainted with the manner in which the supposed author of the document signed his name, merely from inspecting other ancient writings which bear his signature, provided such ancient writings have been treated and regularly preserved as authentic documents, is sufficient; but is distinct from comparison of hands. *Jackson ex dem. Bradt v. Brooks* (1832) 8 Wend. 426, Affirmed in 15 Wend. 112. To the same effect is *Rogers v. Ritter* (1870) 12 Wall. 317, 20 L. ed. 417.

But a witness, not an expert, called to prove the signature of a clerk on an ancient document, whose only knowledge of his hand was derived from seeing at his house instruments signed with the name of the clerk as such, but not known to the witness to have been actually signed by him, is not competent. *Jarvis v. Vanderford* (1895) 116 N. C. 147, 21 S. E. 302.

The Oregon Code of 1902, § 778 (Hill's Anno. Code, § 768), provides: "When a writing is more than twenty years old, the comparisons may be made with writings purporting to be genuine, and generally respected and acted upon as such by persons having an interest in knowing the fact."

V. Comparison with writings already in evidence, or in the record.

a. Writings already in evidence.

Examination of the different general rules, whether under statutes or according to what was, generally mistakenly, thought to be the common-law rule, in England and in the American states (treated *supra*, in II. and III.), discloses that in all these jurisdictions writings already properly in evidence in the cause for any other purpose may be used for the purpose of comparison, either by expert witnesses or the jury (sometimes not by both, however; see *infra*, VIII. and IX.); but there are exceptions, or rather limitations, to this statement. In the Federal courts, for instance, the standard writing, even although in evidence for another purpose, must (apparently) necessarily be also admitted to be genuine by the party against whom it is offered; in Alabama it must be of "unquestioned" genuineness; in Delaware it must be admitted to be genuine; in Indiana (only in the case of writings offered for comparison by witnesses), and in Minnesota, if offered for comparison by either witnesses or the jury, such writings, whether previously in evidence or not, must be admitted to be genuine; in Oregon, even if in evidence, they must be either admitted or treated as genuine by the party against whom they are offered; and in West Virginia writings in evidence before, to be competent as standards of comparison, must be either admitted to be genuine by the party against whom they are offered or such that he is estopped to dispute their genuineness.

The jurisdictions limiting comparison to writings already in evidence in the case included very many of the American states, but, owing to the adoption of liberalizing statutes extending this method of proof of handwriting

to comparison with, generally speaking, any writings proved to the satisfaction of the court to be genuine, there now remain only five states, Alabama, Arkansas (apparently, and in the case of jury comparison only), Georgia, (in the case of witness comparison only), New Mexico, and North Dakota, where this limiting rule, which has been seen to be the English common-law rule, is declared to obtain.

An apparent exception to the general rule permitting comparison with writings already in evidence is seen in a West Virginia case. The plaintiff in an action on a bond, to which the defense was payment, supported by the production of a receipt in the name of the plaintiff, was allowed to prove, without objection, that the body of the bond, sued upon, which was in evidence, was in his own handwriting. He could not prove by an expert that the body of the bond and the signature to the receipt were in the same hand. *Clay v. Robinson* (1874) 7 W. Va. 348.

And even when on a new trial of the same action, on the cross-examination of the plaintiff's witness, it was proved that the body of another writing was in the plaintiff's hand, although the defendant's counsel refused to admit it, it was not competent to allow comparison, by the plaintiff's expert, of the receipt relied upon by the defendant with the body of the other paper; although the standard was established by the defendant's examination. *Clay v. Alderson* (1877) 10 W. Va. 49.

In an English case (before the statute), which seems to have had no following on the point, another limitation was suggested. On an issue as to whether the defendant accepted a bill of exchange, several letters from the defendant on the subject of the bill were read in evidence, and the jury asked to see the letters. Gurney, B., said that, if the letters related to distinct transactions, the jury should not be allowed to see them; but since they all related to the same transaction, they might do so. *Eaton v. Jervis* (1838) 8 Car. & P. 273.

And photographic copies of writings, although in evidence and attached to depositions taken on commission beyond seas, where the originals were so that they could not be produced, were not proper for use as standards of comparison, since a witness speaking from comparison of handwriting should have before him in court, in juxtaposition under his eye, the writings to which he testifies. This requirement is included in the rule that there can be no comparison of handwriting unless the pieces of writing by which the comparison is made are properly in evidence in the case for some purpose other than that of being compared. *Hynes v. McDermott* (1880) 82 N. Y. 41, 37 Am. Rep. 538.

But it seems that, under the same pre-statutory rule, where instruments are received in evidence without objection they must be treated as properly in evidence for all purposes of the case, so as to be competent for comparison by witnesses or the jury with the signature in dispute, although apparently introduced merely for the purpose of comparison. *Miles v. Loomis* (1877) 10 Hun, 372, Affirmed in 75 N. Y. 288, 31 Am. Rep. 470.

It has been held, also, that papers which, although offered merely for the purpose of comparison, were admissible in evidence for the purpose of showing facts inconsistent with the claims of the other party, although it was not necessary under the pleadings to introduce the

evidence, could be used for comparison under the strict common-law rule. *Green v. Terwilliger* (1892) 56 Fed. 384. An implication to the same effect is to be found in *Hazleton v. Union Bank* (1873) 32 Wis. 34, and *Eaton v. Jervis*, 8 Car. & P. 273, *supra*.

As to what is "evidence in the case," for this purpose, it seems that in New York affidavits relating to the case were not necessarily so. *Ellis v. People* (1861) 21 How. Pr. 356.

But where an alleged attesting witness to a deed, examined upon interrogatories after the commencement of the action, denied that he witnessed the conveyance, and swore that his name appearing upon it was not his handwriting, and, at the request of an attorney, wrote his name three times, and later died before the trial, it was held that, although the three signatures were not returned by the officer who took the examination, yet they were sufficiently identified, and might fairly be treated as evidence in the cause, so as to be admissible in evidence for comparison by the jury with the disputed signature; since, on a trial at nisi prius, when a witness had denied his signature to a document produced in evidence and wrote his name in open court, such writing might be treated as evidence in the cause. *Doe ex dem. Devine v. Wilson* (1855) 10 Moore P. C. 502.

Reg. v. Taylor (1852) 6 Cox C. C. 58, is a similar case. It was a prosecution for perjury in swearing in a civil action that a signature to a document was not in the handwriting of the defendant, who alleged that it was a forgery. The judge in that action had directed the defendant to write his name in pencil, which he did, and the judge compared it with the signature to the alleged forgery; and eventually the disputed document, together with the signature made in court, was "impounded." On the trial of the indictment for perjury the court held that the jury might look at and compare the two signatures. The signing of his name by the defendant during his examination on oath in the civil action formed in fact part of the transaction out of which the charge arose.

Where it was shown on a murder trial that the testimony taken at the inquest over the body of the murdered person was written out, and the record of it, containing the defendant's testimony with his signature, was duly filed with the clerk and produced by him in court and read in evidence without objection, it was evidence in the cause admissible for the purpose of comparing the defendant's signature in it with the disputed signature alleged by the prosecution to be the defendant's; but, if the defendant had objected that his signature had not been sufficiently proved, the prosecution would have been required to prove it. *State v. David* (1895) 131 Mo. 380, 33 S. W. 28.

But, on the examination of one charged with arson, an incriminating letter supposed to have been written by him was orally repeated in his hearing, and at the request of the examining officials he wrote on another paper the same words; and the original letter, so repeated, contained words of peculiar form, style, and orthography, so that the copy was in these respects a facsimile of it; and it was held that the act of copying the original letter could not be considered and treated as any part of the oral statement of the defendant elicited upon the examination, and hence, the copy itself was not admissible in evidence for this reason, and, not being admissible for any other purpose,

could not be used for the mere purpose of comparison with the original letter, in accordance with the rule (in Wisconsin before the statute) that the jury may form their opinion as to the genuineness of a document by a comparison of it with any other documents already in evidence before them and shown to be the original production of the person whose handwriting is in question. *State v. Miller* (1879) 47 Wis. 530, 3 N. W. 31.

Writings which had been offered in evidence and made a part of the record on a former trial, and which, although not formally offered in evidence by either party on the second trial, were treated by both parties as in evidence and as competent evidence for the jury, containing signatures which were admitted in open court to be the genuine signatures of the person whose signature was in dispute, were held to be proper subjects of comparison by experts with the disputed signature. *Smith v. Ehnert* (1879) 47 Wis. 479, 3 N. W. 26.

B. Writings otherwise in the record.

The English common-law rule as developed before the statute of 1854, it has been seen, limited the comparison to writings already in evidence in the case. But, following the lead of the Federal courts, this rule has been extended in many of the American states in which the old rule has not been changed by statute, so as to include writings or documents, which, while not in evidence in the case, are "in the case" in the sense of belonging to the record or files of the cause. This modification of the English rule now exists in about half of the nonstatutory jurisdictions which do not extend the rule generally to any writings proved to be genuine; namely: In the Federal courts, in Delaware, Illinois, Indiana (in the case of jury comparison), Michigan, North Carolina, and West Virginia.

As for what is, for the purpose of comparison, a writing in the case, or in the record, under this rule, the affidavit previously filed in the probate court by a claimant in support of his claim upon a promissory note against the estate of a deceased person is, in an action against the administrator on the note, a paper in the cause, so as to be admissible at the instance of the defendant in the proceedings upon appeal, for comparison with the note by experts and the jury, in order to prove its forgery by the plaintiff. *Elsenrath v. Kallmeyer* (1895) 61 Mo. App. 430.

But it is error on the trial of an indictment for forgery to introduce the records of a probate court for the express purpose of putting a will in evidence, in order that the signature upon it may be compared with the disputed signature. *People v. Parker* (1887) 67 Mich. 222, 34 N. W. 720.

The bail bond, however, of the prisoner, and his affidavit for a continuance in the case, were proper for comparison; they were part of the files in the cause, and, as such, belonged to the case to be used for any material and relevant purpose in it. *Ibid.*

So in North Carolina a bail bond constituting part of the record was proper for comparison, because the presumption was that the signature upon it was genuine. *State v. Noe* (1896) 119 N. C. 840, 25 S. E. 812.

And the answer of the defendant was admissible against him for comparison with the 62 L. R. A.

disputed writing, for the reason that he was estopped to deny his signature to the answer and his affidavit in its support. (As to the effect of estoppel, see *infra*, VII. d.) *Lachance v. Loeblein* (1884) 15 Mo. App. 460.

But pleadings cannot, under the nonstatutory rule, be introduced in evidence by the party who made them for comparison of the signatures upon them. *Springer v. Hall* (1884) 83 Mo. 693, 53 Am. Rep. 598; *Doud v. Reid* (1893) 53 Mo. App. 553; *Travers v. Snyder* (1890) 38 Ill. App. 379.

Under the Iowa statute, however, the signature upon an answer was held to be admissible for this purpose in favor of the defendant, over the objection that the evidence should be excluded upon the principle on which, if the plaintiff should prove admissions of the defendant, the defendant might not disprove them by introducing counterstatements of his own made at another time. *Singer Mfg. Co. v. McFarland* (1880) 53 Iowa, 540, 5 N. W. 739.

VI. Comparison with writings made in court.

Between the case of comparison with writings which are already in evidence, or on the record (see *supra*, V.), and the case of comparison with writings which are extraneous and irrelevant to the issue, and produced at the trial merely for the purpose of comparison (see *infra*, VII.), there is comparison with another class of specimen writings, which have some of the advantages and some of the vices, as a class of evidence, of both the others.

Such specimens are writings made in court, in the view of the court or jury, by witnesses, and expressly for the purpose of comparison. The principal advantage of this kind of standard writing is that, since there is no question of genuineness, the most usual objection to comparison, that the jury are embarrassed by collateral issues as to the genuineness of the offered standard, is avoided; but its disadvantage is that the witness, if he wishes to prove that the disputed writing is in his hand, whether it is or not, and if he wishes to prove that it is not in his hand, whether it is or not, will be tempted to disguise his natural hand,—in the first case in order to make the specimen as like as possible, and in the second case to make it unlike, the disputed writing. The most usual case, of course, is that where the witness swears that the disputed writing is not his own, as in the case of both the accused and the prosecuting witness in a trial for forgery; but the converse case, where the witness swears that the writing is his and the other party denies it, is not uncommon, the great case of *Doe ex dem. Mudd v. Suckermore* being of this kind. (See *supra*, II. a, 1.)

This kind of evidence might be elicited in three ways: Upon direct examination; upon cross-examination; and by the court (also, in effect, in cross-examination). As for writings made in court voluntarily, and upon the direct examination, the courts are unanimous in excluding it; when made upon cross-examination such specimens are generally competent evidence.

Osbourne v. Hosier (1716) 6 Mod. 167, is the first decision involving comparison of this kind. The signature of one witness to the bond sued upon having been proved, the defendant produced a person of the same name as that of the other witness, and he swore that the hand was very like his, but denied that it was genuine; and "Holt, Ch. J., ordered them both to write

their names, and thereupon left it to the jury, who found for the plaintiff."

And on a trial for forgery when the jury had turned round to deliberate, Bayley, J., called the person whose name was alleged to be forged into the box and desired him to write his name on a sheet of paper, which was done, and the judge then handed it to the jury together with the imputed forgery. *Williams' Case* (1829) *Lewin C. C.* 123.

The usual reason for excluding specimen writings made in court at the instance of the party calling the witness is that this would open a door to fraud. In two cases, however, *United States v. Jones* (1882) 20 *Blatchf.* 235, 10 *Fed.* 469, and *State v. Koonz* (1888) 31 *W. Va.* 129, 5 *S. E.* 328, the ground of decision is that such papers are incompetent under the rule excluding irrelevant writings.

This is contrary to the rule in England, where, when a witness at nisi prius had denied his signature to a document, and wrote his name in open court, such writing might be treated as evidence in the cause. *Doe ex dem. Devine v. Wilson* (1855) 10 *Moore P. C. C.* 502.

In order to disprove a release of dower, a widow, in the presence of the jury, wrote her name several times upon a slip of paper, and offered it in evidence. It was held that the signatures were not competent; the rule being that a signature made for the occasion *post litem motam*, and for use at the trial, ought not to be taken as a standard of genuineness, and the jury should not be troubled with the additional issue whether the signature so offered is written in a constrained or forced manner or not. The cases to the effect that a witness may be called upon in cross-examination to write in open court, in order that the jury may compare such writing with the controverted signature, are on the ground that this is merely as a part of the cross-examination, and for the purpose of contradicting the witness. *King v. Donahue* (1872) 110 *Mass.* 155, 14 *Am. Rep.* 589, *Followed in Com. v. Allen* (1879) 128 *Mass.* 46, 35 *Am. Rep.* 356; *People v. De Kroyft* (1888) 40 *Hun.* 71, 1 *N. Y. Supp.* 692.

It is noticeable in these three cases that this conclusion is arrived at, even under the liberal rule allowing, in Massachusetts and New York (under the statute), comparison with any writing proved to be genuine.

So in a prosecution for forgery it was error to allow a witness who confessed having written the forged instrument at the request and under the direction of the defendant to write in the presence of the court and jury so that the jury might institute a comparison between the instruments. It would open too wide a door for fraud if a witness were allowed to corroborate his own testimony by a preparation of specimens of his writings for the purpose of comparison. *Williams v. State* (1878) 61 *Ala.* 33.

And in a trial of a Cherokee Indian for murder, where the prosecution introduced in evidence a letter in the Cherokee alphabet proved to be in the defendant's handwriting, against the defendant's denial, and the defendant introduced in evidence, without objection, a letter not relevant in itself, which was identified as his handwriting, and called an expert in Cherokee handwriting, who testified upon comparison of the two writings that they were written by different persons, and defendant then offered a paper which he testified he had written at the table in court that day to compare with the two writ-

ings introduced before, it was held, for the same reasons as in the preceding case, that the exclusion of this third paper was proper. *Hickory v. United States* (1894) 151 *U. S.* 303, 38 *L. ed.* 170, 14 *Sup. Ct. Rep.* 334.

Where the defense on a trial for forgery was that the note in question was genuine, it was error to permit the complainant to write his name in court upon a piece of paper, after the note in question had been shown to him, and to allow this paper to be shown to the jury for comparison with the signature of the disputed instrument. The test to be applied in such a case is, Had the witness a motive for disguising his handwriting? and, if so, the testimony should be excluded, or a party would be permitted to manufacture testimony for himself. Here it was to the interest of the prosecuting witness to write his signature differently from the copy before him, and it is not the intention of the law so to present temptations to human infirmity. The fact, also, that the witness was able to write only his own name, and was consequently unable to change the form of his signature, does not affect the rule, unless it were shown that he could not write his name with the change of a single letter. *McGlasson v. State* (1807) 37 *Tex. Crim. Rep.* 620, 40 *S. W.* 503.

And there is no distinction where the person writing before the jury has not the disputed writing before him. *Whittle v. State* (1902; *Tex. Crim. App.*) 60 *S. W.* 771.

Yet it was proper to allow witnesses, who had testified to the genuineness of a writing charged to have been forged by the prisoner, to write an initial of the name of the prosecuting witness as they thought he wrote it, and to allow the jury to compare it with the forgery. Here the jury were not asked to compare different signatures of the prosecuting witness with his name on the paper in question; it was the same thing as permitting witnesses to make a diagram of a place in the presence of the jury in order to give them a better understanding of the testimony. *State v. Henderson* (1886) 29 *W. Va.* 147, 1 *S. E.* 225.

And where a witness was permitted, over objection, to write his signature in the presence of the jury for comparison by them with the disputed signature purporting to be his, there was no reversible error when the objecting party also, on cross-examination, asked the same witness to write his name, and introduced the signature in evidence. Having adopted the same method to test the genuineness of the witness's signature, the objecting party cannot be heard to complain of the introduction of such evidence. *Allen v. Gardner* (1891) 47 *Kan.* 337, 27 *Pac.* 982.

It was, however, not competent for the plaintiff in an action for personal injuries to write his name before the jury for the express purpose of having them compare it with his signature to a release signed by him about the time of the accident, in order to show by contrast his nervous condition at the time. There was no rule sanctioning a comparison of handwriting for such a purpose; and the jury might have been led to doubt the genuineness of the signature to the release, which was not in issue. *Gulzoni v. Tyler* (1883) 64 *Cal.* 334, 30 *Pac.* 981.

A writing made by a witness at the request of the opposing counsel is treated as a regular part of the cross-examination, being intended to contradict the witness; and the rule is consequently

different. Such a writing was admissible, for jury comparison, in *Cobbett v. Kilminster* (1865) 4 Fost. & F. 490.

In an action of trover in which the defendant alleged that the title was in a third person, and the plaintiff offered in evidence a writing purporting to be signed by the third person, and showing that the title was to remain in the plaintiff, it was proper, on the cross-examination of the third person, when called by the defendant, to require him to write his name upon a piece of paper for comparison by the jury with the signature to the writing sought to be proved; but it might not have been competent for the defendant to exhibit signatures of the witness made at the time for comparison, because, if the witness was an expert writer, he might mislead the jury for the benefit of the party calling him; but when the plaintiff chose to make the experiment it was not for the defendant to object. *Chandler v. Le Barron* (1858) 45 Me. 534.

And on a trial for forgery, the defense being that another person wrote the signature in question, it was proper, upon the cross-examination of that person, who was a witness for the defense, to allow her to write the name of the person whose signature was forged, and to admit it in evidence for the purpose of testing the signatures by comparison; and it was held that this course was admissible under the common-law rule without the assistance of the New York statute of 1880, permitting comparison with any writing proved to be genuine. *People v. De Kroyft* (1888) 49 Hun, 71, 1 N. Y. Supp. 692. To the same general effect are *Roe v. Roe* (1875) 8 Jones & S. 1; *Bronner v. Loomis* (1878) 14 Hun, 341; *Huff v. Nims* (1881) 11 Neb. 363, 9 N. W. 548; and *Bradford v. People* (1896) 22 Colo. 157, 48 Pac. 1013. *Hutchins's Case* (1819) 4 N. Y. City Hall Rec. 119, and *Gilbert v. Simpson* (1875) 6 Daly, 29, are thus overruled.

It seems that the trial court has power to direct a witness, upon cross-examination, to write or print his name upon paper in order to afford to the jury an opportunity to compare it with the signature supposed to be his; but the exercise of this power is in the discretion of the court. *Smith v. King* (1893) 62 Conn. 516, 26 Atl. 1059.

In an action on a note the defense was forgery by the plaintiff's agent, in whose handwriting the body of the note was admitted by the plaintiff to be, and a copy of the whole, made by the agent in court at the request of the defendant upon cross-examination, was held not to be admissible merely for the purpose of showing that the witness disguised his hand and did not write an honest copy, since its use would have no direct tendency to show whether the witness wrote the signature or not; but it was held that, if it had been offered for the purpose of comparison with the signature which the defendant alleged the witness wrote, it would have been admissible. *Bridgman v. Corey* (1889) 62 Vt. 1, 20 Atl. 273.

There are a few cases, however, to the contrary effect on the general question.

On the cross-examination of a defendant in an action on a promissory note the execution of which is denied, it is proper to exclude the questions whether he had signed certain papers not in the case, whether he would not produce signatures made before the note in suit, and whether he would not write his name in court;

the object of the questions being to bring into the case extrinsic signatures for the purpose of comparison by the jury. *First Nat. Bank v. Robert* (1879) 41 Mich. 709, 3 N. W. 199.

So on a criminal trial, where a witness for the prosecution was, on cross-examination, shown a letter, the authorship of which he denied, purporting to have been signed by him and threatening the defendant, and then wrote his signature at the request of the defendant's counsel, it was proper to exclude the letter and the signature offered for the purpose of allowing the jury to compare the two signatures and determine for themselves the genuineness of the signature to the letter. *Griffin v. State* (1890) 90 Ala. 596, 8 So. 670.

In an action on a promissory note it was not error (even under the Wisconsin statute) to refuse to compel a witness twenty-one years old to rewrite, in the presence of the jury, the indorsements which she testified she had written upon the note in question at the ages of ten and thirteen years, for the purpose of being used in evidence by the jury for comparison,—especially as she testified that her handwriting had very much changed and improved since she made the indorsement on the note. *Williams v. Riches* (1890) 77 Wis. 569, 46 N. W. 817.

VII. Comparison with extraneous writings.

a. Writings proved to be genuine.

It has been seen that many of the American states without the aid of legislative enactment, and following the lead of Massachusetts and Connecticut, have established a liberal common-law rule allowing comparison with writings which are irrelevant to any issue in the case and have no relation to the files; the test of their admissibility as standards of comparison being merely proof, to the satisfaction of the court, of their genuineness.

These states are: Connecticut, Kansas, Maine, Massachusetts, Mississippi, New Hampshire, Ohio, Oklahoma, South Carolina, Vermont, Virginia, and Washington. (Some of the states limit the comparison to writings "admitted" or "proved" to be genuine; but this provision amounts to the same thing as "proved.")

The states which have adopted the same rule by statute, besides England, the Canadian Dominion (in criminal cases), and the Province of Ontario, are: Arizona, California, Colorado, Florida, Georgia (only in the case of jury comparison), Iowa, Kentucky, Louisiana (only in the case of expert comparison), Maryland, Missouri, Montana, Nebraska, New Jersey, New York, Pennsylvania, Rhode Island, Tennessee, Texas (in criminal cases), and Wisconsin. Of these the acts of Canada, Ontario, Arizona, Colorado, Florida, Maryland, Missouri, New Jersey, New York, and Rhode Island are substantial, and generally literal, reproductions of the English common-law procedure act of 1854 (17 & 18 Vict. chap. 123, § 27).

b. Writings admitted to be genuine.

Inasmuch as the admission of genuineness is one method of establishing that fact, it will be seen that writings admitted to be genuine by the party against whom they are offered are competent as standards of comparison in the jurisdictions mentioned immediately before (in VII. a), as requiring proof of the genuineness of the specimen writing. Also it has been seen (in

V. a) that sometimes—in the Federal courts and in Delaware—the specimen, even though in evidence, or in the case, must be conceded to be genuine, as well; and in West Virginia it must not only be part of the record, but also either admitted, or such that the party against whom it is offered is estopped to deny its genuineness. In a few other states—namely, Arkansas (in the case of specimens to be compared by witnesses), Indiana (also in the case of specimens for witness comparison), Minnesota, and Utah—the sole test of competency of offered standards is admission of genuineness by the opposing party. In Oregon also, by statute, the specimen must be “admitted or treated as genuine” by him.

In North Carolina the rule is different from that in any other jurisdiction. There, a writing to be admissible as a standard of comparison (by witnesses only) must be in the case, or either conceded to be genuine, or such that the opposite party is estopped to deny its genuineness.

A concession by counsel at the trial that a specimen writing offered in evidence was a power of attorney given by his client to his attorney in fact, by virtue of which he appeared and presented his claim to the court, amounted to a declaration that it was in his hand. *Moore v. United States* (1875) 91 U. S. 270, 23 L. ed. 346.

And failure to object to the use by the other party, while examining witnesses, of a writing as a standard of comparison, amounts to a practical admission of its genuineness, and a later objection to its admission in evidence and use by the jury comes too late. *Sanderson v. Osgood* (1880) 52 Vt. 309.

Mere evidence of admission by a party that a writing was his is not enough. *Jones v. State* (1877) 60 Ind. 241.

And an admission of a party in a deposition before trial, that certain checks had been signed by him, will not preclude him from denying such signatures at the trial, where he might still raise the question of their genuineness, thus bringing on a collateral issue. *McCombs v. Foster* (1895) 62 Mo. App. 303.

And, going further, in Indiana specimens cannot, over objection, be proved to be genuine by the party objecting or any other person; hence, it was proper to refuse to compel a defendant under oath to answer as to the genuineness of specimens to be compared with a writing alleged to be his. *Hazzard v. Vickery* (1881) 78 Ind. 64; *Bowen v. Jones* (1895) 13 Ind. App. 193, 41 N. E. 400.

But in Missouri, on the cross-examination of the defendant in an action on a note he might be compelled to answer whether signatures, to be offered for comparison with the note, were in his hands; but the cross-examining party was bound by his answer. *McCombs v. Foster* (1895) 62 Mo. App. 303.

And, obviously, the concession must be by the party against whom the standard is offered in evidence; the concession must avoid an issue. *Doud v. Reid* (1893) 53 Mo. App. 553.

c Writings whose genuineness the other party is estopped to deny.

In four jurisdictions an offered writing is sufficiently established as a standard for comparison if the party against whose interest it is offered is estopped to deny that it is a genuine 62 L. R. A.

writing. They are: The District of Columbia, North Carolina, Texas (in civil cases), and West Virginia.

So a plaintiff suing executors was estopped to deny the genuineness of the signature to the will under which the defendants had qualified. *Croom v. Sugg* (1892) 110 N. C. 259, 14 S. E. 748.

So, obviously, of papers introduced as genuine by the person against whose interest they were later offered as standards of comparison. *Kennedy v. Upshaw* (1885) 64 Tex. 411; *Smyth v. Caswell* (1887) 67 Tex. 567, 4 S. W. 848.

And on a trial for forging a certificate of record upon a deed of trust the indorsement of the defendant upon the accompanying notes was a legitimate standard of comparison, since, the defendant being estopped to deny the genuineness of his signature on the notes, which he had transferred, no collateral issue could be raised upon them. *State v. Tompkins* (1880) 71 Mo. 613.

VIII. Comparison by the jury and by the court.

Comparison by the jury is allowed, it has been seen, in every jurisdiction except North Carolina and Louisiana; the exclusion of this kind of proof in North Carolina being in accordance with a supposed common-law rule refusing the jury permission to see written documents in the case; and in Louisiana, owing to a statute limiting comparison to experts appointed by the court, according to the civil-law rule.

While juries may exercise their own judgment concerning the genuineness of a signature by comparing it with others of the same person, they must also always receive and weigh all evidence of the witnesses. *Joseph v. First Nat. Bank* (1876) 17 Kan. 256.

And a charge to the jury that they were expected to apply their own judgments to ascertain the evidentiary effect of a comparison of the signatures, and not rely entirely upon the testimony of experts from it, was proper. *People v. Gale* (1883) 50 Mich. 237, 15 N. W. 99.

But an instruction to the jury that they might compare the disputed handwriting with any of the writings proved to be signed by the person whose signature was in dispute, and might determine for themselves, from comparison, whether the signature in dispute was similar to the signature upon other writings proved to be genuine, and might judge for themselves whether the signature in question was genuine or not, although an expert had testified that the signature in question was not exactly like the signatures upon such other papers, was erroneous, since the jury might have thought themselves authorized to pronounce the disputed signature genuine if from a comparison of it with other proved signatures they thought it similar to them; and since such an instruction seemed to authorize the jury to disregard all the expert evidence if they, not being experts, thought from their own comparisons that the signature to the note in question was similar to the genuine ones, though all the experts thought it not genuine and gave their reasons for so thinking. *Coleman v. Adair* (1898) 75 Miss. 660, 23 So. 369.

So upon an assignment of error that the judge, trying a case without a jury, in arriving at his conclusions upon the facts, involving a question of the genuineness of an instrument, disregarded the testimony of the plaintiff's wit-

nesses, and relied solely upon his own personal judgment from comparison as an expert upon handwriting, it was held that the presumption was that the judge duly considered and weighed all the evidence; and when a case is tried before a judge, and the execution of a writing is put in issue, it is the province of the judge to examine and compare all the papers in evidence bearing upon the issue, and from such comparison draw his conclusions as to whether the writing is genuine. The judge is not precluded from making, himself, a comparison of the handwriting because experts have testified in the case; he is not compelled to adopt their opinions, although they should be respectfully considered. *Millington v. Millington* (1894; Tex. Civ. App.) 25 S. W. 320.

In an action on a note, where letters written by the alleged maker were introduced to prove an admission that the note was unpaid, and also to show by comparison that the signature of the note was in the same hand, the plaintiff was entitled to an instruction that the letters might be considered by the jury with a view to a comparison of the handwritings, since the jury might have concluded that the letters were to be considered merely with reference to the alleged admission in them. *Sanders v. Howard* (1879) 51 Iowa, 517, 1 N. W. 708.

When writings have been used by a party in the examination of his witnesses without objection, they may be put in evidence for use and comparison by the jury in spite of the objection of the other party. *Sanderson v. Osgood* (1880) 52 Vt. 309.

And where a witness swore that he thought the indorsement of the defendant on the note sued upon was not genuine, and on cross-examination was asked whether two signatures on a paper shown him were the defendant's and denied it; whereupon the plaintiff proved that the signatures were written by the defendant when the indorsement on the note was first disputed by him,—after admitting this evidence for the purpose of impeaching the witness for the defense, it was error not to allow the paper to go to the jury to sustain the plaintiff's case by comparison with the disputed indorsement. *Royal Canadian Bank v. Brown* (1867) 27 U. C. Q. B. 41.

On a prosecution for criminal libel in which the defense was that the libelous letters had been written by a third person, a large number of samples of whose writing had been submitted to an expert called by the prosecution and declared by him to bear no resemblance to the writings in question, it was error in the court to strike out all the samples of such third person's handwriting which had been admitted in evidence for the purpose of comparison, so that the jury were unable to compare the admitted writings with the disputed writings, on the ground that there had been no independent evidence connecting the third person with the libelous letters; the jury, especially where the question was one of resemblance or similarity merely, should have been permitted to compare the writings and form their own conclusion in reference to similarity or resemblance, and by personal inspection they might have formed a different opinion from that of the expert; and at any rate an examination of the letters by comparison might have raised a reasonable doubt as to whether the disputed writings were made by the defendant. *People v. Storke* (1900) 128 Cal. 486, 60 Pac. 1090.
62 L. R. A.

But where a jury had, by inadvertence or otherwise, improperly got possession of an affidavit of the defendant, it was not error for the court to refuse the request of the jury to permit them, while they had the affidavit, to have a letter alleged and denied to have been written by the defendant, so that they could compare the handwriting of the two; since the possession of the affidavit was admittedly improper, and that impropriety could not have been remedied by giving the jury the other paper for the purpose of comparison. *Phillips v. State* (1896) 92 Ark. 119, 34 S. W. 539.

It is error to refuse to allow a party to furnish the jury a microscope to assist their examination. *Kannon v. Galloway* (1872) 2 Baxt. 230; *Hatch v. State* (1879) 6 Tex. App. 384.

In *State v. Ward* (1867) 39 Vt. 225, and in *State v. Hastings* (1873) 53 N. H. 452, following *State v. Ward*, it was laid down that in a criminal trial it was the province of the jury, after the court had adjudged genuine the writings submitted to them as standards of comparison, before making comparison of the disputed writing with them, to examine the testimony as to the genuineness of the specimen writings, and decide whether it was established beyond a reasonable doubt; and, if they did not so find, it was their duty to lay the writings out of the case.

The Vermont case, however, was overruled in *Rowell v. Fuller* (1867) 59 Vt. 688, 10 Atl. 833, deciding that the jury should not be perplexed with such an issue; and the New Hampshire case is overruled on this point in *UNIVERSITY OF ILLINOIS v. SPALDING*.

In New York, however, although under the statute of that state the question of genuineness is for "the court," the decision of the court admitting papers as standards of comparison is not binding upon the jury. When the writings and the evidence are before them, the jury may then disagree with the court, determine that the standards are not genuine, and refuse to use them for the purpose of comparison. *People v. Molneux* (1899) 27 Misc. 79, 58 Supp. 155.

And in *People v. Molneux* (1901) 168 N. Y. 264, 62 L. R. A. 193, 61 N. E. 286, it is settled that it becomes the duty of the jury, upon receiving the standards, to examine the testimony, and to decide for themselves, under proper legal instructions from the court, whether their genuineness has been established.

The declaration of *State v. Ward* (1867) 39 Vt. 225, that, in a criminal trial, it is also the duty of the jury to determine from the amount of skill possessed by the experts who have testified before them, what weight should be given to their evidence, and that the prisoner should have the benefit of any reasonable doubt in their minds as to the competency of the experts,—seems to be uncontroverted.

According to the English construction of the common-law procedure act, chap. 125, § 27, the jury may be shown writings admitted to be genuine on the cross-examination of the person whose signature is in question, for the purpose of comparison before the cross-examination is proceeded with. *Cresswell v. Jackson* (1860) 2 Fost. & F. 24.

And so writings may be given to the jury without reference to any previous comparison by witnesses. *Cobbett v. Kilminster* (1863) 4 Fost. & F. 490.

Hence, when the plaintiff in an action on a bill of exchange offered no evidence except the bill in question and a letter, which was produced so that the jury could compare the handwriting of it with the acceptance by the defendant, it was held that there was some evidence of the acceptance by the defendant, and a refusal to nonsuit was proper. *Scard v. Jackson* (1875) 24 Week. Rep. 159.

In *King v. King* (1870) 30 U. C. Q. B. 26, upon the same point, the court was evenly divided.

But in New York, under the same statutory terms, the submission of a writing to a jury for comparison must follow and be in connection with the testimony of expert witnesses; and the jury cannot institute an arbitrary comparison, without the aid of the testimony of witnesses. *People v. Plinckney* (1893) 67 Hun, 428, 22 N. Y. Supp. 118; *Glenn v. Roosevelt* (1894) 62 Fed. 550.

This rule under the statute, excluding independent comparison by the jury, without previous comparison by experts, is analogous to the former rule in Pennsylvania, which limited comparison to the jury, and allowed it only in corroboration of previous testimony of (nonexpert) witnesses. The Pennsylvania cases to this effect—*Callan v. Gaylord* (1834) 3 Watts, 321; *Baker v. Haines* (1840) 6 Whart. 284, 36 Am. Dec. 224; *Depue v. Place* (1848) 7 Pa. 428; *Leslie v. Heald* (1858) 3 Phila. 55; *Haycock v. Greup* (1868) 57 Pa. 438; and *Aumick v. Mitchell* (1876) 82 Pa. 211—are of importance, probably, only in South Carolina, under whose rule comparison (by either witnesses or the jury) is permitted only in aid of doubtful proof, resulting from the testimony of nonexperts.

No case has been found laying down any rule governing the case of comparison by a court, trying a cause without a jury, or by a referee, different from the rules as to comparison by the jury.

IX. Comparison by witnesses.

Expert comparison is allowed everywhere in aid of the comparison of the jury. Although there is no authoritative decision to this effect in the Federal courts, such seems to be the rule there; but in Pennsylvania the rule before the statute of 1895 limited comparison to the jury; and in Louisiana and North Carolina comparison by experts is the only comparison allowed.

In two states—Delaware and Michigan (see *supra*, III.)—the comparison may be made by witnesses who are not experts; and in South Carolina the witness, to be competent to compare, need not be a "technical expert;" but persons not at all familiar with handwriting are not competent.

In the states which have literally followed the English statute in their own Codes, "witnesses" has been always construed to mean expert witnesses, in accordance with the general rule of evidence excluding the opinions of witnesses; and in some states the statute expressly limits witness comparison to experts.

Where an expert, without being shown a standard of comparison, was permitted to state that the disputed signature, which was not produced at the trial, and the standard were "probably in the same handwriting," he was not qualified to express the opinion so given, since, before such an opinion is called for, it must first appear, as a foundation for his testimony, that the witness has formed, or is then able to form,

an opinion upon the matter in question. *Koons v. State* (1880) 36 Ohio St. 195.

An expert witness who is not qualified from personal knowledge, to give evidence as to the handwriting in question, except as he compares the writing in dispute with the one proved to be genuine, should not be permitted to testify positively that certain writings were in the hand of an individual; and his evidence should be confined to a comparison of the handwriting of the genuine paper with the handwriting of that in dispute, and to his opinion that they were or were not written by the same person, since such proof was all that was justified by the statute (chap. 36, Laws 1880); and upon such a comparison the jury would understand that his evidence was confined to comparison, and that his opinion was based thereon, which would naturally give it less weight than his positive testimony, when the fact that he had no knowledge of the handwriting except by such comparison might be easily forgotten by the jury. *People v. Severance* (1893) 67 Hun, 182, 22 N. Y. Supp. 91.

But in *Tubbs v. United States* (1900) 44 C. C. A. 357, 105 Fed. 59, it was held that it was not error to allow expert witnesses to handwriting to state unqualifiedly that certain letters were in the handwriting of a party, instead of limiting them to the statement that, "in their opinion," they were so.

There is no distinction as to competence to be made between expert witnesses who have seen the person write whose signature is in dispute and those who have not. *Hadcock v. O'Rourke* (1889) 25 N. Y. S. R. 55, 6 N. Y. Supp. 549. To the same effect is *Durnell v. Sowden* (1887) 5 Utah, 216, 14 Pac. 334.

The rule in *Miles v. Loomis*, 75 N. Y. 288, 31 Am. Rep. 470, to the effect that an opinion as to handwriting should depend, not so much on mathematical measurements and minute criticism of lines in regard to their exact correspondence in detail when placed in juxtaposition with other specimens, as upon its general character and features, as in the recognition of the human face,—was followed in *Re Albinger* (1899) 30 Misc. 187, 63 N. Y. Supp. 744.

So the testimony of an expert who went into an elaborate analysis of the characteristics of the handwriting in question, and assumed to point out minute distinctions between the forms of the letters in the genuine signatures and the appearance of corresponding letters in the disputed signature, should not necessarily have greater weight and influence than the opinions of other experts whose testimony was confined chiefly to the similarity in the general appearance of the genuine and disputed signatures. *Re Gould* (1888) 15 N. Y. S. R. 784.

In Louisiana, where the jury are not allowed to compare, it seems that the report of the experts appointed by the court is not conclusive upon the jury, who are bound to give it such weight as they may think it entitled to. *Temple v. Smith* (1852) 7 La. Ann. 562.

And as to the number of experts to be allowed in a case, it has been held, where the trial court limited to five the number of experts to be called by each side, that the trial judge must have some control over the despatch of business in his court, and some discretion respecting the number of witnesses he will hear upon the specific line of inquiry incident to a case; and hence it follows, from the essential nature of the juridical connection of inferior and appellate courts,

that a ruling originating in the exercise of this discretion will not be reversed unless it has been abused, and it can be seen that this abuse has resulted in injury. *Powers v. McKenzie* (1891) 90 Tenn. 187, 16 S. W. 559.

After testimony by comparison had been given as to a disputed signature, and, upon the objection of a party that the standard for comparison had not been established as such, the court had excluded the specimen from further use, it was error in the court to refuse to exclude and strike out the testimony given from comparison. *Phillips v. State* (1879) 6 Tex. App. 364. This was followed in *Hatch v. State* (1879) 6 Tex. App. 384.

But letters used without objection in the cross-examination of experts and having no relevancy to the issues, are properly excluded, under the limited rule, when offered as standards of comparison for use by his own experts by the same party who had used them before. *Keyser v. Pickrell* (1894) 4 App. D. C. 198.

In an action on a promissory note, it was error in the court to refuse to permit an expert called by the plaintiff, who testified that he had carefully examined the signatures on three notes acknowledged to him by the alleged maker to have been signed by the latter, to state, assuming the signatures which he had examined to be genuine, whether, in the opinion of the witness, the same person wrote the signature on the note in suit; although the same witness, being afterwards recalled by the plaintiff, was permitted to testify that the signatures examined by him and the signature on the note in suit were in the handwriting of another person than the person who acknowledged them to be his; since the plaintiff, by the exclusion of this testimony, was compelled to abandon his first theory of the case, which was that the note in suit was signed by the person who acknowledged the other notes, and then to prove that such signatures and the signature to the note in suit were in the handwriting of the third person, and then further to prove that such third person had authority to make the signature on the note in suit in the name of the other, which imposed upon the plaintiff a more onerous duty, so that he was aggrieved thereby. *Woodman v. Dana* (1860) 52 Me. 9.

Where a signature is disavowed, under the Louisiana Code, proof by experts must be resorted to in the first instance; but the party offering this kind of testimony is not thereby precluded from producing any other kind of legal evidence, either in aid of, or to contradict, the report of the experts. *Clark v. Cochran* (1814) 3 Mart. (La.) 353.

X. Comparison to show copying of signature (the *Howland Will Case*).

There is a distinct class of cases involving comparison of handwriting, in which the object and result of the comparison are precisely the opposite of those usually sought. In the ordinary case of comparison one party seeks to prove, from the dissimilarity of a disputed writing and a genuine one, upon comparison of the two, that the disputed one is a forgery; the other party seeking to prove from its similarity to that or other standards that it is genuine. But in the other case the party attempting to prove forgery of a signature seeks to establish the fact that the disputed signature is so exactly like the genuine signature that the likeness

cannot be the result of a natural effort,—that is, that the disputed signature was traced from the other, by some process such as superposition.

And the same effect, it is to be noted, is attained, without the establishment of a genuine signature, if two signatures, both of which are alleged to be forged, are so nearly identical that both must have been traced from a third.

Of this kind is the earliest reported case of the admission of expert comparison under the common-law rule of England. In the King's bench, in 1754, the issue was whether the name of a party subscribed to two of three exhibits, and their dates, were in his handwriting. Expert opticians, an engraver, and a writing master were examined and agreed in their testimony that they had measured, in nine different manners, the dates of the three exhibits, and that every one did agree so exactly that two of the dates must have been copies of the third, it being impossible for any person, either by chance or with design, to have written the three dates so exactly alike without copying two of them from the third. *Kemp v. Mackrill, Sayer*, 130.

The most famous case of this nature is known as the *Howland Will Case*, the circumstances of the attempted proof of forgery being very extraordinary. The case has not been reported on any point involved in this note, except in 4 Am. Law Review, 625; but the report of its final disposition is found in *Robinson v. Mandell*, 3 Cliff. 169, Fed. Cas. No. 11,959. Attempt was made to establish a kind of irregular codicil, or part of a will, showing a mutual testamentary contract, alleged to invalidate a later will. Some twenty-nine handwriting experts of a very unusual class were sworn during the attempt to prove that the irregular instrument, which was in two copies, was forged; on the side of the claimant appeared Professor Agassiz and Dr. Oliver Wendell Holmes, and nine other experts; on the part of the respondents seventeen experts, including three other Harvard professors and several bank presidents, besides professional experts, swore that there could be no doubt that the writing sought to be established, and showing the contract, was forged, since the signatures of the two copies were so like the signature upon the accompanying will, which was admitted to be genuine, and each other, that there was no possibility of all three having been produced without tracing, and hence that the two copies were forged. In his testimony as an expert in favor of the respondents, Benjamin Pierce, professor of mathematics at Harvard University, swore that the phenomenon of two signatures of Sylvia Ann Howland being naturally produced with such exact similarity as was observed between the signature to the will and that of one of the copies could occur only once in 2,666,000,000,000,000,000,000,000 times,—amounting to an entire impossibility.

To rebut this evidence, however, the complainant was permitted to produce certain carefully selected examples of the signatures of several well-known men, including John Quincy Adams, which showed what was said to be, in the opinions of the experts of the complainant, as great similarity as the signatures in question.

In three other cases forgery was established in the same way. In *Day v. Cole* (1887) 65 Mich. 129, 31 N. W. 823, the supreme court determined that of two instruments one was forged, since the two signatures were too evenly alike to be genuine.

And the fact that two signatures alleged to be

forged are shown upon being superimposed to be facsimiles in every detail is conclusive evidence that one is intentionally simulated, or both. *Hunt v. Lawless* (1879) 7 Abb. N. C. 113.

That an illiterate man capable of writing his name, but not of filling up the body of a note, could produce two signatures practically precisely alike, without tracing and palstalking design, was considered by the court to be incredible. *Re Koch* (1900) 33 Misc. 153, 68 N. Y. Supp. 375.

XI. Construction and validity of the statutes.

The provision of all the statutes that the standards must be proved to be genuine to the satisfaction of the "court" or "judge" has been held in New York and Tennessee not to be contrary to a constitutional provision for trial by jury.

In New York the main question is to some extent evaded, the decision being upon the ground that the trial judge is only part of the "court" to whose satisfaction the standard writing must be proved to be genuine, and has not necessarily the final decision concerning the genuineness of the writing; since the jury may disagree with the court, determine that the standards offered are not genuine, and refuse to use them. *People v. Mollineux* (1899) 27 Misc. 79, 58 N. Y. Supp. 155, (1901) 168 N. Y. 264, 62 L. R. A. 193, 61 N. E. 286.

In Tennessee, however, it is held that this is not an invasion of the province of the jury; it is a legislative adaptation of the settled rule that, as a general proposition, it is the province of the court to say what is evidence in cases, and the province of the jury to determine its efficacy. *Powers v. McKenzie* (1891) 90 Tenn. 167, 16 S. W. 559.

The decision of *Peck v. Callaghan* (1884) 95 N. Y. 73, followed by *Bruyn v. Russell* (1889) 52 Hun, 17, 4 N. Y. Supp. 784, that the New York statute, chap. 36, of 1880, limited the comparison to genuine writings of the person whose the disputed writing purported to be, was followed in Tennessee (in *Franklin v. Franklin* [1891] 90 Tenn. 44, 16 S. W. 557), and in Iowa (in *Coppock v. Lampkin* [1901] 114 Iowa, 664, 87 N. W. 665), but was contradicted in Missouri in *St. Louis Nat. Bank v. Hoffman* (1898) 74 Mo. App. 203, and was rendered ineffective in New York, in 1888, by the passage of chap. 553 of the Laws of 1888, extending the practice to comparison with the genuine writings of any person claimed to have written the disputed document.

But the statute does not authorize comparison with the signatures of a person not charged with being connected with the forgery in any way. *Cook v. Strother* (1903; Mo. App.) 75 S. W. 175.

The dictum in *Peck v. Callaghan* (1884) 95 N. Y. 73, to the effect that disputed writings not the subject of the controversy could not be compared with genuine writings, followed in *People v. Kennedy* (1901) 34 Misc. 101, 69 N. Y. Supp. 470, was overruled in *People v. Mollineux* (1901) 168 N. Y. 264, 62 L. R. A. 193, 61 N. E. 286.

XII. Weight and relevancy of the evidence.

a. Weight.

The earlier opinion of the opinion evidence of handwriting experts was not favorable to it. So it is said in *Robson v. Rocke* (1824) 2 Addams 62 L. R. A.

Eccl. Rep. 53, that such opinions as to genuineness, either from comparison, or from the general appearance, have been constantly held to be the lowest and weakest species of evidence that can be offered.

So it is held in Iowa that a charge to the jury that expert evidence from comparison of handwriting is of the lowest order of evidence, or evidence of the most unsatisfactory character, is not erroneous, and the weight which such evidence "is entitled to bear in satisfying the mind is to be determined just as the force of all other evidence is settled." *Whitaker v. Parker* (1876, 42 Iowa, 585).

And an instruction that the testimony of experts from comparison of handwriting is far from satisfactory, and should be received with great care and caution, is correct. *State v. Van Tassel* (1897) 103 Iowa, 6, 72 N. W. 497.

But where witnesses were introduced, part of whom testified that, from their knowledge of a party's handwriting, they believed the disputed signatures to be his, and others from a like knowledge were of the contrary opinion, and some of the latter witnesses were experts, and, the genuine handwriting of the same person being shown them, gave their opinions as experts from their knowledge of the defendant's handwriting, a charge that "the evidence of experts who are not acquainted with the signature or handwriting of the person whose signature is in dispute is the lowest and least satisfactory kind of evidence as to the genuineness of handwriting" is erroneous, being inapplicable to the facts, and calculated to mislead the jury, who must almost necessarily have treated the testimony actually given as of the lowest kind. *McGregor v. Armill* (1855) 2 Iowa, 30.

In New Jersey, although all doubts of the competency of such evidence have been removed by statute, it must still be esteemed proof of low degree. *Mutual Ben. L. Ins. Co. v. Brown* (1878) 30 N. J. Eq. 193.

A charge that a test by comparison of the genuineness of a signature "is probably regarded as usually of the most satisfactory character" is no error; it was merely an expression as to the weight and character of evidence, which the court was at liberty to make, if the question was, in the end, submitted to the jury. *Rowell v. Fuller* (1887) 59 Vt. 688, 10 Atl. 853.

But a charge that, while the opinion of an expert is competent to go to the jury on an issue involving the genuineness of a written instrument, such evidence is intrinsically weak, and ought to be received and weighed by the jury with great caution, is erroneous. The evidence of experts is neither intrinsically weak, nor intrinsically strong; its value depends upon the character, capacity, skill, opportunities for observation, the state of the mind of the expert himself, and on the nature of the case, and of its weight and worth the jury must judge without any influencing instruction, either weakening or strengthening, from the court. *Coleman v. Adair* (1898) 75 Miss. 660, 23 So. 369.

The Texas statute (*White's Code Crim. Proc.* 1900, art. 794) provides that "proof by comparison shall not be sufficient to establish the handwriting of a witness who denies his signature under oath;" and this was applied in a trial for murder, in *Jones v. State* (1879) 7 Tex. App. 457.

So on a trial for murder the testimony of a witness called to prove by comparison that the defendant was the author of an incriminating

letter, to the effect that there was a similarity in the formation of some of the letters in the writings compared; that perhaps the two were written in different positions; that there was more similarity in the small letters than in the large; that he could not give an opinion as to whether the same person wrote both instruments, and could only go so far as to say that there was quite a similarity in the formation of some of the letters in some of the words; and that, if the papers were casually handed to him, he could only say that there was considerable similarity.—was not sufficient testimony upon which to admit the letter. *Crow v. State* (1897) 37 Tex. Crim. Rep. 295, 39 S. W. 574.

On a prosecution for the forgery of a check, where the only evidence to support the indictment is the testimony of an expert witness by comparison with genuine writings of the defendant, in response to a question whether the "face" of the forged instrument and the writings referred to were in the same handwriting, that in his opinion the "check" and standards of comparison were all written by the same person, is not sufficient proof that the signature was forged to sustain the conviction; although, as matter of strict law, it may be said that the face of the check includes the signature. *People v. Mitchell* (1891) 92 Cal. 590, 28 Pac. 597.

Where two witnesses to an agreement positively testified to its execution, and four other witnesses gave strong corroborative testimony as to its execution, but certain experts testified that the signature was not that of the person purporting to execute it, and that the agreement upon careful inspection and under the scrutiny of the microscope showed that the date had been tampered with, a finding that the instrument was genuine was not to be disturbed, since, if it were not genuine, six of the witnesses would be perjurers and three of them forgers. *Card v. Moore* (1902) 68 App. Div. 327, 74 N. Y. Supp. 18.

The opinion of experts, based on comparison alone, is evidence of low degree, and has been regarded by eminent judges as much too uncertain, even when only slightly opposed to afford a safe foundation for a judicial decision; and, when a party swears that he did not write a letter in dispute, and his bearing in the case has been that of an honest witness, and his testimony as a whole seems to be reasonable, probable, and truthful, and he has appeared willing to tell the whole truth, whether it help or hurt him, his evidence must outweigh any amount of counter proof consisting of opinion merely. *Black v. Black* (1878) 30 N. J. Eq. 215.

So the opinions of experts, however skilful they may be, are weaker in degree of certainty than the direct evidence of a subscribing witness, who swore to the execution of both signatures. *Brown v. Mutual Ben. L. Ins. Co.* (1880) 32 N. J. Eq. 809.

The evidence as to the genuineness of a signature based upon the comparison of handwriting and the opinion of experts is entitled to proper consideration and weight, but it is of the lowest order of evidence and of the most unsatisfactory character; and it cannot be claimed that it ought to overthrow positive and direct evidence of credible witnesses who testify from their personal knowledge, and is most useful in cases of conflict between witnesses as corroborating testimony. *Borland v. Walrath* (1871) 33 Iowa, 130.

So it was held, in accordance with this decision 62 L. R. A.

laration, that where the signature to a mortgage was sustained as genuine by the certificate of acknowledgment and by the comparison of handwritings, upon which were based the opinions of experts; and opposing these was the positive evidence of a party whose credibility was not doubted, corroborated in a degree by other testimony,—the preponderance was in favor of the latter. *Ibid.*

The testimony of one unimpeached and credible witness who swears that he saw the disputed note signed cannot be outweighed by the opinions of two witnesses who state that the signature differs from, and has no resemblance to, the signature of the same person to certain documents filed in the suit, with which it is compared. *Bell v. Norwood* (1834) 7 La. 95. To the same effect upon this point is *Reese v. Reese* (1879) 90 Pa. 89, 35 Am. Rep. 634.

An instruction to the jury that it was for them to say how much weight should be given to the testimony of experts by comparison, taking into consideration the amount of skill possessed by the witnesses, was correct; and, in the absence of a request for an instruction to the effect that such evidence should not in itself be allowed to overcome positive and direct evidence of credible witnesses, there was no error. *Patton v. Lund* (1901) 114 Iowa, 201, 86 N. W. 296.

Where, in an action against an executor on a promissory note, the plaintiff produced one specimen of the decedent's handwriting which the jury compared with the note, but the defendant failed to produce any of the decedent's handwriting, it was held that a verdict in favor of the plaintiff, based upon inspection and comparison, could not be interfered with; the neglect of the executor to produce specimens of handwriting for comparison was almost an admission that the note was genuine. *Meyers v. Hunt* (1892) 44 N. Y. S. R. 273, 17 N. Y. Supp. 637.

The testimony of an expert that writings in question were not genuine, standing alone, without any interrogation as to his reasons for so thinking, was of little, if any, weight, was not enough on which to make a finding of fact, and was struck from the record. *Re Koch* (1900) 33 Misc. 153, 68 N. Y. Supp. 375.

Without an ocular demonstration, consisting of the indication of similar characteristics of both the disputed writing and the standards, the opinion of an expert in handwriting is of a low order of testimony, for the absence of demonstration must be attributed either to deficiency in the expert or lack of merit in his conclusion. *Re Gordon* (1892) 50 N. J. Eq. 397, 26 Atl. 268.

In the probate of a will experts testified, giving their reasons, that the signature of an attesting witness, as well as the body of the will and what purported to be the signature of the decedent, were written in the same hand; and it was held that evidence of similarity of signatures is more satisfactory than evidence of dissimilarity, since signatures of a person vary materially owing to such causes as nervous condition, position, pens, and other circumstances. *Sarvent v. Hesdra* (1880) 5 Redf. 47.

This is partially, in discriminating between two distinct kinds of evidence, in accord with the declaration in *Young v. Brown* (1828) 1 Hagg. Eccl. Rep. 556, that "dissimilitude of handwriting is the weakest and most deceptive of all evidence."

b. Relevancy.

In order to prove that a note sued upon was fraudulent in its inception, and that the design of the payee was not to deliver the goods which were the consideration, it was competent to introduce writings made in similar transactions at about the same time, for the purpose of showing by comparison of the handwritings the identity of the person engaged in the different transactions. *Nichols v. Baker* (1883) 75 Me. 334.

So on a prosecution for forgery of a school warrant other orders of the same general character, proved to have been in the handwriting of the defendant, were admissible in evidence to be considered by the jury for the purpose of determining by comparison whether the defendant was the forger of the warrant recited in the indictment; and the mere fact that such orders may have demonstrated the defendant's abilities in the way of creation of spurious papers offered no legal objection to their admissibility as evidence of his handwriting. *People v. Bibby* (1891) 91 Cal. 470, 27 Pac. 781.

And in a prosecution for piracy it was competent, in order to prove that a transfer of the ship was made to a fictitious person, to prove by an expert that two different signatures in the registry, one of the fictitious transferee and the other of the captain, who was not the defendant, were in fact made by one person under different names, without showing that any particular person made both signatures; but the testimony was of a rather dangerous character, and not much to be relied upon. *United States v. Darnaud* (1855) 3 Wall. Jr. 143, Fed. Cas. No. 14,918. To the same effect is *State v. Webb* (1899) 18 Utah, 441, 56 Pac. 159.

But on a charge of forgery of a mortgage and note, which were assigned to the prosecuting witness, the testimony of an expert, from comparison, that the handwriting of the signature of the assignment and of the note's indorsement were by the same person who wrote the body of the mortgage, is, in the absence of proof that any one of the writings compared was done by the defendant, incompetent, not being sufficient to connect the accused with the forgery. *People v. Cline* (1880) 44 Mich. 290, 6 N. W. 671.

And the comparison of the handwriting of a party with a handkerchief marked with his name, the mark of which had almost entirely disappeared, was incompetent to connect the party with the handkerchief when the other party failed to prove that the handkerchief belonged to him, that the mark upon it resembled his writing, or that it had ever been shown to him. *Smith v. King* (1893) 62 Conn. 515, 26 Atl. 1059.

On a trial for the forgery of a deed purporting to be the act of a nonexistent person, other deeds similar to the one in dispute, executed in the same place, and purporting to be signed and acknowledged by the same person, were properly admitted in evidence for the purpose of showing the intent with which the act was done; but it was held to be error to allow the jury to compare the signature of the fictitious person as it appeared on the deed in dispute with the same signature upon the other and similar deeds, because the other documents were not admitted to be in the handwriting of the defendant. *State v. Minton* (1893) 110 Mo. 605, 22 S. W. 808.

An expert witness in a forgery case was allowed to make an imitation or copy of the signature charged to be forged, and the copy or imitation so made was exhibited and handed to the jury with the signature for their inspection and comparison, simply in order to show how easily the name could be counterfeited or forged. Such evidence was wholly immaterial and inadmissible. It could throw no light on the transaction. It might have been perfectly easy for the expert to counterfeit this signature or any other, but such a fact did not tend in the slightest degree to prove, either that defendant did it, or even that he was competent to do it. *Thomas v. State* (1885) 18 Tex. App. 213.

Where the defense to an action on a note was a forgery by the plaintiff's agent, in whose handwriting the body of the note was admitted by the plaintiff to be, a copy of the whole note, made by the agent in court, upon cross-examination by the defendant, was not admissible merely for the purpose of showing that the witness disguised his hand and did not write an honest copy, since its use would have no direct tendency to show whether the witness wrote the signature or not. *Bridgman v. Corey* (1889) 62 Vt. 1, 20 Atl. 273.

But in an action brought by a bank to recover the amount paid by it upon a forged check, the testimony of experts to the effect that the signature of the forged check was very different from the signatures of the person whose signature was forged, upon genuine checks which had been offered in evidence and submitted to the jury for their inspection, was admissible to prove negligence on the part of the bank in paying the check. *Iron City Nat. Bank v. Peyton* (1897) 15 Tex. Civ. App. 184, 30 S. W. 223.

XIII. Comparison of lost instruments.

A kind of comparison distinct from that hitherto treated is that used to establish the handwriting of instruments which have been lost, or are otherwise incapable of being produced in court.

This comparison, of a mental exemplar in the mind of the witness of the character of the disputed handwriting, which is not present in court, with proved specimens which are present, is, it will be seen, the converse of that common method of proof of handwriting hitherto spoken of as pseudo-comparison,—namely, comparison of the disputed writing, which is present in court, with the mental exemplar, retained by the witnesses, of other writings which are not so present; and it would seem that the same rules would properly apply to both. But there is much difference of opinion on the point.

In an action on a note which was lost after the complaint was drawn, the plaintiff offered to prove the signature to be that of the defendant by comparison by an expert witness who had frequently handled the note, of an admittedly genuine signature of the defendant with the witness's recollection of the signature to the note. The objection to this evidence was sustained on the ground that the note itself was not present in court; and this ruling was reversed on appeal, the court saying that, in the ordinary case of proof of signatures by persons acquainted with the handwriting of its supposed author, the opinions of the witnesses were necessarily based upon the comparison between the standard as preserved by their recollection of the writings admitted to be genuine and the disputed writings in evidence. And the

fact that the authorities recognized the competency of opinions based upon a comparison other than by juxtaposition cannot be successfully questioned. The court asked the question, Why, if a comparison between the disputed writing in evidence and the mental exemplar of the witness be allowable, may not the comparison be made between the admitted standard and the lost instrument as remembered by the witness? If the lost writing were carefully examined by an intelligent and capable witness but a short time before the giving of his testimony, his opinion might be entitled to much consideration; where it is practical, the writings to be compared should be so produced that the parties in interest may inspect them; but if the disputed writing be lost, the party in interest should not be denied the right to submit the best secondary evidence as to its genuineness which the nature of the case will admit. Section 3655 of the Iowa Code provides for a comparison to be made by experts as well as by the jury; but it does not in terms require a comparison by juxtaposition, although that is the kind usually made by experts. It was designed to make competent evidence which the strict rule of the common law would have excluded, and is not restrictive in its character. *Hammond v. Wolf* (1889) 78 Iowa, 227, 42 N. W. 778, Followed in *Sankey v. Cook* (1891) 82 Iowa 128, 47 N. W. 1077.

The implication of *Koons v. State* (1880) 36 Ohio St. 105, is to the same effect.

So an expert may compare a disputed signature as he remembers it, which he has seen, but which has since been lost, with a signature admitted to be genuine and among the papers of the case; and, although such evidence must be weak, it should be admitted for what it is worth. *Abbott v. Coleman* (1879) 22 Kan. 250, 31 Am. Rep. 186.

To the contrary effect, a charge by the court in an action on a lost note that proof of the signatures of the defendant could not be made by comparison with other signatures was held to be correct. The handwriting must be proved by witnesses who have seen the party write and are familiar with his signature, or have seen letters or other documents which the party has, in the course of business recognized or admitted as his own handwriting. *Putnam v. Wadley* (1866) 40 Ill. 340.

And where it was sought to prove that the name "Burks," written in an instrument, was meant for "Banks," but the instrument had been lost, letters written by the person who, it was alleged, drew the instrument, offered to show by comparison that the name was really Banks, as the writer was in the habit of making an "a" like "u" and an "n" like "r," were incompetent; as the original instrument was not produced there could be (in a civil case) no comparison of the handwriting. *Collins v. Ball* (1891) 82 Tex. 259, 17 S. W. 614.

Under the Georgia statute (*supra*, III.), which requires that the party intending to introduce specimens of handwriting for the purpose of comparison must submit them to the opposing party before the trial, and that the writings to be used for comparison must be present to go to 62 L. R. A.

the jury, it is inadmissible to prove a copy of a letter the original of which is not in court, by a witness who is shown genuine papers, and then asked whether the original letter is not in the same handwriting as the writings shown him. *Bruce v. Crews* (1889) 39 Ga. 544, 99 Am. Dec. 467.

In *Hynes v. McDermott* (1880) 82 N. Y. 41, 37 Am. Rep. 538, before the New York statute, it is held that an expert in handwriting, when speaking as a witness only from comparison of handwriting, must have before him in court the writing to which he testifies and the writings from which he testifies; otherwise there can be no intelligent examination of him, either in chief or in cross, and no fair means of meeting his testimony by that of other witnesses.

Under the former limited rule in New Hampshire, on an issue as to the genuineness of the signature of the defendant's testator offered in evidence by the defendant, it was not competent to inquire of a witness who had once seen the defendant try to imitate the testator's name from a signature, said at the time by the defendant to be the testator's, upon a slab of marble which had not been preserved, whether the defendant's effort to copy was successful or otherwise, since it was only between signatures admitted to be genuine and in evidence before the jury and the one in question that a witness was allowed to institute a comparison and give an opinion. *Reed v. Spaulding* (1860) 42 N. H. 114.

But in a later criminal case in New Hampshire an expert was properly allowed to testify, for the purpose of proving entries upon hotel registers to have been made by the defendant, that they were in the same handwriting as certain other signatures proved to be the defendant's, although the registers were not before the jury, having been destroyed by the defendant for the purpose of destroying the evidence. The defendant could not complain, having destroyed the evidence, that, in the absence of the registers, the jury had no opportunity for an actual comparison of the handwriting in order to test the expert's opinion; and moreover, in the ordinary case of proof of handwriting by a witness who saw the individual write, the signature which he saw made is not received for comparison, and the jury have no means of testing the accuracy of the mental comparison of the witness, who speaks from a comparison of the signature in question with the exemplar in his own mind. *State v. Shinborn* (1866) 46 N. H. 497, 88 Am. Dec. 224.

And upon analogy with this kind of comparison, there was no impropriety in allowing an expert witness to testify that the signature of the defendant upon a note resembled more nearly his signatures on a book which was not present in court than it did his signatures on another book which was in court, it being shown that the witness had previously made a comparison between the signature on the note and the signatures in the first book. *Bailey v. State* (1897; Tex. Crim. App.) 38 S. W. 992.

L. B. B.

DISTRICT OF COLUMBIA COURT OF APPEALS.

Max KOHNER, Appt.,

v.

CAPITAL TRACTION COMPANY.

(.....D. C.....)

1. If plaintiff has made a prima facie case he is entitled to have it submitted to the jury, regardless of the case which is made by defendant.
2. Where a peaceable passenger on a street car is unlawfully assaulted and injured by the conductor, the burden is on the carrier to show that there was no negligence on its part, and that the injury was the result of unavoidable accident.
3. The liability of a street car company for injury to a passenger by the conductor cannot be decided, as matter of law, where the conductor in rebuttal of the prima facie case explains his conduct by stating that, in passing along the footboard on the side of the car he lost his balance, and, to save himself from falling, reached for the stanchion, when his hand came in contact with plaintiff,—since the jury have a right to pass upon the truth of such assertion.

(June 3, 1903.)

A PPEAL by plaintiff from a judgment of the Supreme Court of the District of Columbia in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by an assault by one of defendant's employees. *Reversed.*

The facts are stated in the opinion.

Mr. Lorenzo A. Bailey, for appellant:

The evidence adduced by the plaintiff would, if wholly uncontradicted, support a verdict for him and place upon the defendant the burden of overcoming that presumption, if it could, by evidence; and without such evidence for the defendant the court should have instructed the jury to find for the plaintiff.

Nitro-glycerine Case, 15 Wall. 537, 538, 21 L. ed. 211; *Shearm. & Redf. Neg. 5th ed. § 516*, p. 945, note 14; *Lapointe v. Middlesex R. Co.* 144 Mass. 18, 10 N. E. 497; *Wilkie v. Bolster*, 3 E. D. Smith, 327; *Abbott Trial Brief*, 218; *St. Louis S. W. R. Co. v. Johnson* (Tex. Civ. App.) 68 S. W. 58; *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. ed. 115; *Gleeson v. Virginia Midland R. Co.* 140 U. S. 435, 439, 443, 35 L. ed. 458, 462, 403, 11 Sup. Ct. Rep. 859.

NOTE.—As to liability of carrier for accidental blow by employee to passenger, see also, in this series, *Goodloe v. Memphis & C. R. Co.* 29 L. R. A. 729.

As to liability of carrier for assault upon passenger by its servants, see *note to Davis v. Houghtelin*, 14 L. R. A. 737; *Baltimore & O. R.* 62 L. R. A.

The attempt to prove the accident inevitable has failed.

1 *Shearm. & Redf. Neg. 5th ed. § 16*.

It is only when the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one for the court.

Grand Trunk R. Co. v. Ives, 144 U. S. 408, 417, 36 L. ed. 485, 489, 12 Sup. Ct. Rep. 679; *Texas & P. R. Co. v. Gentry*, 163 U. S. 353, 368, 41 L. ed. 186, 193, 16 Sup. Ct. Rep. 1104.

Messrs. R. Ross Perry, R. Ross Perry, Jr., and G. Thomas Dunlop, for appellee:

The doctrine of *res ipsa loquitur* does not apply, even in the case of a passenger, where there is no proof of a negligent act.

Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; *Benedick v. Potts*, 88 Md. 52, 41 L. R. A. 478, 40 Atl. 1067.

It is not the duty of a common carrier absolutely to protect a passenger from the violence of fellow passengers.

Tall v. Baltimore Steam Packet Co. 90 Md. 248, 47 L. R. A. 120, 44 Atl. 1007.

The duty owing from the common carrier to a passenger does not render the former liable for an injury to the latter, inflicted by an involuntary act of the conductor, which act was necessary to preserve the conductor from danger not produced by the latter's negligence.

New Orleans & N. E. R. Co. v. Jones, 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109; *Goodloe v. Memphis & C. R. Co.* 107 Ala. 233, 29 L. R. A. 729, 18 So. 166; *Gibson v. International Trust Co.* 177 Mass. 100, 52 L. R. A. 928, 58 N. E. 278; *Skinner v. Atchison, T. & S. F. R. Co.* 39 Fed. 188.

Morris, J., delivered the opinion of the court:

The appellant in this case, while riding as a passenger, with his wife and children, in one of the open summer cars of the appellee, was injured by the violent contact of the right hand of the conductor of the car with the face of the appellant, whereby the appellant's nose and right eye were lacerated and bruised. He instituted this suit to recover damages from the appellee on the theory of negligence on the part of the conductor. At the trial his testimony, which was that of his wife and himself, leaving out of considera-

Co. v. Barger, 26 L. R. A. 220; *Atchison, T. & S. F. R. Co. v. Henry*, 29 L. R. A. 465; *Krantz v. Rio Grande Western R. Co.* 30 L. R. A. 297; *St. Louis S. W. R. Co. v. Jones*, 39 L. R. A. 784; *Savannah, F. & W. R. Co. v. Quo*, 40 L. R. A. 483, and *Haver v. Central R. Co.* 43 L. R. A. 84.

tion the medical testimony in regard to the nature and extent of his injuries, was limited to showing that he was a passenger on the car, and that his injuries were caused by his being struck by the conductor. There was no specific proof of negligence on the part of the latter, other than as might be inferred from the occurrence of the injury under the circumstances. On behalf of the defendant, the testimony of the conductor, which is not controverted, was to the effect that, while he was moving forward on the side step of the car, holding some punched transfers in his hand, he, in some unaccountable way, lost his balance and was about to fall from the car; and that, in trying to regain his balance, he threw his other hand forward to grasp the stanchion, or upright post of the car, against which the plaintiff, as he stated, was reclining his head, and in so doing struck the plaintiff in the eye.

Upon this condition of the testimony the trial court, holding that the occurrence was a mere accident, and that there was no testimony to show negligence on the part of the defendant company or its agents, instructed the jury upon the whole evidence to render a verdict in favor of the defendant, which was accordingly done. From the judgment rendered thereon the plaintiff has appealed.

The question in this case is whether there was any sufficient evidence to go to the jury upon which a verdict for the plaintiff could properly be based. The question, it is almost needless to say, is not one of the preponderance of evidence, with which we have nothing to do, nor one of the weight to be given to the testimony on behalf of the defendant, which likewise is not one for an appellate tribunal; but whether the plaintiff has made out a prima facie case for the jury, which, if uncontroverted, would justify and support a verdict in his favor. Whether a verdict is directed against a plaintiff at the conclusion of the testimony on his own behalf in chief, which may be done upon demurrer to such evidence, or upon motion equivalent to a demurrer, or whether it is directed at the end of the trial upon the whole evidence in the case, is ordinarily immaterial in law, since in both cases the direction must necessarily be based, not upon the strength of the defendant's case, but upon the weakness of that for the plaintiff. To allow that the plaintiff has made out a prima facie case, and yet to hold that the defendant has overcome it by his testimony, and thereupon peremptorily to direct a verdict for the defendant, would be simply to usurp the function of the jury. That there may be possible exceptions to this rule may perhaps be conceded, as when, for example, there is only a scintilla of evidence and nothing substantial on the part of the plaintiff, and a

verdict in his favor, if rendered, would not be permitted to stand. But no case for exception is made here. The general rule is applicable that, if the plaintiff has made out a prima facie case, he is entitled to have it submitted to the jury, whatever be thought of the case made by the defendant.

The plaintiff, as has been noted, has not specifically proved negligence on the part of the defendant. He has simply proved that he was a passenger on the defendant's car, and that he was injured by the act of the conductor of that car, and the doctrine of *res ipsa loquitur* is thereupon invoked to show negligence. The expression *res ipsa loquitur*, "the thing speaks for itself," as stated in the case of *Benedick v. Potts*, 88 Md. 52, 41 L. R. A. 478, 40 Atl. 1067, "is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident." As Shearman and Redfield in their work on Negligence say: "It is not that, in any case, negligence can be assumed from the mere fact of an accident and an injury; but in these cases [that is, in the cases where the doctrine of *res ipsa loquitur* applies] the surrounding circumstances, which are necessarily brought into view by showing how the accident occurred, contain, without further proof, sufficient evidence of the defendant's duty and of his neglect to perform it." And those learned authors add that "the fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer." [§ 59.]

In the case of *Griffen v. Manice*, 166 N. Y. 188, 193, 52 L. R. A. 922, 59 N. E. 925, the court of appeals of New York, referring to this doctrine and the citation just made from Shearman and Redfield on Negligence, uses the following language: "I think a single illustration will show the correctness of the view of the learned authors, that it is not the injury, but the manner and circumstances of the injury, that justify the application of the maxim and the inference of negligence. If a passenger in a car is injured by striking the seat in front of him, that of itself authorizes no inference of negligence. If it be shown, however, that he was precipitated against the seat by reason of the train coming in collision with another train, or in consequence of the car being derailed, the presumption of negligence arises. The *res*, therefore, includes the attending circumstances, and, so defined, the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring the existence of, the traversable or prin-

principal fact in issue, the defendant's negligence. The maxim is also in part based on the consideration that where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present."

In the case of *Benedick v. Potts*, already cited, the court of appeals of Maryland says: "The maxim does not go to the extent of implying that you may from the mere fact of an injury infer what physical fact produced that injury, but it means that, when the physical act has been shown or is apparent and is not explained by the defendant, the conclusion that negligence superinduced it may be drawn as a legitimate deduction of fact."

These citations are sufficient to state, and they are believed to state correctly, the doctrine of *res ipsa loquitur*, and the extent and meaning of that doctrine in the law. It remains to apply the maxim in the present case, if it is in fact applicable.

It does not seem to be controverted on the part of the appellee that the doctrine is at all events *prima facie* applicable. So far as is apparent, the plaintiff was a peaceable passenger on the defendant's car, and as such he was entitled to be safely transported to his destination, so far at least as reasonable care and prudence on the part of the defendant and its employees could effect that result; and he was entitled to absolute immunity from all unlawful assault and injury on the part of the agents and employees of the defendant. Being so entitled, he was unlawfully assaulted and injured by the conductor. It is plainly a case where the doctrine of *res ipsa loquitur* applies, and throws upon the defendant the burden of proving that there was no negligence on its part, and that the injury was the result of unavoidable accident. In other words, the plaintiff proved a *prima facie* case of negligence on the part of the defendant and resulting injury to himself. In the absence of satisfactory explanation by the defendant no more was required to justify a verdict in favor of the plaintiff.

But the defendant did offer an explanation, which was in effect that the act of the conductor by which the plaintiff was injured was wholly unintentional and accidental on his part, and that it was merely the result of an effort by him to save himself from serious injury. Whether this explanation was sufficient in law to rebut the presumption of negligence raised by the *prima facie* case of the plaintiff, since it leaves untouched the question whether the conductor was not guilty of negligence
62 L. R. A.

in placing himself in such position as that he was in danger of falling off, may, perhaps, be doubted. It is usual for conductors, whether collecting fares or distributing transfers, to hold on to one stanchion of these summer cars and not to let go their hold of it before they have firmly grasped another stanchion, as otherwise there is always danger of their being thrown off; and it does not appear in this case whether the conductor was free from negligence in this regard. But however this may be, and assuming that the explanation, if well founded in fact, was sufficient in law to rebut the presumption of negligence, yet the question remains whether it was well founded in fact.

Now, it is not for the court to determine the question of the truth of the explanation given; that is peculiarly the province of the jury. The plaintiff has proved a *prima facie* case of negligence; the defendant has offered an explanation which tends to show that there was no such negligence. This raises a disputed question of fact, proper to be passed upon by the jury, under instructions duly formulated by the court for the purpose. Unless, therefore, we are to adopt the theory that the plaintiff's *prima facie* case only lasts until the defendant has offered some explanation, and that such explanation, whether true or false, destroys the presumption of negligence raised by the plaintiff's proof, and casts upon the plaintiff the necessity of proving by additional testimony in rebuttal that, notwithstanding the explanation, there was in fact negligence on the part of the defendant, there is no escape from the conclusion that the case must be submitted to a jury. But we find no warrant in reason or in adjudicated cases for such a theory. No case has been pointed out which holds such a doctrine. No case has been pointed out where a verdict has been directed for the defendant because the defendant's explanation has tended to controvert the presumption of negligence, and the explanation itself has remained uncontroverted by testimony in rebuttal. We find that in all the cases the question of the defendant's negligence, under such condition of the testimony, has been submitted to the jury for its determination.

It does not follow that, because an explanation is sufficient in law, therefore it is true; nor does it follow that, because it is true, it is sufficient to exonerate the defendant. The explanation may be true as far as it goes, and yet it may not be sufficient to overcome the presumption of negligence raised from the circumstances of the accident. The case is not one of uncontroverted testimony on the one side and no testimony, or no sufficient testimony, on the other side,

It is a case of testimony of circumstances on the one side from which negligence may be inferred, and testimony of circumstances on the other side from which it may be inferred that there was no negligence. This undoubtedly makes a case for submission to the jury, with proper instructions from the court, which would not permit a proper defense to be ignored.

In contravention, as we think, of the re-

quirement of the law, the trial court in the present case failed to submit what we regard as a controverted question of fact to the jury; and this we are compelled to regard as error. *For this error the judgment appealed from must be reversed, with costs; and the cause must be remanded to the Supreme Court of the District of Columbia with directions to award a new trial. And it is so ordered.*

GEORGIA SUPREME COURT.

Mamie S. RING, *Plff. in Err.*,
v.
George RING.

(.....Ga.....)

1. "Cruel treatment," within the meaning of § 2427 of the Civil Code of 1805, which provides that such treatment shall be a ground for divorce, is the wilful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justifies an apprehension of danger to life, limb, or health. *Odom v. Odom*, 38 Ga. 286, approved and followed; *Gholston v. Gholston*, 31 Ga. 625, and *Myrick v. Myrick*, 67 Ga. 771, doubted, criticised, and distinguished.
2. It follows that the habitual and intemperate use of morphine, unaccompanied by any conduct coming within the definition laid down in the preceding headnote, is not such cruel treatment as the law recognizes as a ground for divorce.
3. The intention to wound is a necessary element of the cruel treatment for which a divorce is allowed.

(June 3, 1903.)

ERROR to the Superior Court for Bibb County to review a judgment in favor of plaintiff in an action brought to obtain a divorce. *Reversed.*

The facts are stated in the opinion.

Mr. M. W. Harris, for plaintiff in error:

The only intoxication which the law of divorce recognizes is intoxication from "liquors."

Ring v. Ring, 112 Ga. 854, 38 S. E. 330.

The allegation in the petition, the evidence introduced, and the law as applied to the facts do not constitute cruel treatment.

Myrick v. Myrick, 67 Ga. 771; *Odom v. Odom*, 38 Ga. 286; *Glass v. Wynn*, 76 Ga. 319; *Waldron v. Waldron*, 85 Cal. 251, 9 L. R. A. 487, 24 Pac. 649, 858.

*Headnotes by CANDLEY, J.

NOTE.—For another case in this series holding that the habitual use of morphine is not "cruelty" which will authorize a divorce, see *Youngs v. Youngs*, 6 L. R. A. 548, with note as to divorce on ground of habitual drunkenness.

For other cases as to what constitutes cruel treatment which will justify granting of divorce, 62 L. R. A.

Mr. John P. Ross, for defendant in error:

Any act which actually afflicts without necessity is cruel treatment, and may be a ground entitling the injured one to a divorce.

Glass v. Wynn, 76 Ga. 319; *Myrick v. Myrick*, 67 Ga. 771; *Gholston v. Gholston*, 31 Ga. 625; *Lee v. Savannah Guano Co.* 99 Ga. 574, 27 S. E. 159; *Fleming v. Fleming*, 95 Cal. 430, 30 Pac. 566; *Sharp v. Sharp*, 116 Ill. 509, 6 N. E. 15.

The confirmed use of morphine for the purposes of intoxication, and the acts and conduct of the wife to procure the drug, and those caused by its use, will warrant a divorce on the part of the husband upon the ground of cruel treatment.

Dawson v. Dawson, 23 Mo. App. 169; *Sheffield v. Sheffield*, 3 Tex. 79.

Under a statute providing for "extreme cruelty," it is extreme cruelty for a wife constantly to humiliate and disgrace her husband, and endanger his means of subsistence by false charges of improper conduct.

Carpenter v. Carpenter, 30 Kan. 712, 46 Am. Rep. 108, 2 Pac. 122; *Whitmore v. Whitmore*, 49 Mich. 417, 13 N. W. 800.

Acts causing mental suffering, although not affecting bodily health, may constitute extreme cruelty under a statute which defines extreme cruelty as "the infliction of grievous bodily injury, or grievous mental suffering."

Barnes v. Barnes, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298.

A divorce for cruelty arising from habitual drunkenness may be granted, although habitual drunkenness is not a cause for divorce.

McVickar v. McVickar, 46 N. J. Eq. 490, 19 Atl. 249; *Crichton v. Crichton*, 73 Wis. 59, 40 N. W. 638; *Wachholz v. Wachholz*, 75 Wis. 377, 44 N. W. 506.

Mental suffering need not impair health

see *Doolittle v. Doolittle*, 6 L. R. A. 187, and note; *Waldron v. Waldron*, 9 L. R. A. 487; *Fritts v. Fritts*, 14 L. R. A. 685; *Barnes v. Barnes*, 16 L. R. A. 660; *Hardie v. Hardie*, 25 L. R. A. 697; *McMahon v. McMahon*, 41 L. R. A. 802; and *Maddox v. Maddox*, 52 L. R. A. 628.

in order to authorize a divorce on the ground of cruel treatment.

Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183.

What constitutes cruel treatment authorizing a divorce is a question of fact for the jury, and not one of law for the court.

Ga. Civ. Code, § 2427; *Fleming v. Fleming*, 95 Cal. 430, 30 Pac. 566.

Candler, J., delivered the opinion of the court:

As will be seen by reference to the case of *Ring v. Ring*, 112 Ga. 854, 38 S. E. 330, the defendant in error in the present case at first brought a suit for divorce against his wife, Mrs. Mamie S. Ring, under § 2427 of the Civil Code of 1895, on the ground of her habitual intoxication from the intemperate use of morphine and other opiates. The jury returned a verdict finding a total divorce for him, but the judgment of the lower court was reversed by this court, on the ground that "intoxication," as used in § 2427 of the Civil Code of 1895, which provides for the granting of a divorce on the ground of 'habitual intoxication,' means drunkenness produced by alcoholic liquors, and not the condition resulting from the excessive use of morphine." The plaintiff then dismissed his suit, and brought the present action, which is based upon the ground of cruel treatment of the plaintiff by the defendant, consisting of the habitual use of morphine. The petition sets forth various acts of misconduct on the part of the defendant, but it affirmatively appears from the allegations made that these acts were committed while the defendant was under the influence of morphine, and as a direct result of the use of that drug; and the petition, taken as a whole, presents definitely, as a ground of divorce, alleged cruel treatment, consisting in the persistent and intemperate use of morphine. To this petition the defendant demurred generally, "and particularly, for the reason that the allegations of fact therein contained do not constitute cruel treatment under the law." This demurrer was overruled. The defendant also filed an answer, and the issue thus formed was submitted to a jury, who found for the plaintiff a total divorce. The defendant made a motion for new trial, which was denied, and to the overruling of her motion and of her demurrer she now excepts.

It is agreed by counsel on both sides that the only real questions before this court are made by the demurrer, and the general grounds of the motion for a new trial that the verdict was contrary to law and the evidence. It may be said at the outset that the evidence for the plaintiff fully sustained the allegations of his petition, and in this con-

nection the following, quoted from the testimony of the plaintiff as contained in the brief of evidence, is worthy of notice as bearing upon the real meaning and intent of the petition: "The use of morphine was the only objection that I ever had to her. That was the only complaint I made, and the only complaint I make now." We have, then, presented for our determination the clear-cut question, Is the habitual use of morphine such cruel treatment as will constitute a ground for divorce under the laws of Georgia?

1, 2. This court has, both by approval of definitions given by other courts, and by its own rulings, set forth its understanding of the meaning of the *sævitia* of the English law, or "cruel treatment," as it is known in our own. In the earliest case on this subject to be found in our reports, that of *Head v. Head*, 2 Ga. 191, Nisbet, J., delivering the opinion, held that the English law, as construed by the courts of that country, prevailed in this state, and that only for the causes prescribed by the common law, as of force in England at that time, could divorces be granted here. On page 206, the court said: "In determining what is *sævitia* by the ecclesiastical law, it has been adjudged to be necessary that there should be a reasonable apprehension of bodily hurt; the causes must be grave and weighty, and show a state of personal danger, incompatible with the duties of married life; mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to the cruelty against which the law can relieve." In *Smith v. Smith*, 84 Ga. 440, 8 L. R. A. 362, 11 S. E. 496, the *Head Case* was considered, and the conclusions therein announced distinctly upheld, to the effect that the English ecclesiastical law, as there held, was in effect in Georgia until the passage of the act of February 22, 1850. The act of 1850 (Civ. Code 1895, §§ 2426 *et seq.*), in setting out the grounds for divorce in this state, did not define cruel treatment, nor make any attempt to change the construction already placed upon the expression by this court. It did change the law so as to authorize the jury trying the case to grant a total or partial divorce on this ground, according to the circumstances of the case. Prior to its passage, the common-law rule prevailed in Georgia, and for cruel treatment only a partial divorce could be procured. It is difficult for us to believe that the legislature intended at one and the same time, to make more far-reaching the effects of cruel treatment, and put a more lax construction upon that expression. The act of 1850 was probably brought about by the de-

cision in the *Head Case*, 2 Ga. 191, as the effect of the judgment rendered in that case was to cut off divorces on some of the grounds on which they had previously been granted in Georgia, and the purpose of the act was evidently to extend the law so as to increase the number of grounds upon which divorces could be obtained. The court had, in the *Head Case*, expressly approved the definition of the term "cruel treatment" given by the English courts, and there is nothing in the act of 1850 to indicate that the general assembly had any intention to give it a different construction.

We will now consider what were the rulings of the English ecclesiastical courts on which the judgment in the *Head Case* was based. In the leading case of *Evans v. Evans*, 1 Hagg. Consist. Rep. 35, decided in 1790, the court declined the task of laying down a direct definition of the term, but said: "The causes must be grave and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in commencement and in obligation; but what falls short of this is with great caution to be admitted. . . . What merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty: they are high moral offenses in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. . . . There must be a reasonable apprehension of bodily hurt." In the case of *Westmeath v. Westmeath*, 2 Hagg. Eccl. Rep. 653, the court quotes from the *Evans Case*, and says that the ecclesiastical courts have been uniformly strict in holding that, to make out a case of legal cruelty justifying a divorce, there must be proof of actual injury, or of real apprehension of injury as it may affect the safety or the health of the person. In all cases where the infliction of mental suffering has been held to justify a divorce, except where the decisions were controlled by peculiar statutes, the judgments have proceeded upon the idea that the mental anguish caused was so grievous as to endanger the health of the complaining party.

We have already seen that prior to the passage of the act of 1850 the English defini-

tion of the term "cruel treatment" was the one adopted by our court, and this doctrine prevailed until ten years after the passage of that act, as is shown by the opinion of Judge Benning in the case of *Buckholts v. Buckholts*, 24 Ga. 238, where, on page 244, the following language was used: "And may we not lay it down for law that, to make out a case of cruelty, 'there must be either actual violence committed, attended with danger to life, limb, or health, or there must be a reasonable apprehension of such violence'" Citing Bishop, Marr. & Div. § 454, note 1. In the case of *Johns v. Johns*, 29 Ga. 722, Chief Justice Lumpkin, in passing upon a charge given by the trial judge where a husband was seeking a divorce from his wife on the ground of cruel treatment, recognized the doctrine that, to sustain a suit for divorce on this ground, the libellant must show that there was a reasonable apprehension of danger from living with the defendant, and held that any conduct of the husband tending to show that there was no such apprehension on his part was admissible to rebut the charge of cruelty. The decisions of the English courts are also cited in the opinion to sustain another branch of the decision in that case, and it is manifest that the court did not construe the act of 1850 as changing the law as it existed in England and Georgia prior to its passage, except in so far as a particular intention to do so was clearly shown.

Apparently somewhat antagonistic to this doctrine are the *Case of Gholston*, 31 Ga. 625, decided at the November term, 1860, of this court, and *Myrick v. Myrick*, 67 Ga. 771, which was decided at the January term, 1861, but the opinion in which was, for some unknown reason, withheld from publication for over twenty years. Both of these cases were suits brought by the wife against the husband on the ground of cruel treatment, and the specific acts of cruelty shown in both were amply sufficient to bring them within the strictest construction of the rule laid down by the ecclesiastical courts and the earlier decisions of this court. In neither of these cases was there any suggestion of reviewing the earlier *Cases of Head, Johns, and Buckholts*, nor was there anything in the pleadings or the facts of either that called for such a review. A careful consideration of the *Gholston Case* shows that what was said in the *Myrick Case* to have been therein held was in reality not held.—an error which probably grew out of the misleading nature of the third headnote in that case. The headnote referred to is as follows: "The charge of the court below (incorporated into the opinion) correctly expounds the law of divorce, in such a case,

upon all the points made against it in the bill of exceptions." In the opinion is set out a rather lengthy extract from the judge's charge, much of which was then and still is sound, a portion of it, however, being in conflict with the previous rulings of this court. But the motion for new trial pointed out no error in this extract. While the rule as to assignments of error on charges in this court was not so stringent at that time as now, still the writer cannot see, even under the rule as it then was, where a long extract in a charge is excepted to, and most of it is good law, how a new trial could be granted on a small part of it that was not sound, no exception being made to the bad alone. The court dealt with all the exceptions to various extracts of the charge in the following general manner: "We overrule all the exceptions from the 3d to the 8th, inclusive, holding that, on all the points therein made, the court gave the law in charge to the jury." The *Gholston Case* was decided December 3, 1860. The *Myrick Case*, which was decided February 12, 1861, cites the *Gholston Case* as authority, but, as before stated, does not mention any of the earlier cases, one of which was decided before, and the others after, the passage of the act of 1850. In so far, therefore, as it essays to lay down any rule by which to determine what is cruel treatment, within the meaning of the law of divorce, different from that already expounded by the courts of this state and of England, it is in no manner binding as authority, because it was in the teeth of prior adjudications to the contrary. In the case of *Odum v. Odum*, 36 Ga. 286, this court, speaking through Chief Justice Warner, evidently did not consider either the *Gholston* or the *Myrick Case* binding as precedent, for in the opinion, on page 317, it is said: "In view of the various grades and conditions of mankind in society, it is extremely difficult to assert any definite rule, applicable to all classes of society, as to what will constitute legal cruelty. Legal cruelty may be defined to be such conduct on the part of the husband as will endanger the life, limb, or health of the wife, or create a reasonable apprehension of bodily hurt. What must be the extent of the injury, or what particular acts will create a reasonable apprehension of personal injury, will depend upon the circumstances of each case. The acts of cruelty must be such as to render cohabitation unsafe, or are likely to be attended with injury to the person or to the health of the wife,"—citing *Evans v. Evans*, 1 Hagg. Consist. Rep. 35, and *Westmeath v. Westmeath*, 2 Hagg. Eccl. Rep. 653. The case cited was one in which the wife was the libellant, but under our law

the doctrine announced is equally applicable in a case where the husband is the complaining party. The case of *Glass v. Wynn*, 76 Ga. 319, cites the *Myrick Case* approvingly, but it holds nothing to the contrary of the *Odum Case*, and the language used was not necessary to the ruling made. The case of *Ray v. Ray*, 106 Ga. 260, 32 S. E. 91, which was an alimony proceeding, also cites the cases of *Myrick v. Myrick* and *Glass v. Wynn* as authority for the proposition that slanderous reports made by the husband against the wife, and which were brought to the wife's attention, to the effect that she had been untrue to her marital vows, was such cruelty as would justify the wife in separating herself from her husband, and that, having left him for that reason, she would be entitled to alimony. Such conduct on the part of a husband has by numerous courts been held to be cruel treatment, on the idea that a man who would so outrage the feelings of his wife, and so brutally trample upon her sensibilities, is not a safe person for her to live with; that such a man is necessarily of an extremely jealous temperament, and subject to violent paroxysms of passion, the occurrence of which would reasonably create an apprehension of bodily harm to the wife; and that the knowledge by a virtuous wife that she was thus being subjected to the vilest calumny by the one from whom she had the right to expect the tenderest consideration would have a tendency to cause her such mental anguish as to seriously threaten her physical well-being. 1 Bishop, Marr. & Div. § 1574. As has been noticed, however, the *Ray Case* was an alimony proceeding, and the language of the court to the effect that the conduct mentioned would sustain an action for divorce was plainly *obiter*.

So much has been said for the purpose of demonstrating that on the question under consideration neither this court nor the law-making power of the state has ever departed from the well-settled conservative principles of the English law. On the other hand, from the date of the adopting statute in 1784 down to this good hour, it has been the policy of the law in this state to refuse divorces when sought for reasons of convenience, or on account of differences of temperament, or petty grievances, between man and wife.

3. The original act providing for cruel treatment as a ground of divorce used the words "in case of cruel treatment on the part of one towards the other." To the mind of the writer, this language expresses an idea altogether at variance with that upon which the petition in the present case is based. Cruel treatment, such as must

have been in the contemplation of the law-makers, necessarily involves the doing of some act with the intention of causing pain or suffering to the other party; else why the language, "on the part of one towards the other?" Plainly the meaning is an act done, a word spoken, abuse directed, towards the other; a setting in motion by one party, by word or act, of something the purpose of which is to cause pain and suffering to the other. It must be the intention of the offending party to injure—to wound. It must be a wilful act the purpose of which is to hurt. Words spoken or acts done may cause the greatest pain, the most acute suffering, but in the absence of an intention to wound they do not constitute the cruel treatment contemplated by the law as a ground for divorce. In the present case the allegations of the petition and the testimony of the witnesses show that Mrs. Ring was guilty of conduct highly disagreeable in its consequences to her husband, but there is an entire absence of any showing that she was actuated by any desire or intention to inflict the pain which he is alleged to have endured. It seems that she had, previously to her marriage, been the victim of a railroad accident, in which she suffered severe internal injuries, and that while undergoing medical treatment for those injuries she became addicted to the habitual use of morphine, which continued during the eight years that she and her husband lived together. Its use was to her a seeming necessity, and when in want of it she suffered intensely. It appears that, in order to quiet her, her husband himself on occasions procured the drug and gave it to her. When deprived of it she would, at times, make exhibitions of her condition which amazed, not only her husband, but the neighborhood in which they lived, and caused him much humiliation. Her frantic screams, when begging for morphine, often caused the neighbors to believe that he was mistreating her. While all this must necessarily have been very mortifying to her husband, none of her acts were done with that intention. None were wilful, malicious, or wanton, but all were the result of her uncontrollable desire for this terrible narcotic.

We are not alone in the position that intention is a necessary element of the cruel treatment which the law recognizes as a ground for divorce. Massachusetts has a statute which allows a divorce on the ground of "cruel and abusive treatment." In the comparatively recent case of *W— v. W—*, 141 Mass. 495, 55 Am. Rep. 491, 6 N. E. 541, Mr. Justice Holmes, who is now an associate justice of the United States Supreme Court, delivering the opinion, said: 62 L. R. A.

"The single question reserved is whether the practice of masturbation by a husband in the presence of his wife, but without compelling her to remain present, which injures her health by its effect upon her feelings, is 'cruel and abusive treatment' within the meaning of the law. "We will assume, although it is not found as a fact, that the libelee knew how his conduct worked upon his wife, and we fully agree that, in general, foresight of a consequence of one's act has the same effect upon liability for procuring it as intent to produce that consequence. . . . But the actual intent and purpose with which an act is done may be of importance when the question is not one of liability, but of dissolving the marriage tie. Certainly they may be made so by statute. The words 'cruel and abusive treatment' seem to import on their face conduct directed towards the other party, and with a malevolent motive. Without deciding that a case could not be imagined which would fall within the meaning of the words without such a motive, it is enough to say that purely self-regarding conduct, not forced upon even the knowledge of the wife otherwise than by the usual intimacy of matrimony, does not constitute the offense, merely because its folly, its disgusting character, or its wickedness disturbs her nerves or conscience, and thus affects her health." In another case from the same state, that of *Ford v. Ford*, 104 Mass. 198, it was held that to make out a case of cruel treatment the same must be "intentionally inflicted." In the case of *Miller v. Miller*, 78 N. C. 108, the court said: "The husband's conduct was not consciously or wilfully to the annoyance of the wife. His acts were not intended or expected to annoy her. . . . The indignity to her feelings was not wilful on his part;" and it was held that the petition of the libellant must be dismissed. In *Everton v. Everton*, 50 N. C. (5 Jones L.) 210, which is another case decided by the same court, the court said: "Whether any other circumstances of insult and injury, short of violence to, or threats against, her person, would be a sufficient ground of relief, and if any, what, it is not necessary for us now to say. If there be any such, they must have, as an essential ingredient, a wilful and malicious intent to offer insult and do injury, and such intent must be alleged and proved. A wrong inflicted from mere thoughtlessness, or without due consideration for the feelings or situation of the wife, may deserve censure, but, in the absence of a malicious intent, it cannot be allowed the effect of sundering the strong bond of marriage." To the same effect, see *Shaw v. Shaw*, 17 Conn. 189; 1 Bishop, Marr. & Div.

§ 1575, where it is laid down that an unintentional act, "though occasioning pain and injury, will not warrant a divorce." The reason of this doctrine grows out of the rule that prevails both in the ecclesiastical law and the law of most, if not all, of our states, viz., that there must be, arising out of the cruel treatment complained of, a reasonable apprehension of danger to life, limb, or health.

In those states where the greatest latitude is allowed in the grant of divorces, where threats, unkind words, jealous accusations, and the like, are held to be cruel treatment within the meaning of the law, the decisions proceed upon the idea that those things imply a state of bad feeling which in the nature of things will eventually result in danger of bodily harm to one party or the other. While habitual drunkenness is, by statutory enactment in many states, including our own, made a ground for divorce, in but few jurisdictions has drunkenness, unmixed with other misconduct, been held to constitute cruel treatment. In 73 Am. Dec. 628, in a note to the case of *Morris v. Morris*, 14 Cal. 76, it is said: "Drunkenness, although long-continued and excessive, is not of itself such cruelty as will constitute ground for divorce. It may entail upon the wife much misery, and a lifelong trial of patience and fruitless hope, but, if unaccompanied by real or apprehended physical injury, it is insufficient; the court will not unsettle the law, or depart from the decided cases, to indulge its feelings or to sympathize with a petitioner's misfortunes,"—citing *Hudson v. Hudson*, 3 Swabey & T. 314; *Brown v. Brown*, L. R. 1 Prob. & Div. 46; *Waskum v. Waskum*, 31 Miss. 154; *Haskell v. Haskell*, 54 Cal. 262. In *Haskell v. Haskell*, 54 Cal. 262, the court said: "That adultery or habitual intemperance would in a popular sense constitute extreme cruelty, we do not question. And so would wilful desertion or wilful neglect. But, in a legal sense, extreme cruelty is something different from any of the other causes of divorce, and constitutes a separate and distinct cause of action; otherwise it would be unnecessary to specify any other cause than extreme cruelty as a ground of divorce in any case." Again, where a brutal stepfather beat and mistreated the children of his wife, but the purpose of his conduct was not to distress or annoy the wife or to wound her feelings, but was due solely to his hatred or ill will toward the children, it was held not to be cruel treatment. *Wallscourt v. Wallscourt*, 11 Jur. 134. *Perry v. Perry*, 1 Barb. Ch. 516, holds practically the same principle, where the wife was cruel to the children of the husband. But where the beating was

done in the presence of the wife and for the purpose of wounding her sensibilities, it was held to be cruel, on the idea that her suffering, although mental, was a menace to her health, and showed such a disposition on the part of the husband as to justify an apprehension on the part of the wife of bodily harm to herself. *Bramwell v. Bramwell*, 3 Hagg. Eccl. Rep. 618; *Friend v. Friend*, 53 Mich. 543, 51 Am. Rep. 161, 19 N. W. 176; *Gleason v. Gleason*, 16 Neb. 15, 19 N. W. 784. There is authority for the position that the word "treatment" includes any behavior of one party which affects the other physically or mentally, whether with a malevolent motive or not. *Robinson v. Robinson*, 66 N. H. 600, 15 L. R. A. 121, 23 Atl. 362. The decision in that case, however, was made under a statute which authorized divorce for conduct seriously injuring the health or endangering the reason of the complaining party. It was held that, under that statute, a malevolent motive need not be proved; that divorce is not intended as a punishment of the offender, but for the protection of the sufferer. "Whether the behavior proved is a sufficient ground of divorce depends on the question whether it has seriously injured health or endangered reason." The decision is placed solely on the words of the statute, although the reasoning employed is opposed to the idea set forth in the Massachusetts case of *W— v. W—*, 141 Mass. 495, 55 Am. Rep. 491, 6 N. E. 541. In many former decisions of this same court defining "cruelty of either party to the other," there is much authority for the construction placed by us on our statute. In *Poor v. Poor*, 8 N. H. 307, 29 Am. Dec. 664, Richardson, Ch. J., says: "In the judgment of law, any wilful misconduct of the husband which endangers the life or health of the wife, which exposes her to bodily hazard and intolerable hardship, and renders cohabitation unsafe, is extreme cruelty. . . . Whenever force and violence, preceded by deliberate insult and abuse, have been once wantonly and without provocation used, the wife can hardly be considered safe." The case of *Harratt v. Harratt*, 7 N. H. 196, 26 Am. Dec. 730, holds that, under the statute in New Hampshire, a divorce will not be granted on the ground of cruelty for conduct not wanton and wilful, and directed towards the innocent party. In the *Robinson Case*, 66 N. H. 600, 15 L. R. A. 121, 23 Atl. 362, it appeared that the New Hampshire statute had been enlarged, and the court held that it was for the very purpose of providing for divorce in cases like the one now under consideration, where the conduct complained of did not fall within the established definition of cruel treatment.

We have carefully examined all the cases cited in the brief of the able counsel for the defendant in error which were decided by courts other than our own, and which lay down a different doctrine from that here announced, and we find that in many instances they are controlled by special statute utterly unlike our own. Thus, in the case of *Dawson v. Dawson*, 23 Mo. App. 169, where it was held that "the habitual use of opiates, whose tendency is to render the user callous, reckless, untruthful, and stupid, to cause physical prostration, to undermine and destroy all the objects of the marital relation, and which habit is usually incurable, constitutes such indignities as furnish ground for a divorce," it appears that the Missouri law especially provides for the grant of a divorce where either the husband or the wife "shall offer such indignities to the other as shall render his or her condition intolerable." So, also, the Texas case of *Sheffield v. Sheffield*, 3 Tex. 79, was decided under a statute which declared that "a divorce from the bonds of matrimony may be obtained where either the husband or wife is guilty of excesses, cruel treatment," etc. The case of *Barnes v. Barnes*, 95 Cal. 171, 16 L. R. A. 660, 30 Pac. 298, besides being directly contrary to the ruling in the earlier California case of *Waldron v. Waldron*, 85 Cal. 251, 9 L. R. A. 487, 24 Pac. 649, 858, proceeds under a special provision of the law of that state which expressly defines cruel treatment to be "the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage."

If the general assembly sees fit to extend the provisions of the Georgia law on this subject, it has, of course, the power to do so. This court has neither the power nor the inclination. We can find no authority of law in this state for granting divorces to either party for any conduct, no matter how disastrous its consequences, which does not amount to intentional violence to the injured party, or create a reasonable apprehension of such violence. Our legislature has not seen fit to enact that any violation of the penal laws shall constitute cruel treatment,

but has expressly provided that for none other than those in which the defendant has been found guilty of a felony and sentenced to at least two years in the penitentiary shall a divorce be granted, except for the one misdemeanor of adultery. Both these, however, are made a distinct ground for divorce. The writer can conceive of nothing more distressing or harrowing to mind and body than to be united in marriage to an insane person, yet no general assembly in Georgia has so reflected on the humanity of our civilization as to insert in our law a provision that insanity occurring after the marriage shall be a ground for divorce. Under our marriage contract, husbands and wives still take one another "for better or for worse," and the divorce laws of this state do not confer upon the courts the discretion to annul the contract of marriage in all cases where, from considerations of expediency, or by reason of the incompatibility of temperament of the parties, such a course might seem desirable. The defendant in error has doubtless suffered much on account of the unfortunate habit of his wife, but the only bad habit which the law of Georgia recognizes as a ground for divorce is habitual intoxication from the use of alcoholic liquors.

It may not be amiss to say, in conclusion, that in making this decision we announce no new doctrines or strange theories. On the contrary, we but declare what has been the law in Georgia ever since Georgia has been. If, upon occasions, this court has seemed to depart from those ancient principles, the effect has not been to change the law, but to stray from it.

Judgment reversed.

All the justices concur, except **Lumpkin**, P. J., absent on account of sickness.

Simmmons, Ch. J., concurring specially:

I concur in the reversal of the judgment, on the ground that the habitual use of morphine by a wife is not, under the Code, such cruel treatment as will authorize a divorce.

ILLINOIS SUPREME COURT.

PEOPLE of the State of Illinois *ex rel.* J. S. STEVENSON *et al.*, *Pliffs in Err.*,

v.

LAW & ORDER CLUB.

(203 Ill. 127.)

An incorporated social club cannot, without a license, dispense liquors to

its members in exchange for checks delivered to them upon their payment of special assessments levied to meet the cost of procuring the liquors, under a statute providing that giving away intoxicating liquors, or other shift or device to evade the provisions of the act, shall be held to be an unlawful sale.

(June 16, 1903.)

NOTE.—As to sales of intoxicating liquor by social clubs, see also, in this series, *People v.* 62 L. R. A.

Soule, 2 L. R. A. 494, and *note*; *People v. Andrews*, 6 L. R. A. 128, and *note*; *State v. Neis*.

ERROR to the Circuit Court for Randolph County to review a judgment dismissing an information in the nature of quo warranto requiring defendant to show cause why its charter should not be revoked. *Reversed.*

Statement by Carter, J.:

This was an information in the nature of a quo warranto, filed by leave of the court in the circuit court of Randolph county by the state's attorney, requiring the defendant in error, the Law & Order Club, to show cause why its charter should not be revoked for misuser. The court was informed that the defendant in error was incorporated on the 20th of May, 1902, under the law of the state of Illinois pertaining to corporations not for pecuniary profit; that its object, as stated in its certificate, is for the mutual development and advancement of the social, literary, and benevolent character of its members, but that the corporation was in fact conducting a dramshop without a license; that it has fitted up a room, known as the "Annex" to the Randolph Hotel, in the city of Sparta, with all the fixtures and appurtenances of a dramshop, and constantly keeps on hand intoxicating liquors; that it issues checks or assessment tickets to its members, entitling them to the amount of liquors equaling the amount in value of the money paid for the tickets or checks, which can be bought for cash of the barkeeper, and can be used to purchase liquors at any time in any quantity desired; that only a nominal admission fee of 25 cents and monthly dues of 10 cents are charged, which are the only sources of income the club has, outside of its sales of liquors; that its trustees and managers are three former saloon keepers, whose licenses expired shortly before the incorporation of the club; that it has taken out a United States liquor dealer's license, but has never had a dramshop license under the laws of Illinois; that the sole object of the corporation is to furnish intoxicating liquors to its members conveniently, without paying the license required of dramshop keepers.

The defendant in error, in its plea to the information, stated and admitted many of the facts we have set out above, contained in the information, but denied that it conducted a dramshop and that it was organized for the purpose alleged in the information. The plea sets out the constitution and by-laws of the club in full. They provide, among other things, that any male person of sound mind, above the age of twenty-one years, not an habitual drunkard, shall be eli-

gible to membership, and that the applicant shall be elected by ballot; two or more black balls being sufficient to reject. It avers that the revenues of the club are derived from an initiation fee of 25 cents, monthly dues of 10 cents, and from special assessments, which assessments "may be levied by any officer of the club, at the suggestion of any member, upon himself, at any time, in such amounts as may be mutually agreeable, provided that no sum less than \$1 shall be levied at any time, and such sums paid, together with the initiation fees and monthly dues, shall be subject to the disbursal of the officers of the club, whose duties it shall be to provide out of said fund the club rooms, light, heat, books, periodicals, papers, refreshments, and all other expenses, including the salary of the officers, and the residue, if any, shall be turned into the funds of the club;" that the officers shall be a president, a vice president, and a secretary-treasurer, who constitute the board of managers and have full control of the affairs of the club, and shall receive each a salary not to exceed \$50 per month. It shall be the duty of the officers to furnish the members with suitable club rooms, and provide books, magazines, periodicals, daily papers, and refreshments out of the funds of the club. A member may be expelled for drunkenness, abuse, or neglect of his family, profane and insulting language to a member, and violation of the constitution and by-laws. A quorum for business is constituted of the president, secretary, and three members. The plea further avers that the club has always kept cigars, bottled beer, and intoxicating liquors, but has never kept any keg beer; that it has never sold or given away anything to anybody, but has dispensed and furnished its goods to its members by the drink or bottle, to be drunk in the club room; that the members paid nothing whatever for their drinks, except the actual cost of the same and cost of serving; that the liquors, beers, and cigars are paid for by special assessment, for which the party paying gets a receipt for the amount of refreshments to the extent of said assessment; that no money whatever is paid at the bar; that the main object of the club is to obtain and enjoy a place of comfort and friendly intercourse for its members, and that the furnishing liquors is merely incidental to the main object of the club; that it has a library, magazines, periodicals, and daily papers; that it occupies one room, 100 feet long by 26 wide, which is divided into three rooms or subdivisions, *viz.*, the anteroom, the reading room,

12 L. R. A. 412, and *note*; State v. Horacek, 3 L. R. A. 687; State v. Easton Social, L. & M. Club, 10 L. R. A. 64; Barden v. Montana Club, 11 L. R. A. 593; State v. Boston Club, 20 L. R. A. 185; State *ex rel.* Bell v. St. Louis Club, 26 62 L. R. A.

L. R. A. 573; State v. Austin Club, 30 L. R. A. 500; People v. Adelphi Club, 31 L. R. A. 510; Klein v. Livingston Club, 34 L. R. A. 94; and Mohrmann v. State, 43 L. R. A. 398.

and the entertainment room, in which last room the social and literary exercises are held, luncheon and refreshments served, and where the library is kept.

The people demurred to the plea, and, the demurrer being overruled by the court, they elected to abide by their demurrer. The information was dismissed by the court, and the people have prosecuted this writ of error to reverse the judgment.

Messrs. A. E. Crisler and H. Clay Horner, for plaintiffs in error:

The dispensing of liquors to the members of a club is a sale, and the club should have a dramshop license.

State, Newark, Prosecutor, v. Essex Club, 53 N. J. L. 99, 20 Atl. 769; *People v. Soule*, 74 Mich. 250, 2 L. R. A. 494, 41 N. W. 908; *Marmont v. State*, 48 Ind. 21; *Martin v. State*, 59 Ala. 34; *State v. Lockyear*, 95 N. C. 633, 59 Am. Rep. 287; *State v. Mercer*, 32 Iowa, 405; *United States v. Wittig*, 2 Low. Dec. 466, Fed. Cas. No. 16,748; *Krnavek v. State*, 38 Tex. Crim. Rep. 44, 41 S. W. 612; *Army & Navy Club v. District of Columbia*, 8 D. C. App. 544; *State v. Shumate*, 44 W. Va. 490, 29 S. E. 1001; *State v. Neis*, 108 N. C. 787, 12 L. R. A. 412, 13 S. E. 225; *State v. Farmers' Social, L. & M. Club*, 73 Md. 98, 10 L. R. A. 64, 20 Atl. 783; *State v. Boston Club*, 45 La. Ann. 585, 20 L. R. A. 186, 12 So. 895; *University Club v. Ratterman*, 3 Ohio C. C. 21; *Nogales Club v. State*, 69 Miss. 219, 10 So. 574; *Bowyer v. Percy Supper Club* [1893] 2 Q. B. 154; *Rickart v. People*, 79 Ill. 85; 17 Am. & Eng. Enc. Law, 2d ed. p. 360.

Such misuser of the charter justifies the dissolution of the corporation.

State ex rel. Bell v. St. Louis Club, 125 Mo. 308, 26 L. R. A. 573, 28 S. W. 604.

Mr. M. W. Borders, for defendant in error:

The distribution of liquor by a bona fide club among its members is not a sale within the inhibition of a liquor law, even though the person receiving the liquor gives money in return for it, and the law prohibiting the sale of liquor on Sunday does not apply to such a club.

11 Am. & Eng. Enc. Law, 1st ed. p. 727; Black, *Intoxicating Liquors*, § 142; *State ex rel. Bell v. St. Louis Club*, 125 Mo. 308, 26 L. R. A. 573, 28 S. W. 604; *Com. v. Pomphret*, 137 Mass. 564, 50 Am. Rep. 340; *Seim v. State*, 55 Md. 566, 39 Am. Rep. 419; *Com. v. Ervig*, 145 Mass. 119, 13 N. E. 365; *Com. v. Geary*, 146 Mass. 139, 15 N. E. 363; *Tennessee Club v. Dwyer*, 11 Lea, 452, 47 Am. Rep. 298; *Piedmont Club v. Com.* 87 Va. 541, 12 S. E. 963; *People v. Adelphi Club*, 149 N. Y. 5, 31 L. R. A. 510, 43 N. E. 410; *Rickart v. People*, 79 Ill. 85.
62 L. R. A.

Carter, J., delivered the opinion of the court:

The only question presented by this record is whether the facts set up in the plea, considered according to their legal effect, are sufficient to justify the defendant in error in using its corporate powers in dispensing and furnishing intoxicating liquors to its members without first having taken out a dramshop license according to the statutes of this state. The contention of the corporation is that a bona fide club can dispense liquors to its members, as incidental merely to its organization, without taking out a dramshop license. Many cases from other jurisdictions are cited holding this doctrine. The plaintiffs in error cite a large number of cases holding the contrary doctrine. The authorities seem to be in hopeless conflict on the subject. However, the statute of this state must govern the case. The dramshop act (Hurd's Rev. Stat. 1901, p. 750), in § 1, defines a dramshop to be "a place where spirituous or vinous or malt liquors are retailed by less quantity than 1 gallon," and declares these liquors to be intoxicating liquors within the meaning of the act. Section 2 provides that "whoever, not having a license to keep a dramshop, shall, by himself or another, either as principal, clerk or servant, directly or indirectly sell any intoxicating liquor in any less quantity than 1 gallon . . . shall be fined," etc. Section 7 provides that "all places where intoxicating liquors are sold in violation of this act shall be taken, held, and be declared to be common nuisances, and all rooms, taverns, eating houses, bazars, . . . or other places of public resort, where intoxicating liquors are sold in violation of this act, shall be deemed public nuisances." Section 13 provides that "the giving away of intoxicating liquors, or other shift or device to evade the provisions of this act, shall be held to be an unlawful selling." Other sections provide for the granting of licenses, etc.

Under the general laws of the state no person has the legal right to sell spirituous liquors without a license, and by doing so a fine is incurred, which may be collected by indictment or suit. *Kadgish v. Bloomington*, 58 Ill. 229. The dramshop act, which took the place of similar legislation which has long been on our statute books, declares the business of selling intoxicating liquors in quantities less than 1 gallon to be criminal, except so far as it is expressly authorized and made lawful by license. *People ex rel. Morrison v. Cregier*, 138 Ill. 401, 28 N. E. 812. The language of the statute is certainly comprehensive enough to include any person, natural or artificial, and any kind of a sale or device used in lieu of a sale direct.

Under similar statutes much ingenuity has been expended in attempting to show that the dispensing or furnishing of liquors to members of a club by an agent of the club was not a sale, but a mere transfer of the special property of the other members to him (*Graff v. Evans*, L. R. 8 Q. B. Div. 373); was in fact only an equitable and convenient mode of distributing refreshments to its members (*Tennessee Club v. Dwyer*, 11 Lea, 452, 47 Am. Rep. 298); was a delivery to the member of his part of the liquors owned by the club (*State ex rel. Columbia Club v. McMaster*, 35 S. C. 1, 14 S. E. 290); was but a distribution among the members of the club of the property that belonged to them (*People v. Adelphi Club*, 149 N. Y. 5, 31 L. R. A. 510, 43 N. E. 410); was a mere division among the members of the common stock of liquors according to a previously arranged system (*Com. v. Smith*, 102 Mass. 144). We do not concur in these views, and, having regard for the provisions of the statute of this state regulating the sale of intoxicating liquors, they cannot be allowed to control cases of this character. A sale is a transmutation of property from one man to another in consideration of some price or recompense in value. 2 Bl. Com. 446. It is a transfer of the absolute or general property in a thing for a price in money. Benjamin, Sales, § 1. A sale is the passing of the title and possession of any property for money which the buyer pays or promises to pay. *Krnavek v. State*, 38 Tex. Crim. Rep. 44, 41 S. W. 612. The word "sell" has a well-known legal signification, and, in the absence of anything to the contrary appearing in the statute, we must assume that it is here intended to have that signification. *Siegel v. People*, 106 Ill. 89.

The corporation or club, being the owner of the liquor, through its appointed agent delivers it to the member of the club on his request, and receives a fixed compensation in money therefor. The property in the liquor passes to and becomes vested in the individual member, and the money paid is received for and becomes the property of the corporation. *State v. Farmers' Social, L. & M. Club*, 73 Md. 98, 10 L. R. A. 64, 20 Atl. 783. If an agent is appointed by several tenants in common to dispose of real or personal property, and he does dispose of any part thereof in exchange for money, it is none the less a sale because the party paying the money and receiving such part to his own use happens to be one of the tenants in common. *State v. Neis*, 108 N. C. 787, 12 L. R. A. 412, 13 S. E. 225. The liquor is not the property of the member before it is separated from the common mass and delivered to him under his promise to pay for it, but the property of the company. It is not the property of the member until 32 L. R. A.

after the delivery and appropriation of it by him to his own use. If he should clandestinely enter the club house at night and regale himself with the liquors of the club, it would not be a defense to an indictment for the offense to prove that he was a member of the corporation owning the property. Such specious defenses have received no countenance, except in prosecutions for the illegal sale of ardent spirits. *State, Newark, Prosecutor, v. Essex Club*, 53 N. J. L. 99, 20 Atl. 769. It has been said that while the beer was in the keg it was the common property of the society, but when a portion was withdrawn and delivered to a member of the society, upon credit or for cash, the portion so withdrawn ceased to belong to the society and became the separate property of the member receiving it, and the transaction invested him with the power to drink it himself, to give it away, to sell it, or to throw it away. *Marmont v. State*, 48 Ind. 21.

But it is not necessary to consider further the decisions of other states. This court has spoken on this subject in *Rickart v. People*, 79 Ill. 85. In speaking of the contention there made that the ticket holders or parties constituting the association owned the liquors, we said (p. 90): "In that view the liquors would belong to the company as partnership stock, and the company would have no more rightful authority to sell to the individual members or partners at retail, without a license to keep a dramshop, than a mere stranger would have. Buying tickets, as we have seen [as in the case at bar, levying a special assessment and getting checks therefor], was simply buying twenty drinks and paying for them in advance. Each one paid for whatever he got, as he would have done had he bought of a licensed seller. It is preposterous to assume that a number of persons may, with impunity, associate themselves together as a firm or voluntary company, purchase a quantity of liquors, and retail them out to the several members as they would to strangers. Such an enterprise is unlawful; and all concerned would be guilty of violating the statute. If such a device could be tolerated, it would render all legislation on this subject nugatory." This reasoning applies with equal cogency to a corporation. As said in *State v. Shumate*, 44 W. Va. 490, 29 S. E. 1001: "Whatever may be the decisions and practice in other states, our statute is so broad as to allow no shift or device to defeat the purpose of its enactment. It plainly forbids the selling . . . by one person to another of the forbidden intoxicants without a state license; it matters not for what purpose,—literary, social, or otherwise. To decide to the contrary would be to turn every saloon into a literary, social, or musical club, to the entire destruction of

the peace and good order of society, and the nullification of all prohibitory and revenue legislation."

Much is said in the argument about the question whether the corporation was organized in good faith for literary, social, and benevolent purposes, or was a mere "shift or device" to carry on a dramshop without a license, and thus to avoid the statute. The demurrer admits, of course, all the facts well pleaded, but does not admit the mere conclusions of the pleader; and it is apparent from the pleadings that the corporation is engaged in selling intoxicating liquors in less quantities than 1 gallon without license. The mere fact that such liquors are sold to its members, and for a price sufficient, only, to pay their cost and the cost of serving them, can, under the statute, make no difference. As we have seen, liquors so dispensed are sold within the meaning of our statute, and such sales without license are a violation of the dramshop act. In this view of the case it is immaterial whether or not the organization and management of this corporate club are a mere "shift and device" to evade the statute. In either case the statute is violated.

It may be said, however, that very strong inferences arise from the facts alleged in the information and not denied by the plea, and from the facts averred in the plea, that one of the leading objects of the formation of the club was to furnish a place and opportunities for the dispensing of intoxicating liquors, without complying with the statute, to a large class of persons desiring and who could obtain them by paying a nominal initiation fee and becoming members. No male person not a minor, a lunatic, or habitual drunkard was excluded by the constitution and by-laws from membership. Such excluded persons are usually excluded from dramshops. No real or substantial provision was made for the support of the club, and to pay the salaries of the officers or attendants, except from the sales of liquors and cigars to the members. So far as we can determine from the averments of the plea, the member desiring to obtain liquor or beer suggested to the officer of the club in attendance that he (the member) should be specially assessed, whereupon such officer levied an assessment upon him in such an amount as was "mutually agreeable," not less than \$1, and (as alleged in the information and not denied by the plea) tickets were issued to such member, for which he paid the amount assessed, and then used them in procuring such liquors. While it may be true that in the formation of the club other and laudable purposes were intended to be subserved, still we cannot avoid the conclusion, reached from a careful consideration of the facts admitted by the 62 L. R. A.

pleadings, that one of the controlling purposes of the corporation was the purchasing and dispensing to its members of intoxicating liquors without having obtained a license to keep a dramshop; and this, as we hold the law to be, is a violation of the statute. It follows that the court below erred in overruling the demurrer to the plea.

The judgment will be reversed, and the cause remanded, with directions to sustain the demurrer, and for such further proceedings as to law and justice may appertain

Charles A. PIERCE *et al.*, State Board of Live-Stock Commissioners, *Appts.*,

v.

E. B. DILLINGHAM.

(203 Ill. 148.)

1. Under a statute permitting the governor to schedule localities from which cattle cannot be imported except under the regulations of the board of live-stock commissioners, upon their reporting to him that certain contagious and infectious diseases have become epidemic in such locality, the governor cannot schedule all the states and territories of the United States, so as to prevent the importation of cattle therefrom until after a tuberculin test, upon a report of the board that "contagious disease prevails to a greater or less extent" in such states and territories.
2. A report by a board of live-stock commissioners that cattle affected with a disease which prevails to a greater or less extent in a particular locality are liable to communicate the disease does not meet the requirements of a statute authorizing the governor to schedule places from which cattle cannot be imported except under the regulations of the board, when the condition of cattle from such locality is such as to render them "liable to convey such disease."
3. A statute permitting regulations which will prevent the importation of cattle except under the rules of the state board of live-stock commissioners from "certain localities in other states" in which contagious diseases have become epidemic cannot be so extended as to comprehend the whole world outside of the state where the regulations are to be enforced.
4. Rules of a state board of live-stock

NOTE.—As to validity of statute establishing quarantine against sheep imported into state, see, in this series, *State v. Rasmussen*, 52 L. R. A. 78, affirmed by Supreme Court of United States in 45 L. ed. U. S. 820.

As to validity of statutory regulations generally as to infected animals, see *note to Grimes v. Eddy*, 26 L. R. A. 638.

As to reasonableness of order of board of health forbidding any person to get off from any boat or train in the state until after further orders from the board because of existence of yellow fever in certain places, see *Wilson v. Alabama G. S. R. Co.* 52 L. R. A. 357.

commissioners providing for applying a tuberculin test to all cattle which are brought into the state for dairy or breeding purposes, but exempting all other kinds, are invalid.

5. To justify the application of the tuberculin test to all cattle imported into the state for dairy or breeding purposes, it must appear that it will in a reasonable degree, or in some manner, determine the existence or nonexistence of tuberculosis.

(June 16, 1903.)

APPEAL by defendants from a judgment of the Appellate Court, Second District, affirming a judgment of the Circuit Court for Kane County in favor of plaintiff in an action brought to recover possession of certain cattle. *Affirmed.*

Statement by **Ricks, J.:**

This is an appeal from a judgment of the appellate court for the second district affirming a judgment of the circuit court of Kane county in an action of replevin brought by appellee to recover from appellants 23 head of cattle. A plea of justification was filed to the declaration, to which demurrers, special and general, were filed. The demurrers were sustained, and the defendants elected to stand by their plea, the sufficiency of which is the only question presented on this appeal.

At the time the facts in this case took place appellant Charles A. Pierce was veterinarian of the state board of live-stock commissioners, and on the 19th of May, 1900, appellee imported into this state, from Wisconsin, 23 dairy and breeding cattle, such cattle being unaccompanied with a certificate of tuberculin test, as required by the rules of said state board. On said date appellant Charles A. Pierce, as such veterinarian, in accordance with the rules of said board, quarantined and took possession of said cattle at the stock yards at Dundee, Illinois, with the aid of the sheriff of Kane county, and placed Lyman Andrews in charge as custodian, and Pierce proceeded to test such cattle. On May 22, 1900, appellee filed his affidavit in replevin, alleging the wrongful detention of said cattle, and that he was entitled to their possession. In due course, declaration and plea thereto were subsequently filed. The plea sets up that the state board of live-stock commissioners on June 13, 1899, reported in writing to John R. Tanner, governor, that "tuberculosis, a dangerously contagious disease, prevails to a greater or less extent among the cattle constituting the dairy and breeding herds of all the states and territories of the United States and foreign countries, and that cattle affected with this disease, brought into the state of Illinois, are dangerous, and liable

to communicate said disease to other cattle with which they are brought in contact," and requesting the governor to issue a proclamation in pursuance of the terms of "An Act to Revise the Law in Relation to the Suppression and Prevention of the Spread of Contagious and Infectious Diseases among Domestic Animals," and requesting the governor, in such proclamation, to schedule all states and territories within the United States, other than the state of Illinois, and all foreign countries, and prohibit the importation of dairy and breeding cattle (cows, bulls, or calves) therefrom into the state of Illinois, except in accordance with the rules and regulations adopted by said board; that the board of live-stock commissioners on June 13, 1899, submitted with their report to the governor a set of rules and regulations prescribed by the said board to govern the importation of dairy and breeding cattle into the state of Illinois from states and territories to be scheduled by the governor's proclamation, "as requested by the said report with reference to tuberculosis among cattle;" that the rules so submitted were on the 13th day of June, 1899, duly approved by the governor. The rules of said board are set out in the plea, and are substantially as follows:

Rule 1. Any shipper or owner of dairy or breeding cattle in states or territories, scheduled or to be scheduled by the governor on account of tuberculosis among cattle, desiring to ship such cattle into the state of Illinois, must, before offering the same for shipment to any railroad or transportation company, or before driving the same into this state, have the cattle tested with tuberculin by a veterinarian recognized by the sanitary authorities of the state in which such owner or shipper resides, and authorized by such authorities to make such test.

Rule 2. Before offering any such cattle for shipment as aforesaid, or before driving the same into the state of Illinois, a statement, in duplicate, of temperature taken in the test provided for in rule 1, certified by such duly authorized and recognized veterinarian, with the affidavit on the back thereof of the owner, setting forth that the cattle to be shipped or transported or driven into this state are the same referred to in the statement of temperature therein, must be sent to the state board of live-stock commissioners at Springfield, Illinois, for indorsement or acceptance and approval of such test, which indorsement, if the test is accepted and approved, shall be made by the secretary or chairman of said board, and the original copy of the statement, thus indorsed, will be returned to the owner.

Rule 3. In conducting such tuberculin

test, the veterinarian shall take at least four preliminary temperatures at intervals of two hours during the day of the evening of injecting, and at least five temperatures at intervals of two hours, commencing ten hours after injection.

Rule 4. No shipment of dairy or breeding cattle destined to any point in the state of Illinois from states and territories prescribed and designated in the proclamation of the governor aforesaid shall be received by any railroad or transportation company doing business in the state of Illinois, from the original shipper or from any connecting railroad or transportation company, unless the same be accompanied by the certificate designated in rule 2, properly indorsed as provided therein; such certificate to be attached to the way bill, memorandum bill, or bill of lading accompanying the shipment, and to be delivered with said bill to the consignee.

Rule 5. Any dairy or breeding cattle (cows, bulls, or calves), shipped or driven into the state of Illinois from other states and territories designated and described in the governor's proclamation aforesaid, without being accompanied by the certificate aforesaid, properly indorsed, will, upon discovery, be placed in quarantine until tested with tuberculin by a veterinarian designated by this board, which test shall be made at the expense of the owner, and any cattle that shall react to such test and be condemned will be destroyed without compensation to the owner.

The plea then recites that the governor, in pursuance of such report, issued a proclamation (which is set out hereafter). The plea further recites: "That on the 19th day of May, 1900, the said proclamation and the said rules of the said state board of live-stock commissioners being then in full force and virtue and unrevoked, the said 23 cows mentioned in said declaration, then and there being dairy and breeding cattle, arrived in Dundee, Kane county, Illinois, in a special stock car of the Chicago & Northwestern Railway Company, and were there delivered by the said railway company to the plaintiff, which said 23 cows had been, during the month of May, 1900, shipped into the state of Illinois from the state of Wisconsin by the plaintiff, and which said cows were not then and there accompanied by a certificate of tuberculin test of the said cows, as designated in rule 2 of the said rules and regulations of said board of live-stock commissioners of the state of Illinois, approved by the said governor, and which said 23 cows were intended to be used for dairy and breeding purposes in said state of Illinois; that this defendant Charles A.

Pierce, assistant state veterinarian, then and there, by virtue of the statutes of this state and the said proclamation and said rules, served a notice of quarantine of the said 23 cows upon the plaintiff personally, and after the service of the said quarantine notice this defendant Charles A. Pierce called upon this defendant H. F. Demmer, who was then and there sheriff of Kane county, Illinois, to assist him, the said defendant Charles A. Pierce, to take possession of the said 23 cows, and the defendant Charles A. Pierce, as such veterinarian, assisted by the said H. F. Demmer, as such sheriff, took possession of the 23 cows, for the purpose that the said defendant Charles A. Pierce, as such veterinarian, might test them with tuberculin, and this defendant Charles A. Pierce, as such veterinarian, then and there proceeded immediately to test the said 23 cows with tuberculin, in accordance with the said rule 5 of the said rules and regulations of the said state board of live-stock commissioners, hereinbefore set forth, which is the same taking and detention in the said declaration above supposed, and none other."

Messrs. C. H. Wayne and F. W. Joslyn, with **Mr. H. J. Hamlin**, Attorney General, for appellants.

Messrs. Russell & Hazelhurst and D. B. Sherwood, for appellee:

The executive can exercise no power except such as is clearly granted by the Constitution.

Field v. People, 3 Ill. 79; *People ex rel. McDougall v. O'Toole*, 164 Ill. 350, 45 N. E. 683.

Where an affirmative statute, introductive of new law, directs a thing to be done in a certain manner, it can be done in no other manner.

Potter's Dwarrr. Stat. p. 72; *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14.

Where power is conferred on a municipal corporation to enact rules, such rules must be reasonable.

Tugman v. Chicago, 78 Ill. 405; *Hurst v. Warner*, 102 Mich. 247, 26 L. R. A. 484, 60 N. W. 440; *Potts v. Breen*, 167 Ill. 67, 39 L. R. A. 152, 47 N. E. 81.

The power conferred by statute upon the state board of live-stock commissioners to make rules and regulations does not authorize such board to prescribe rules and regulations that are unreasonable, or that restricts rights and privileges guaranteed by public law.

Potts v. Breen, 167 Ill. 67, 39 L. R. A. 152, 47 N. E. 81; *Lucbaugh v. Board of Education*, 177 Ill. 572, 52 N. E. 850; *State ex rel. Adams v. Burdge*, 95 Wis. 390, 37 L. R. A. 157, 70 N. W. 347; *Re Smith*, 146 N. Y. 68, 28 L. R. A. 820, 40 N. E. 497; *People ex rel.*

Copcutt v. Board of Health, 140 N. Y. 1, 23 L. R. A. 481, 35 N. E. 320.

A regulation prohibiting the importation of cattle from all other states or countries is invalid, where the state only authorizes such prohibition of importation from certain localities where a dangerous or infectious disease exists.

Hurst v. Warner, 102 Mich. 247, 26 L. R. A. 484, 60 N. W. 440.

A regulation making the importation of a certain kind of cattle an offense, and which does not prohibit the importation of certain other kinds of cattle from the same locality, that are subjected to the same exposure, is illegal and void.

Harding v. People, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624.

Police power does not justify class legislation.

Eden v. People, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108.

There is no presumption in law that tuberculosis is a contagious disease, arising from the proclamation of the governor.

Davis v. Walker, 60 Ill. 452.

It is the fact of contagious disease, or of exposure thereto, which, under the statute, gives the power to the board of live-stock commissioners to quarantine; and, unless that fact exists, no authority to quarantine exists.

Pearson v. Zehr, 138 Ill. 48, 29 N. E. 854.

If the statute were the same as these rules and regulations, it would clearly be unconstitutional.

Re Barber, 39 Fed. 641; *Harvey v. Huffman*, 39 Fed. 646, note.

Ricks, J., delivered the opinion of the court:

The only question presented for determination in this case is, Did the plea of appellants set up sufficient facts to give legal justification for their acts in the premises? If so, the demurrer filed by appellee should have been overruled; otherwise, it was properly sustained. Legislation having for its object the limitation and stamping out, as far as human precautions can, infectious diseases of man or beast, is of vital importance, not only because of the salutary results sought to be gained thereby, but also because the means to be employed must generally involve an infringement of personal liberty or interference with private property; and, when such is the case, the provisions of the law under which it is claimed such rights of interference are conferred demand a most careful consideration. "Where such right is claimed, it must appear very clearly and satisfactorily, not only that it has been conferred by the law, but also that in its exercise the facts were present which 62 L. R. A.

justified it. The validity of the law is not so much called in question as the right to enforce its provisions. . . . Certainly no power should be implied from an act which is not necessary to its due execution, and, where the liberty and the property of persons are sought to be brought within its operation, the case must be clearly seen to be within those intended to be reached." *Re Smith*, 148 N. Y. 68, 28 L. R. A. 820, 40 N. E. 497.

The state board of live-stock commissioners is a creation of the statute, and must derive its authority therefrom. That section of the statute under which the appellants in this case assumed to act is penal in its nature, hence requires a strict construction. Its powers cannot be extended by intendment. Though the authority conferred on this board may permit it some latitude of action, yet its powers must be restricted to the enforcement of some statute relating to some particular condition or emergency in respect to the live stock of the state. *State ex rel. Adams v. Burdige*, 95 Wis. 390, 37 L. R. A. 157, 70 N. W. 347. Section 4 of the statute in relation to the suppression and prevention of the spread of contagious and infectious diseases among live stock provides (Hurd's Rev. Stat. 1899, p. 155, chap. 8) as follows: "Whenever said board of commissioners shall report to the governor that such diseases have become epidemic in certain localities in other states, or that their condition would render such domestic animals liable to convey such diseases, he may, by proclamation, schedule such localities, and prohibit the importation of any live stock of the kind diseased into the state, except under such regulations as may be prescribed by the said board and approved by the governor."

Assuming to comply with the requirements of this section, the state board of live-stock commissioners, on June 13, 1899, reported to the governor of this state "that tuberculosis, a dangerously contagious disease, prevails to a greater or less extent among the cattle constituting the dairy and breeding herds of all the states and territories of the United States and of foreign countries, and that cattle affected with this disease, being brought into the state of Illinois, are dangerous, and liable to communicate said disease to other cattle with which they are brought in contact, and respectfully request Your Excellency to issue a proclamation in pursuance of the terms of said above-entitled act, scheduling all states and territories within the United States, other than the state of Illinois, and all foreign countries, and prohibiting the importation of dairy or breeding cattle (cows, bulls, or calves) therefrom into the state of Illinois."

nois, except in accordance with the rules and regulations adopted by this board and herewith submitted for your approval." Pursuant to the reception of said report by the governor he made proclamation as follows: "Now, therefore, I, John R. Tanner, Governor of the state of Illinois, as provided by § 4 of the above-entitled act, do hereby make proclamation of the foregoing facts and schedule the following territory, to wit: All the states and territories of the United States, other than the state of Illinois, and all foreign countries; and prohibit the importation of dairy or breeding cattle (cows, bulls, or calves used or intended to be used for dairy or breeding purposes) from the above-described territory into the state of Illinois, except under the regulations, hereto attached and made a part hereof, that have been prescribed by the state board of live-stock commissioners and approved by me."

Careful examination convinces us that the report made by the state board in this case is not such as is required by the statute as a prerequisite for the issuance by the governor of a proclamation scheduling certain localities and prohibiting or restricting the importation of live stock into the state. The statute's essential requirement of the report is "that such diseases have become epidemic in certain localities in other states, or that their condition would render such domestic animals liable to convey such diseases." The term "such diseases" must relate to "contagious or infectious diseases" designated in the preceding § 2. Under § 4 such report is only justified when contagious or infectious diseases become epidemic. The board did not report that such was the case in the territory they ask to have scheduled. They simply state that a certain "contagious disease prevails to a greater or less extent . . . in all states and territories of the United States." A contagious disease may "prevail to a greater or less extent," and still there be no epidemic. Contagious disease simply means one communicable by contact. The victim of such a disease might be so isolated from others of its species as to render contact and an epidemic impossible. The other alternative of the statute is, "or that their condition would render such domestic animals liable to convey such diseases." The report of the board does not state that the condition of all cattle in the district scheduled, or even all "dairy or breeding cattle," which is the particular class sought to be scheduled against, is such "that their condition would render such domestic animals liable to convey such diseases." The report simply states "that cattle affected with this disease . . . are

liable to communicate said disease." It seems clear to us that neither of the statutory requirements on which to base such a report has been complied with. If not, the proclamation of the governor was unwarranted, and the acts of the appellants in the premises were without legal justification.

We also think that the intention of that portion of the statute which says "that such diseases have become epidemic in certain localities in other states" is not met by the report that "tuberculosis, a dangerously contagious disease, prevails to a greater or less extent among the cattle constituting the dairy and breeding herds of all the states and territories of the United States and foreign countries." The purpose of the statute no doubt is to vigilantly guard the health conditions of the domestic animals of the state, but it should be done with due care that no order entered to secure it shall be so sweeping and arbitrary as to interfere unreasonably with the rights of its citizens or place unnecessary restrictions upon their trade. *Wilson v. Alabama G. S. R. Co.* 77 Miss. 714, 52 L. R. A. 357, 28 So. 567. We think it was not the intention of the legislature that the meaning of the term "certain localities in other states" should be so extended as to comprehend the whole world outside of the state of Illinois, nor do we think it a legitimate exercise of the police power to so enlarge the meaning of the statute and invest this board with so arbitrary and sweeping power. The term "locality" has a well understood and limited application, and without the plea averring (which it does not) that the cattle replevied came from a locality where the disease was epidemic, or that they were themselves affected, or that their condition was such as to render them liable to convey tuberculosis, we think it would be extending the authority of this board beyond unheard of limits to give it the right to seize private property and subject it to some test that it might provide for in its rules and regulations, when there is no ground whatever, or even claim advanced, for suspecting that the stock in question was not free from all disease. In fact, the whole defense of appellants is predicated upon the charge above that the cattle in question had not been subjected to the tuberculin test prescribed by the board before shipment. It is not alone the fear or apprehension of possible danger, unsupported by reasons, that justifies so grave an interference with private rights. *Greensboro v. Ehrenreich*, 80 Ala. 579, 60 Am. Rep. 130, 2 So. 725. In the opinion of the appellate court Justice Waterman aptly said (p. 311, 96 Ill. App.): "The report of the state board to the governor does not, in

accordance with the statute, state that any contagious or infectious disease has become epidemic, either in the state of Wisconsin or any other state, territory, or country; nor does it declare that the condition of the domestic animals of the state of Wisconsin or any other locality is such as would render such domestic animals liable to convey such diseases. It merely declares that tuberculosis, a dangerously contagious disease, prevails to a greater or less extent among the cattle constituting the dairy and breeding herds of all the states and territories of the United States and foreign countries; . . . that is to say, the state board reports that one or more of the cows in the dairy and breeding herds of the state of Wisconsin, Asia, Europe, South America, and the rest of the world was or were affected with tuberculosis, and upon such report as to one cow or more, asked the governor to, and he did, in so far as by a proclamation he could, prohibit the importation of dairy or breeding cattle (cows, calves, or bulls) into the state of Illinois. . . . However great may be the powers of the state board, it is manifest they are only such as are conferred by the statute. The statute has authorized the governor to, by proclamation, schedule localities from which the importation of cattle cannot be made only upon a report by the board that infectious and contagious diseases prevail in such localities, or that the condition of cattle there is such as would render the domestic animals thereof liable to convey such diseases."

Rule 5 of the set of rules and regulations adopted by said board, submitted to the governor and attached to and made a part of his proclamation, provides that any cattle of the class scheduled against, brought into the state unaccompanied by the certificate provided for in rule 2, shall, "upon discovery, be placed in quarantine until tested with tuberculin by a veterinary designated by this board, which test shall be made at the expense of the owner. Any cattle that shall react to such test and be condemned will be destroyed without compensation to the owner." Rule 1 provides for the application of such test to cattle outside of the state as a prerequisite to their being brought into it. Rule 3 provides for the application of the test in a certain manner. There is no averment in either the rules or the plea that tuberculosis is, as a matter of fact, a contagious disease; nor is it averred in either the rules, plea, or report to the governor that the test prescribed is a sure means of its detection, and the rules proceed on the assumption of both as absolute facts; nor is it averred that such test has received 62 L. R. A.

the legislative sanction of this state. They assume that this test gives warrant to the board for the slaughter of such animals as are affected by the test in a certain way, and that without compensation to the owner.

We held in *Davis v. Walker*, 60 Ill. 452, that, although a statute assumed a certain theory as a fact, a legal presumption of the truth of the theory did not follow, and that liability could be avoided only upon actual proof of facts warranting the exemption. In *Pearson v. Zehr*, 138 Ill. 48, 29 N. E. 854, we held that the board of live-stock commissioners could not exempt itself from liability for the slaughter of animals, except upon actual proof that the slaughtered animals were affected with, or had been exposed to, a certain disease. The test proposed here may be efficacious, or it may not. There is no averment in the plea that it is. So far as disclosed, it may be of no utility whatever. Certainly, then, the plea cannot be said to give authority for the acts of appellants. In *Potts v. Breen*, 167 Ill. 67, 39 L. R. A. 152, 47 N. E. 81, we held that the state board of health had no authority to establish and cause to be enforced a rule requiring all children to be vaccinated as a prerequisite to attendance at public school, where the children had not been exposed to and were not shown to be affected with smallpox, and said disease was not declared or shown to be epidemic. So far as the pleadings in this case disclose, the cattle in question were not affected with, nor had they been exposed to, any disease, contagious or otherwise; nor was there any averment in the plea that the condition of the cattle was such as to render them liable to convey such disease, or that an epidemic of tuberculosis prevailed in the locality from which they came. The principle recognized in the case last cited has been held to be the law in numerous other cases. *State ex rel. Adams v. Burdge*, 95 Wis. 390, 37 L. R. A. 157, 70 N. W. 347; *Re Smith*, 146 N. Y. 68, 28 L. R. A. 820, 40 N. E. 497.

We think this plea bad for many reasons, among which are that it does not appear by the report of the board of live-stock commissioners that the disease of tuberculosis existed in an epidemic form in any locality, state, territory, or foreign country; that it is nowhere averred in the plea that the stock in question came from any locality, state, territory, or country where the disease was epidemic; that they were in fact affected with it; or that their condition was such that it might render them liable to convey such disease.

Appellants insist, however, that, though it be conceded that the report of the board,

the proclamation of the governor, and the averments of the plea are all too broad and too general, and all lacking in certainty to a reasonable intent, still the demurrer should have been overruled, the plea sustained, and appellee required to proceed to trial; and then, if appellants could prove that the cattle in question did, as a fact come from a particular locality in Wisconsin where tuberculosis did exist to the extent that cattle brought therefrom were liable to convey the disease to cattle in this state, all the general terms of the report and proclamation could be rejected as surplusage, and a verdict sustained. This seems to us to be begging the question. The report, rules, and regulations of the board and the proclamation of the governor alone are pleaded as a justification for the taking of the cattle in question, and appellants' justification is to be determined by the validity and force that are to be given to such report, rules, and proclamation. As we view it, the question of the force and validity of the proclamation depends upon the report and rules upon which it is based. With them it must stand or fall as a whole. There is no part of it that may be said not to be vital to the whole of it. There is no part of it that can be so separated from any other part, or from the whole, that it can be said that part may be rejected as surplusage. It is a familiar rule of construing statutes, ordinances, and the like that they must be construed together and as a whole, and if any part of them, and any part of the whole that is so material that it can be said of it that the whole would not have been enacted or ordained or declared without the part, then the whole must fall with the part. The proclamation was based upon the report of the board, and with the broad and sweeping terms of the report, including, as it did, all the states, territories, and foreign countries, how can this or any court say that the governor, in issuing his proclamation, and giving, or attempting to give, force and efficacy to the statute, which it is urged applies to this case, regarded any part of that report as surplusage, or as unimportant, or his proclamation in any way as restricted, when by the proclamation itself it appears that he seems to have taken especial pains to make it as broad, in all respects, as the report?

The proclamation of the governor, pursuant to the report and request made by said board, makes a discrimination between different classes of cattle, and the restrictions imposed are limited alone to "dairy or breeding cattle (cows, bulls, or calves)." If the restricted class is more susceptible to the disease sought to be prohibited and guard-

ed against, or more liable to convey it, such facts are nowhere averred in the plea, nor stated in the report on which the governor's proclamation is based, and the court cannot infer that such is the case. The board is doubtless to be given some latitude in the formation of rules and orders, when an emergency exists, to effectuate the purpose of its creation, but the reasonableness and legality of its rules are for the court to determine, as has been often held. *Wilson v. Alabama G. S. R. Co.* 77 Miss. 714, 52 L. R. A. 357, 28 So. 567; *Re Smith*, 146 N. Y. 68, 28 L. R. A. 820, 40 N. E. 497; *Hurst v. Warner*, 102 Mich. 238, 26 L. R. A. 484, 60 N. W. 440; *State ex rel. Adams v. Burdge*, 95 Wis. 390, 37 L. R. A. 157, 70 N. W. 347; *Kosciusko v. Slomberg*, 68 Miss. 469, 12 L. R. A. 528, 9 So. 297. It will not be supposed that the legislature intended to clothe this board with an authority to pass rules or regulations having the effect of law, and exempt it from the necessity of conforming to the fundamental principles of constitutional legislation. The operation of the rule here sought to be enforced extends beyond the scope of necessary protection into the domain of restraint of lawful trade. *Greensboro v. Ehrenreich*, 80 Ala. 579, 60 Am. Rep. 130, 2 So. 725. Under the requirement here sought to be enforced, one person might buy and bring into this state, without any restriction imposed upon him, steers of the same breed and from the same lot from which another person bought cows or calves, yet the latter would be subjected to burdens and restrictions from which the former are exempt. A law making that an offense if committed by a person in one class of business which if done by another person engaged in another branch of the same business would be lawful, without reasons for distinctions between the two, is unconstitutional. All persons subject to law have a right to be governed by general laws. Laws and regulations entirely arbitrary in their character, and singling out particular persons in distinction from others in the same community, are not of that class, and hence are unconstitutional. We regard the effect of the governor's proclamation and the rules established by the board in this case as producing unwarranted and illegal discrimination. *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *Bailey v. People*, 190 Ill. 28, 54 L. R. A. 838, 60 N. E. 98. The validity of the statute upon which the proclamation is predicated is not put in question, but the question presented is as to its application, and whether the board and the governor, in their proceedings, kept within the terms of the

statute, and whether the plea, merely reciting and averring the fact of the proclamation and the report and rules of the board, makes a sufficient justification.

Appellants cite and rely upon a number of cases in other states, chiefly *St. Louis S. W. R. Co. v. Smith*, 20 Tex. Civ. App. 451, 49 S. W. 627; *Hurdwick v. Brookover*, 48 Kan. 609, 30 Pac. 21; and *State v. Snell*, 21 R. I. 232, 42 Atl. 869; and, while there is much said in those cases that has application to the case at bar, and we are much impressed with the reasoning of those cases, yet we do not regard them as in accord with the views of this court relative to the powers of boards of this class and the force of proclamations, or as applicable to our statute. In *State v. Snell*, 21 R. I. 232, 42 Atl. 869, the statute of Rhode Island, upon which that case was based, provided expressly for the tuberculin test, and the court, in passing upon it, seemed to recognize that as sufficient authority for regulations as to the imposition of that test. In *Davis v. Walker*, 60 Ill. 452, we had under discussion a statute of this state relative to Texas or Cherokee cattle, and, although the statute assumed by its provisions that all Texas or Cherokee cattle transported into this state were diseased, or would at least communicate disease to the native cattle, in considering the statute this court said (p. 453): "It is true, the act of the legislature under which this suit was brought is based upon the theory, assumed as true, that

Texas cattle do communicate disease. The legislature, undoubtedly, was convinced this theory rested upon satisfactory evidence and that the enactment of this law was a necessary precaution. It may have been so; but, while it is the duty of a court to enforce the act, it is not a legal presumption that this theory in regard to the disease is true. That is a question of fact, which, when it arises, must be left open for the determination of a jury." The legislature in this state has not seen fit to declare the tuberculin test an efficient or certain one, nor does the board of live-stock commissioners so declare, nor is it so declared in the plea; and, unless it somewhere appeared in the plea of justification that such test would, in a reasonable degree or in some manner, determine the existence or nonexistence of tuberculosis, it must be held an unreasonable and unjustifiable requirement that before stock of the class named shall be shipped into the state it shall be subjected to that test and due record thereof preserved, to be presented to the authorities in this state, and on failure of which the cattle, when brought into this state, may be quarantined, subjected to the test at the owner's expense, and if they react be slaughtered without compensation to the owner.

With the views we have already expressed, we deem it unnecessary to go into a further discussion of these authorities.

The judgment of the Appellate Court is affirmed.

INDIANA SUPREME COURT.

Riley R. GADBURY *et al.*, *Appts.*,
v.

OHIO & INDIANA CONSOLIDATED NATURAL & ILLUMINATING GAS COMPANY.

(.....Ind.....)

1. A condition subsequent to develop the property upon discovering oil or gas in paying quantities is implied in a contract giving the right, for a nominal consideration, to enter upon and explore for oil or gas, where there is a provision that, upon failure to drill a well within a specified time, the lessee shall pay a certain amount per day while such completion is delayed.

2. Equity may enforce a forfeiture of a

NOTE.—As to forfeiture of oil and gas leases, see also, in this series, *Evans v. Consumers' Gas Trust Co.*, 31 L. R. A. 673, and note; *Woodland Oil Co. v. Crawford*, 34 L. R. A. 62; *Steel-smith v. Gartlan*, 44 L. R. A. 107; *Huggins v. Daley*, 48 L. R. A. 320; and *Freer v. Davis*, 59 L. R. A. 356.
62 L. R. A.

contract for the right to explore for oil or gas on a tract of real estate where it would be against equity to permit the lessee longer to assert his title.

3. A forfeiture of a gas lease for breach of a condition subsequent is sufficiently evidenced to give equity jurisdiction of a suit to declare it, where, although the lessor was not out of possession so that he could not enter for the breach, he has, after failure for a long time without apparent excuse to develop the property, treated the lease as abandoned.

(May 14, 1903.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Blackford County in favor of defendant in an action brought to quiet title to certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. **Hindman & Powell**, for appellants:

The finding of gas or oil vested in the

lessee a title for a special purpose, i. e., the right to remove such gas or oil under the express or implied conditions of the lease, and the actual production, under the express or implied conditions of the lease, is a condition precedent to the continuance of the special title, which is limited to the right to operate with due diligence and in good faith; and, when such operation ceases, then, also, does the right longer to hold the premises cease.

Parish Fork Oil Co. v. Bridgewater Gas Co. 51 W. Va. 583, 59 L. R. A. 566, 42 S. E. 655; *Huggins v. Daley*, 48 L. R. A. 320, 40 C. C. A. 12, 99 Fed. 606; *Crawford v. Ritchey*, 43 W. Va. 252, 27 S. E. 220; *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732; *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713; *Steelsmith v. Gartlan*, 45 W. Va. 27, 44 L. R. A. 107, 29 S. E. 978; *Cassell v. Crothers*, 193 Pa. 359, 44 Atl. 446; *Foster v. Elk Fork Oil Co.* 32 C. C. A. 560, 61 U. S. App. 576, 90 Fed. 178; *Ray v. Western Pennsylvania Natural Gas Co.* 138 Pa. 576, 12 L. R. A. 290, 20 Atl. 1065; *Petroleum Co. v. Coal, Coke & Mfg. Co.* 89 Tenn. 381, 18 S. W. 65; *National Oil & Pipe Line Co. v. Teel* (Tex. Civ. App.) 67 S. W. 545.

Where the only consideration which moved the grantor to execute the lease was the prospective royalties from gas or oil which could come only when the lessee is carrying out the implied covenant to operate, a failure to operate with reasonable diligence will work an extinguishment of the lease.

Island Coal Co. v. Combs, 152 Ind. 379, 53 N. E. 452; *Steelsmith v. Gartlan*, 45 W. Va. 27, 44 L. R. A. 107, 29 S. E. 974; *Ray v. Western Pennsylvania Natural Gas Co.* 138 Pa. 576, 12 L. R. A. 290, 20 Atl. 1065; *Kleppner v. Lemon*, 176 Pa. 502, 35 Atl. 109; *McKnight v. Manufacturer's Natural Gas Co.* 146 Pa. 185, 23 Atl. 164; *Huggins v. Daley*, 48 L. R. A. 320, 40 C. C. A. 12, 99 Fed. 606; *Federal Oil Co. v. Western Oil Co.* 112 Fed. 373; *Parish Fork Oil Co. v. Bridgewater Gas Co.* 51 W. Va. 583, 59 L. R. A. 566, 42 S. E. 655; *Glasgow v. Chartiers Oil Co.* 152 Pa. 48, 25 Atl. 232; *Foster v. Elk Fork Oil & Gas Co.* 32 C. C. A. 560, 61 U. S. App. 576, 90 Fed. 178; *Elk Fork Oil & Gas Co. v. Jennings*, 84 Fed. 839; *Aye v. Philadelphia Co.* 193 Pa. 451, 44 Atl. 555; *Marvett v. Todd*, 112 N. C. 677, 16 S. E. 926; *Hawkins v. Pepper*, 117 N. C. 407, 23 S. E. 434; *Shenandoah Land & A. Coal Co. v. Hise*, 92 Va. 238, 23 S. E. 303; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493; *Conrad v. Morehead*, 89 N. C. 31; *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732; *Koch's Appeal*, 93 Pa. 434; *Munroe v. Armstrong*, 96 Pa. 307; *Rorer Iron* 92 L. R. A.

Co. v. Trout, 83 Va. 409, 2 S. E. 713; *Cowan v. Radford Iron Co.* 83 Va. 547, 3 S. E. 120.

The only remedy is an extinguishment of the lease.

Ohio Oil Co. v. Lane, 59 Ohio St. 307, 52 N. E. 791; *Indianapolis Gas Co. v. Teters*, 15 Ind. App. 475, 44 N. E. 549.

A lease which is determined at the will of one party is equally determined at the will of the other party.

Knight v. Indiana Coal & I. Co. 47 Ind. 105, 17 Am. Rep. 692; *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 359, 19 L. ed. 955, 961.

Where the lease does not prescribe the time within which operations shall commence and the manner and diligence with which operations shall be continued, there is an implied covenant to begin within a reasonable time, and to carry on and continue the work with reasonable diligence. What may be regarded as a reasonable time and reasonable diligence depends upon the circumstances of the particular case.

Huggins v. Daley, 48 L. R. A. 320, 40 C. C. A. 12, 99 Fed. 606; *Federal Oil Co. v. Western Oil Co.* 112 Fed. 373; *Kennedy v. Crawford*, 138 Pa. 561, 21 Atl. 19; *Munroe v. Armstrong*, 96 Pa. 307; *Cassell v. Crothers*, 193 Pa. 359, 44 Atl. 446; *Parish Fork Oil Co. v. Bridgewater Gas Co.* 51 W. Va. 583, 59 L. R. A. 566, 42 S. E. 655.

Messrs. Cantwell & Simmons, with *Mr. William Walter Orr*, for appellee:

In an action to recover an estate for breach of condition subsequent the complaint must show not only the breach, but also a forfeiture on account of the breach, effected by re-entry, or demand for possession (its equivalent) prior to the filing of the complaint.

Etna L. Ins. Co. v. Sellers, 154 Ind. 370, 56 N. E. 97; *Elkhart Car Works Co. v. Ellis*, 113 Ind. 215, 15 N. E. 249; *Cory v. Cory*, 86 Ind. 567; *Preston v. Bosworth*, 153 Ind. 458, 55 N. E. 224; *Cross v. Carson*, 8 Blackf. 138, 44 Am. Dec. 742; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 635; *Clark v. Holton*, 57 Ind. 564; *Carter v. Branson*, 79 Ind. 14; *Ellis v. Elkhart Car Works Co.* 97 Ind. 247; *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698; *Manifold v. Jones*, 117 Ind. 212, 20 N. E. 124; *Cree v. Sherfy*, 138 Ind. 354, 37 N. E. 787; *Beard v. Smith*, 6 T. B. Mon. 444; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914; *Minneapolis & St. C. R. Co. v. Duluth & W. R. Co.* 45 Minn. 104, 47 N. W. 404; *Minnick v. State*, 154 Ind. 379, 56 N. E. 851; *Thrash v. Starbuck*, 145 Ind. 673, 44 N. E. 543; *Meni v. Rathbone*, 21 Ind. 462; *Heiple v. Reed* (Iowa) 65 N. W. 331; *Cannon v. Wilbur*, 30 Neb. 777, 47 N. W. 85; *Wakefield v. Sundal Lake*

Min. Co. 85 Mich. 605, 49 N. W. 135; *Jenkins v. Jenkins*, 63 Ind. 415, 30 Am. Rep. 229; *Bacon v. Western Furniture Co.* 53 Ind. 229.

Conditions subsequent, even when expressed, will be strictly construed.

Elkhart Car Works Co. v. Ellis, 113 Ind. 215, 15 N. E. 249; *Ellis v. Elkhart Car Works Co.* 97 Ind. 247; *Clark v. Holton*, 57 Ind. 564; *Lindsey v. Lindsey*, 45 Ind. 569; *Jenkins v. Jenkins*, 63 Ind. 422, 30 Am. Rep. 229; *Hill v. Nisbet*, 100 Ind. 356; 6 Am. & Eng. Enc. Law, 2d ed. p. 502; *Crane v. Hyde Park*, 135 Mass. 147; *Wier v. Simmons*, 55 Wis. 637, 13 N. W. 873; *Duryee v. New York*, 96 N. Y. 477; *Bishop, Contr.* 1st ed. §§ 417, 418; *Manifold v. Jones*, 117 Ind. 221, 20 N. E. 124; *Brown v. Chicago & N. W. R. Co. (Iowa)* 82 N. W. 1003.

Condition broken gives the right of re-entry.

Leach v. Leach, 4 Ind. 628, 58 Am. Dec. 642; *Scott v. Stipe*, 12 Ind. 74; *Cory v. Cory*, 86 Ind. 573.

A condition subsequent that will defeat an estate created by deed must be fairly expressed in the deed itself.

Sumner v. Darnell, 128 Ind. 43, 13 L. R. A. 173, 27 N. E. 162; *Manifold v. Jones*, 117 Ind. 221, 20 N. E. 124; *Guffy v. Hukill*, 34 W. Va. 49, 8 L. R. A. 759, 11 S. E. 754; *Harris v. Ohio Oil Co.* 57 Ohio St. 118, 48 N. E. 502; *Heiple v. Reed (Iowa)* 65 N. W. 331; *Halstead v. Jessup*, 150 Ind. 85, 49 N. E. 821; *Higbee v. Rodeman*, 129 Ind. 244, 28 N. E. 442; *Neupoint Lodge v. Neupoint*, 138 Ind. 145, 37 N. E. 650; 6 Am. & Eng. Enc. Law, 2d ed. p. 502; *McKnight v. Manufacturers' Natural Gas Co.* 146 Pa. 185, 23 Atl. 164; *Marshall v. Forest Oil Co.* 198 Pa. 83, 47 Atl. 927; *Hooks v. Forst*, 165 Pa. 238, 30 Atl. 846; *Wakefield v. Sundal Lake Min. Co.* 85 Mich. 605, 49 N. W. 135; *Cannon v. Wilbur*, 30 Neb. 777, 47 N. W. 85; *Bauer v. Knoble*, 51 Minn. 358, 53 N. W. 805; *Winkler v. Gibson*, 2 Kan. App. 621, 42 Pac. 937; *Bird v. Hawkins*, 58 N. J. Eq. 229, 42 Atl. 588; *Taylor, Land. & T.* § 488.

There must be a demand for performance before action begun, by the party entitled to insist upon a forfeiture of the estate, except in that class of cases in which the forfeiture becomes complete by the express terms of the deed.

Ellis v. Elkhart Car Works Co. 97 Ind. 247; *Schiff v. Ransom*, 79 Ind. 463; *Risley v. McNiece*, 71 Ind. 434; *Lindsey v. Lindsey*, 45 Ind. 552; *Cory v. Cory*, 86 Ind. 573; *Guffy v. Hukill*, 34 W. Va. 49, 8 L. R. A. 759, 11 S. E. 754; *Allegany Oil Co. v. Bradford Oil Co.* 86 N. Y. 638; *Faylor v. Brice*, 7 Ind. App. 551, 34 N. E. 833; *Cree v. Sherfy*, 138 Ind. 354, 37 N. E. 787.

The demand must be made upon the holder of the estate, or interest in lands, before forfeiture can take place.

Cory v. Cory, 86 Ind. 567; *Ellis v. Elkhart Car Works Co.* 97 Ind. 247.

A man cannot enter upon himself, and, when he is in the sole and exclusive possession, need not make re-entry or demand possession.

Richter v. Richter, 111 Ind. 456, 12 N. E. 698; *Cree v. Sherfy*, 138 Ind. 354, 37 N. E. 787; *Island Coal Co. v. Combs*, 152 Ind. 379, 53 N. E. 452; *Allegany Oil Co. v. Bradford Oil Co.* 86 N. Y. 638; *Guffy v. Hukill*, 34 W. Va. 49, 8 L. R. A. 759, 11 S. E. 754.

In the following cases damages were allowed for breach of condition subsequent, or upon contract, and were held to be, not "speculative," but natural and proximate, and ascertainable with reasonable certainty:

Harris v. Ohio Oil Co. 57 Ohio St. 118, 48 N. E. 502; *Blair v. Peck*, 1 Pennyp. 247; *Bradford Oil Co. v. Blair*, 113 Pa. 83, 57 Am. Rep. 442, 4 Atl. 218; *Stone v. Marshall Oil Co.* 188 Pa. 614, 41 Atl. 748, 1119; *Marshall v. Forest Oil Co.* 198 Pa. 83, 47 Atl. 927; *Brown v. Chicago & N. W. R. Co. (Iowa)* 82 N. W. 1003; *Bird v. Hawkins*, 58 N. J. Eq. 229, 42 Atl. 588; *Donnelly v. Eastes*, 94 Wis. 393, 60 N. W. 157; *Gates v. Parmly*, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739; *Henry v. Tupper*, 29 Vt. 358; *Pom. Eq. Jur.* §§ 455, 459.

Where no time is fixed for the performance of an act or contract in the agreement itself, the law steps in and requires performance within a reasonable time.

Adams v. Byerly, 123 Ind. 368, 24 N. E. 130; *Byram v. Gordon*, 11 Mich. 531; *Stange v. Wilson*, 17 Mich. 342; *Grant v. Merchants' & Mfrs. Bank*, 35 Mich. 515; *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 593; *Hayden v. Stoughton*, 5 Pick. 534; *Ellis v. Kyger*, 90 Mo. 605, 3 S. W. 23; *Junkin v. Lippman*, 18 Ind. App. 316, 48 N. E. 8; *Taber v. Cincinnati, L. & O. R. Co.* 15 Ind. 459.

Gillett, J., delivered the opinion of the court:

By their second paragraph of complaint, appellants seek to quiet their title to a certain tract of real estate, which they allege that they own in fee simple. The cloud that they seek to have removed was occasioned by the execution of a written contract by them and appellee's grantor, one Andrews, which contract is in the words and figures following:

In consideration of the sum of \$1, the receipt of which is hereby acknowledged, we, R. R. Gadbury and J. A. Gadbury, first parties, hereby grant unto J. S. Andrews, sec-

ond party, its successors and assigns, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil, gas, or water, and to erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of oil, gas, or water from said premises, excepting and reserving, however, to the first parties, the one-sixth (1-6) part of all oil produced and saved from said premises to be delivered in the pipe line with which second party may connect his wells, namely: All that certain lot of land situate in the township of Licking, county of Blackford, in the state of Indiana, bound and described as follows, to wit:

The east half of the northwest quarter of section 32, township 23, north, range 10, east, containing 80 acres, more or less.

To have and to hold the above premises on the following conditions: If gas only is found, second party agrees to pay \$100 each year for the product of each well while the same is being used off the premises, and the first party to have gas free of cost for domestic purposes.

Whenever first party shall request it, second party shall bury all oil and gas lines and pay all damages done to growing crops by reason of burying and removing said pipe lines.

No wells shall be drilled nearer than 200 feet to the house or barn on said premises, and no well shall occupy more than 1 acre. In case no well is completed within forty days from this date, then this lease shall become null and void, unless second party shall pay to first parties \$1 per day thereafter such completion is delayed. The second party shall have the right to use sufficient gas, oil, or water to run all necessary machinery for operating said wells, and also the right to remove all its property at any time. It is understood between the parties to this agreement that all the conditions between the parties hereto shall extend to their heirs, executors, and assigns.

In witness whereof, the parties hereto have hereunto set their hands and seals this 1st day of December, A. D. 1897.

[Signed]

R. R. Gadbury.

J. A. Gadbury.

J. S. Andrews.

Said paragraph of complaint further alleges that said contract was assigned by said Andrews to said defendant on the 6th day of January, 1900; that there was no consideration for the execution of said contract by plaintiffs, except the income, rents, profits, and royalties referred to in said instrument; 62 L. R. A.

that said Andrews completed a well on said premises on the 19th day of February, 1899, and paid plaintiffs the sum of \$1 per day during the time that completion of said well was delayed after forty days from the execution of said contract down to the date last aforesaid; that, by the construction of said well, gas was found on said premises in large and paying quantities; that, notwithstanding the discovery of said gas as aforesaid, said Andrews, immediately upon the completion of said well, closed and anchored the same, so as to prevent any gas from escaping therefrom, and neither said Andrews nor said defendant, nor any other person or corporation, has produced any gas or oil on or from said premises, nor have they, or either of them, used or transported any gas whatever from said premises; that neither said Andrews nor said defendant has ever paid the plaintiffs anything for the product of said well, or for the privilege of holding said premises after the completion of said well, and that the defendant since the date of said assignment has held, and still claims the right to hold, said premises without developing the same, and without producing any oil or gas therefrom, and without paying the plaintiffs any consideration whatever for the privilege of so doing, and without paying the plaintiffs anything whatever for the gas and oil which could be produced upon said premises; that, during all of the time since the execution of said lease, gas and oil have existed in and under said premises in large and paying quantities, and still continue so to exist, all of which was known to said Andrews and said defendant during all the time since the execution of said lease. It is further alleged in said paragraph of complaint that said Andrews and said defendant failed, neglected, and refused to give or furnish plaintiffs, or either of them, with any gas for domestic use; that on the 28th day of December, 1899, plaintiffs declared said contract forfeited, and all rights thereunder terminated, by reason of a failure to develop said premises and to produce gas or oil therefrom, and that plaintiffs did then and there take possession of said well, and connect the same with their dwelling house on said premises; and that said contract is a cloud upon plaintiffs' title. Prayer that said title be quieted. A demurrer was sustained to said paragraph of complaint, and an exception was duly reserved; and from a final judgment that appellants take nothing, they appeal, and assign error based on said ruling.

The grant in question, upon its face, appears to be a mere option to the grantee. Every express undertaking upon his part is subsidiary to the exercise of the option to

explore and develop the real estate. The question arises, however, whether obligations to explore and develop the property may not be implied, and whether such undertakings, if implied, are not such an essential part of the contract as to be treated as conditions. An implied condition may be inseparably annexed to a grant, from its essence and constitution, although no condition be expressed in words. 2 Bl. Com. *152; *Petroleum Co. v. Coal, Coke, & Mfg. Co.* 89 Tenn. 381, 18 S. W. 65. In determining whether a condition is to be implied, it is important to note that the substantial consideration which moves a grantor to execute such a grant is the hope of profits or royalties if oil or gas is discovered. Even if the grantee in this case had paid the stated consideration of \$1, —a technically valuable consideration,—yet we must construe the instrument with the fact in view that a more substantial reason or reasons prompted the making of the grant. *Huggins v. Daley*, 48 L. R. A. 320, 40 C. C. A. 12, 99 Fed. 606; *Federal Oil Co. v. Western Oil Co.* 112 Fed. 373. In an ordinary agricultural lease, where the rent is payable in kind, it would, of course, be implied that the tenant would farm the land; and the requirement is implied that lessees in mineral leases, upon royalties, will develop the property, if exploration warrants it, where the minerals are stable, although the only result of a delay in operating would be to postpone the receipt of profits or royalties. *Island Coal Co. v. Combs*, 152 Ind. 379, 53 N. E. 452; *McKnight v. Manufacturers' Natural Gas Co.* 146 Pa. 185, 23 Atl. 164. If a duty to operate is to be implied in such cases, there is much more reason for the implication in a grant of the right to operate for oil and gas upon a royalty, owing to the migratory habit of the fluids. "Oil leases," it was declared in *McKnight v. Manufacturers' Natural Gas Co.* 146 Pa. 185, 23 Atl. 164, "must be construed with reference to the known characteristics of the business." As said in another Pennsylvania case: "The nature of oil and gas, the pressure of the superincumbent rocks, and the vagrant habit of both fluids under the influence of this pressure, enter into the contemplation of both parties to such an arrangement." *Kleppner v. Lemon*, 176 Pa. 502, 35 Atl. 109. In grants of the character in question, the title is inchoate, and for the purpose of exploration only, until oil or gas is found in quantities warranting operation; and while the courts manifest a disposition to protect the grantee at this stage, by treating his interest as no longer postponed to the happening of a condition precedent, yet it is thoroughly settled that he cannot omit to develop the property and hold the grant

for speculative purposes purely. *Parish Fork Oil Co. v. Bridgewater Gas Co.* 51 W. Va. 583, 59 L. R. A. 566, 42 S. E. 655; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493; *Guffy v. Hukill*, 34 W. Va. 49, 8 L. R. A. 759, 11 S. E. 754; *Ray v. Western Pennsylvania Natural Gas Co.* 138 Pa. 576, 12 L. R. A. 290, 20 Atl. 1065; *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732; *Kleppner v. Lemon*, 176 Pa. 502, 35 Atl. 109; *Huggins v. Daley*, 48 L. R. A. 320, 40 C. C. A. 12, 99 Fed. 606; *Federal Oil Co. v. Western Oil Co.* 112 Fed. 373; *Hawkins v. Pepper*, 117 N. C. 407, 23 S. E. 434.

The duty to develop the property upon the discovery of oil or gas in paying quantities is not to be regarded as a mere implied covenant, but, in a case like this, where practically the whole consideration must depend upon the implied undertaking, is to be treated as a condition subsequent. Conditions subsequent are not ordinarily favored, "because," as declared by Prof. Kent, "they tend to destroy estates, and the rigorous exaction of them is a species of *summum jus*, and in many cases hardly reconcilable with conscience." 4 Kent, Com. *129. Accordingly, it has been declared in unrestricted terms that equity will not lend its aid to enforce a forfeiture. Where there has been a cause of forfeiture, followed by an entry upon the part of the grantor, so that the title has been lost, it is not strictly the enforcing of a forfeiture for a court of equity to decree a cancellation of the instrument. *McClellan v. Coffin*, 93 Ind. 456; *Birmingham v. Lesan*, 77 Me. 494, 1 Atl. 151. But even in a case of this kind, where the circumstances do not permit of an entry, the forfeiture may be, in effect, enforced by suit in equity. Forfeitures are usually against conscience and without equity, and it is for these reasons that courts of chancery ordinarily refuse relief in such cases; but an exception to the rule must exist where it be against equity to permit the defendant to longer assert his title. *Leach v. Leach*, 4 Ind. 628, 58 Am. Dec. 642; *McClellan v. Coffin*, 93 Ind. 456; *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698. In the case last cited a stipulation was treated as a condition subsequent, rather than a covenant, and the grantor's title quieted, because of the lack of another remedy. In the case in hand specific performance could not be enforced (*Louisville, N. A. & C. R. Co. v. Bodenschatz-Bedford Stone Co.* 141 Ind. 251, 39 N. E. 703); and the completion of the first well having cut off the liquidated damages of \$1 per day for noncompletion and as no gas has been disposed of off the premises, there remains no measure of damages, for, while the damages would be substantial,

they would be speculative. *Foster v. Elk Fork Oil Co.* 32 C. C. A. 560, 61 U. S. App. 576, 90 Fed. 178; *Federal Oil Co. v. Western Oil Co.* 112 Fed. 373. The lack of any other remedy, and the danger that the gas might be withdrawn through wells on other lands, makes a case of this kind appeal to the conscience of the chancellor, and calls upon him to enforce the incurred forfeiture by removing the cloud from the title. In *Munroe v. Armstrong*, 96 Pa. 307, it was said concerning a gas and oil lease: "Forfeiture for nondevelopment or delay is essential to private and public interests in relation to the use and alienation of property. In such cases as this, equity follows the law. In general, equity abhors a forfeiture, but not when it works equity and protects a landowner from the laches of a lessee whose lease is of no value till developed."

The next question that arises is whether the paragraph of complaint in question sufficiently shows that the interest conveyed by appellants to said grantee Andrews has been forfeited. An estate is not *per se* forfeited by the breach of a condition subsequent. *Cross v. Carson*, 8 Blackf. 138, 44 Am. Dec. 743; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638. It was a rule of the common law that, where an estate commenced by livery, it could not be determined before entry. 4 Kent, Com. *128. In Indiana a demand of possession, based on the breach, followed by a refusal, is equivalent to an entry on the premises. *Clark v. Holton*, 57

Ind. 564; *Indianapolis, P. & C. R. Co. v. Hood*, 66 Ind. 580; *Cory v. Cory*, 86 Ind. 567; *Preston v. Bosworth*, 153 Ind. 458, 55 N. E. 224. Without determining whether this rule as to an entry should be applied to the grant of an easement or of a chattel interest (*Roberts v. Davey*, 1 Nev. & M. 443), or whether it is enough for the grantor in such case to evince unequivocally his election, we think that it may be affirmed in this case that the forfeiture is sufficiently shown. Here the grant did not dispossess the appellants, and they could not enter upon themselves; and, besides, the failure for so long a time, without apparent excuse, to develop the property, *prima facie* authorized appellants, without demand, to treat the grant as abandoned. See *Richter v. Richter*, 111 Ind. 456, 12 N. E. 608; *Cree v. Sherfy*, 138 Ind. 354, 37 N. E. 787; *Island Coal Co. v. Combs*, 152 Ind. 379, 53 N. E. 452; *Huggins v. Daley*, 48 L. R. A. 320, 40 C. C. A. 12, 99 Fed. 608; *Guffy v. Hukill*, 34 W. Va. 49, 8 L. R. A. 759, 11 S. E. 754. As to election by suit, see *Carnahan v. Tousey*, 93 Ind. 561.

The facts stated in the second paragraph of complaint, which stand as admitted by the demurrer, were such as to require the court below to aid appellants, by means of its jurisdiction, to decree cancellation and to remove clouds from titles.

The judgment is reversed, with an instruction to the court below to overrule the demurrer to the second paragraph of complaint.

KENTUCKY COURT OF APPEALS.

Maggie REED, Appt.,

v.

William MALEY.

(.....Ky.....)

Merely soliciting a woman to sexual intercourse gives her no right of action.

(*Hobson, J., dissents.*)

(June 5, 1903.)

APPEAL by plaintiff from a judgment of the Circuit Court for Fleming County in favor of defendant in an action brought to recover damages for insult. *Affirmed.*

The facts are stated in the opinion.

Messrs. John S. Power and G. A. Cassidy, for appellant:

Trespass may be maintained against one who stands upon the sidewalk in front of the premises of an abutting owner and uses

NOTE.—For the analogous question of criminality of solicitation to crime that is not consummated, see *State v. Butler*, 25 L. R. A. 434, and note.

For a case in this series holding that attempt to seduce plaintiff's wife will not sustain action for trespass in entering upon his premises where defendant had license to go upon premises, see *Bennett v. McIntire*, 6 L. R. A. 736.

For conflicting authorities as to right of action for damages resulting from shock or fright, see note to *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 14 L. R. A. 686.

For cases denying the right, see *Halle v. Texas & P. R. Co.* 23 L. R. A. 774; *Mitchell v. 62 L. R. A.*

Rochester R. Co. 34 L. R. A. 781; *Spade v. Lynn & B. R. Co.* 38 L. R. A. 512, 43 L. R. A. 832; *Braun v. Craven*, 42 L. R. A. 199; *Smith v. Postal Tele. Cable Co.* 47 L. R. A. 323; and *Sanderson v. Northern P. R. Co.* 60 L. R. A. 403.

For cases sustaining the right, see *Sloane v. Southern California R. Co.* 32 L. R. A. 193; *Mack v. South Bound R. Co.* 40 L. R. A. 679; *Gulf, C. & S. F. R. Co. v. Hayter*, 47 L. R. A. 325; *Denver & R. G. R. Co. v. Roller*, 49 L. R. A. 77; *Tuttle v. Atlantic City R. Co.* 54 L. R. A. 582; *Homans v. Boston Elev. R. Co.* 57 L. R. A. 291; *Watson v. Dilts*, 57 L. R. A. 559; and *Kline v. Kiline*, 58 L. R. A. 397.

abusive language toward him, refusing to depart.

Elliott, Roads & Streets, 536; 26 Am. & Eng. Enc. Law, p. 573, note 2.

Where the act is not immediately injurious, but only by consequence and collaterally, an action of the special case will lie for the damages consequent on such act.

3 Bl. Com. §§ 122, 123; Pom. Rem. § 20.

If the act complained of is committed in a manner indicating a reckless disregard of the rights of the injured party, punitive or exemplary damages may be recovered.

1 Sedgw. Damages, § 135, note A; *Chiles v. Drake*, 2 Met. (Ky.) 146, 74 Am. Dec. 406; *Slater v. Sherman*, 5 Bush, 213; *Dawson v. Louisville & N. R. Co.* 4 Ky. L. Rep. 801; *Merrills v. Tariff Mfg. Co.* 27 Am. Dec. 682, and note, 10 Conn. 384; *Hopkins v. Atlantic & St. L. R. Co.* 72 Am. Dec. 287, and note, 295, 36 N. H. 9; *Perkins v. Towle*, 43 N. H. 220, 80 Am. Dec. 149.

The injury often consists in the inconvenience and annoyance to which the plaintiff is subjected, the invasion of his privacy, and the interference with his comfort; and for this compensatory damages may be recovered.

Sedgw. Damages, p. 529, note b; *Ives v. Humphreys*, 1 E. D. Smith, 196; *Chiles v. Drake*, 2 Met. (Ky.) 146, 74 Am. Dec. 406; *Dawson v. Louisville & N. R. Co.* 4 Ky. L. Rep. 731.

There are offenses against morals which would pass without reprehension, did not the providence of the courts permit the private remedy to become an instrument of public correction.

Burr v. Burr, 7 Hill, 207; *Dawson v. Louisville & N. R. Co.* 4 Ky. L. Rep. 801; *Merrills v. Tariff Mfg. Co.* 27 Am. Dec. 682, and note, 10 Conn. 384; *Perkins v. Towle*, 43 N. H. 220, 80 Am. Dec. 149; *Hopkins v. Atlantic & St. L. R. Co.* 72 Am. Dec. 287, and note, 36 N. H. 9; *DeMay v. Roberts*, 46 Mich. 160, 41 Am. Rep. 154, 9 N. W. 146.

Messrs. W. O. Dearing and J. P. McCartney for appellee.

Paynter, J., delivered the opinion of the court:

The petition makes substantially the following averments: That the plaintiff was a married woman; that on October 19, 1898, whilst sitting near the window in her house, the defendant approached near it, and proposed to her to have sexual intercourse with him; that she indignantly refused the proposal; that the defendant thereby committed a trespass against her person; that she was frightened, and caused great mortification and shame; and in consequence of which she was greatly excited and damaged. It was not averred that the defendant entered

her house or was in reach of her, so as to put her in fear. The court sustained a demurrer to and dismissed the petition on the ground that it did not state a cause of action. In an action for an assault the petition must allege the facts which constitute the assault, and in alleged trespass it is essential to state the facts which constitute it. *Stivers v. Baker*, 87 Ky. 508, 9 S. W. 491. No facts were averred which showed that the defendant made an assault upon the plaintiff, hence he did not inflict any injury upon her person.

The sole question presented for consideration is, Will a cause of action lie in favor of a woman against a man who solicits her to have sexual intercourse with him? If it will, the petition states a cause of action; otherwise it does not. This is a novel case, but the novelty of the case is no reason for denying a recovery if the cause of action can be made to rest upon some sound principle of law. The fact that learned counsel have been unable to cite any case involving the question here for our determination strongly conduces to show that the legal profession for centuries has labored under the impression that a civil action will not lie on a state of facts like those averred in the petition, for it is probable that, during past generations, applications have been made to them for the institution of actions like this one. If such applications have been made, it is probable that they have been made by good and virtuous women; and certainly there is no moral or social reason why the members of the legal profession should not have instituted such actions to recover damages for the wounded feelings and humiliation good women have suffered from such proposals, if such an action in their judgment could have been maintained. The solicitation for such intimacy is not equivalent to charging a woman with the want of chastity; therefore, if made under circumstances that would make a charge of unchastity a slander and actionable, no action for slander could be maintained on account of such solicitation. The solicitation was not a libel, and of course not actionable upon that ground. It was not a breach of contract, as in *Chapman v. Western U. Teleg. Co.* 90 Ky. 265, 13 S. W. 880, where there was a failure to deliver a telegram, which resulted in an injury to the feelings, etc. So the principle upon which actions for slander and libel and the *Chapman Case* are based cannot be the foundation upon which to rest a recovery in this action. Neither does the principle upon which actions for malicious prosecutions or false arrest are founded furnish a basis for recovery. As there was no assault upon or trespass against the person

of the plaintiff, and no physical injury produced, it seems to us that no recovery can be had. It is well settled that mental suffering may be taken into consideration in estimating damages in cases of physical injury. In such cases there may be a recovery for physical and mental suffering arising from physical injury. The objection to a recovery for injury occasioned without physical impact is the difficulty of testing the statements of the alleged sufferer, the remoteness of the damages, and the metaphysical character of the injury considered apart from physical pain. In *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695, 8 S. W. 574, the court had under consideration the question of allowing damages for mental suffering unaccompanied by physical injury. Judge Lurton, then a member of that court, in a dissenting opinion said: "The reason why an independent action for such damages cannot and ought not to be sustained is found in the remoteness of such damages, and in the metaphysical character of such an injury considered apart from physical pain. Such injuries are generally more sentimental than substantial. Depending largely upon physical and nervous condition, the suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated and impossible to disprove, it falls within all of the objections to speculative damages, which are universally excluded because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental, shall be ascertained and assessed by a jury with justness, not by way of punishment to the defendant, but as mere compensation to the plaintiff, is not to be expected. . . . Mental distress is or may be in some cases as real as bodily pain, and it as certainly results from language not amounting to an imputation of crime; yet such actions have always been dismissed as not authorized by the law as it has come down to us, and as it has been for all time administered." The only instance in which this court seems to have refused to apply this rule is in *Chapman v. Western U. Teleg. Co.* There are a class of cases in this jurisdiction where the court has allowed the jury to award punitive damages, where the employees of a railroad have wrongfully ejected persons from a train in a rude, offensive, or high-handed manner. Those cases, however, are no authority for a recovery in this case. As we have said, the defendant did not accuse the plaintiff of the want of chastity, but showed a purpose to seduce her from the path of virtue. If A should solicit B, a rep-
62 L. R. A.

utable citizen, to join him in the commission of the crime of arson, larceny, or robbery, B would indignantly reject the solicitation. He might become excited, and feel humiliated and ashamed to have been thus approached, and might have worried over it for days and nights thereafter; but could he maintain an action against A for thus approaching him with such an infamous proposition? We think not. Suppose a bawd should solicit a man upon a public street to have sexual intimacy with her; he certainly could not maintain a civil action against her. If an action could be maintained by a woman against a man for such solicitation, the same right to maintain one would exist in his favor. Whilst he might not suffer the same anguish and humiliation on account of such solicitation as the woman, yet the right of recovery would be the same. The amount of it would only be determined by reason of the difference in effect such solicitation would have upon one or the other. Society and the moral sentiments of the people strongly condemn conduct like that with which the appellee is charged, but there is no principle of law known to us which will enable a party to maintain a civil action upon facts like those here under consideration.

Newell v. Whitcher, 53 Vt. 589, 38 Am. Rep. 703, is relied upon as an authority authorizing a recovery. It appeared that the plaintiff was a blind music teacher; that she went to the house of the defendant to give lessons to his daughters; that he assigned her to a room for the night; that during the night he stealthily entered her room, sat on her bed, leaned over her person, and made repeated solicitation to her for sexual intimacy, which she repelled. The court held that her private sleeping room during the night was exclusive; that trespass *quare clausum fregit* would lie against him; that sitting on her bed and leaning over her was an assault; and that she was entitled to recover exemplary damages. The principle of that case does not apply, because the defendant was guilty of trespass *quare clausum, fregit*, and an assault upon the plaintiff's person. The recovery was evidently allowed on account of these wrongs.

In *Bennett v. McIntire*, 121 Ind. 231, 6 L. R. A. 736, 23 N. E. 78, the husband sued the defendant in trespass, alleging that the latter with force and arms entered upon plaintiff's premises and attempted to seduce his wife by wickedly soliciting and attempting to persuade her to submit to carnal intercourse. The evidence showed that defendant entered upon plaintiff's premises with his license, and recovery was denied, the court holding that the averments as to the defendant's conduct after he entered upon

the premises was laid by way of aggravation of damages, and not as a ground of the action. The denial of recovery was not placed upon the ground that a cause of action was in the wife, not in the husband, for the wrong which she suffered. The attorney who brought the action, and the court which tried it, evidently labored under the impression that no cause of action existed except for the trespass on the premises, and that the defendant's other acts did not constitute a cause of action, but were only available as an aggravation of damages.

It has been urged in consultation that solicitation to commit adultery is a common-law offense, and may be indicted as such; and, after that conclusion is reached, the argument proceeds to the effect that, as Maley transgressed the common law, thereby being guilty of an indictable offense, a cause of action arose. In support of that conclusion, Bishop, Non-Contract Law, § 71, is cited. It reads as follows: "The doctrine in general terms, is that the civil wrong and the criminal are legally distinct things, though both may proceed from one act of the offender. If the injury is of a nature falling on the entire community, an individual, suffering from it only as others do, can maintain no action against the wrongdoer, even should it in degree casually press more heavily upon him than upon others. But he who suffers a special damage may have his suit, though by reason of the public harm the defendant is also indictable." And also § 466, Ky. Stat., is cited, which reads as follows: "A person injured by the violation of any statute may recover from the offender such damage as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed." It is also urged that the cases of *Henderson v. Clayton*, 22 Ky. L. Rep. 283, 53 L. R. A. 145, 57 S. W. 1, and *Hutchison v. Louisville & N. R. Co.* 108 Ky. 615, 57 S. W. 251, support that view. The doctrine stated by Bishop does not apply to the facts of this case. If one carries away another's property with the felonious intention to convert it to his own use, or if one person commits an assault upon another, the wrongdoer may be indicted therefor, but that fact does not relieve him of liability in a civil action for damages the injured party may have suffered in his estate or person. This doctrine cannot be applied, in disregard of other well-known rules of law, to sustain a recovery where no cause of action exists. Section 466 of the Kentucky Statutes is of the same tenor as the rule announced by Bishop, except its operation is restricted to violations of statutes. As there is no statute denouncing a penalty for solicitation to commit adultery, it cannot be claimed to 62 L. R. A.

have any application to the case under consideration. The statute was applicable to the cases of *Henderson v. Clayton*, and *Hutchison v. Louisville & N. R. Co.*, and those cases are of the character to which the doctrine stated by Bishop and the provisions of the statute apply. In the former, the city of Henderson, in violation of the statute, maintained a pesthouse by reason of which Mrs. Clayton and her family took smallpox, and suffered in person and estate. In the latter case *Hutchison* was compelled by the Louisville & Nashville Railroad, in violation of the Constitution, to pay excessive freight charges, and for the damages sustained in consequence thereof he was adjudged the right to recover. The court does not admit (the question not being here) that the appellee could have been indicted at common law for the alleged offense of solicitation to commit adultery, but, assuming he could have been, it is of the opinion that that fact would not enable the appellant to maintain the action.

The judgment is affirmed.

Hobson, J., dissenting (filed June 9, 1903):

Appellant, Maggie Reed, filed this suit against appellee, William Maley. He demurred to the petition; his demurrer was sustained; and, she declining to plead further, the petition was dismissed. From this judgment she appeals.

Whether the facts in the petition are sufficient to constitute a cause of action is the only question to be determined on the appeal. These facts are as follows: The plaintiff was a married woman, a resident of Fleming county; on October 19, 1898, she was at her home, sitting near a window in her house. The defendant came to the house, approached very near to the window, proposed to her to have sexual intercourse with her, saying to her, "Won't you meet me out somewhere? Won't you meet me alone somewhere?" She indignantly refused the proposal. It is charged in the petition that the defendant committed a trespass thus against the person of the plaintiff, and illegally, wilfully, and maliciously thus made a criminal assault upon her; that thereby she was frightened, humiliated, and caused great mortification and shame, and was greatly excited, unnerved, and damaged. The amount of the damages was laid at \$3,000 for which judgment was prayed.

So much of the opinion of the court is concurred in as holds that the petition fails to state facts sufficient to constitute a cause of action for assault. See *Stivers v. Baker*, 87 Ky. 508, 9 S. W. 491; 3 Cyc. Law & Proc. 1025; *Bennett v. McIntire*, 121 Ind. 231, 6 L. R. A. 736, 23 N. E. 78. But on another

ground it is submitted that the petition is sufficient.

In *State v. Avery*, 7 Conn. 266, 18 Am. Dec. 105, the defendant was indicted for sending to a married woman a letter written by him proposing carnal intercourse with her. It was urged that he could not be punished for criminal libel because there was no publication of the letter; but the court held that the sending of such a letter, without any publication, is clearly an offense of a public nature and punishable as such, as it tends to create ill blood and cause a disturbance of the public peace; that, adultery being an offense, an attempt to commit it, or a solicitation to another to commit it, is a misdemeanor. In Connecticut, when this case was decided, adultery was a felony. By our statute it is only a misdemeanor. Ky. Stat. 1899, § 1320. In *Smith v. Com.* 54 Pa. 209, 93 Am. Dec. 686, it was held that solicitation to adultery is not indictable where adultery is by law made only a misdemeanor. But it is hard to see why the solicitation to commit a felony should be punishable, and not that to commit a misdemeanor, nor does the weight of authority sustain this distinction. In 1 Bishop, New Crim. Law, § 768, it is said: "Though to render a solicitation indictable, it is, in general, as in other attempts, immaterial whether the thing proposed is technically a felony or a misdemeanor; yet, as the soliciting is the first step only in a gradation reaching to the consummation, the thing intended must, on principles already explained, be of a graver nature than if the step lay further in advance."

In *Com. v. Tibbs*, 1 Dana, 524, the defendant was indicted for challenging another to fight a duel. The proof showed that when they had been quarreling Tibbs said to him, "I am told you carry weapons for me. I will fight you a duel with a pistol or rifles from one step to a hundred yards." The court held that, considering the occasion and the accompanying circumstances, the words did not necessarily import a demand, but only willingness to fight if the other person desired such an encounter. It then added: "Such words might amount to a misdemeanor at common law, for they may be deemed an 'insinuation' of a desire to fight with deadly weapons, which might provoke such combat, and which, therefore, is punishable as a misdemeanor."

In *United States v. Lyles*, 4 Cranch C. C. 469, Fed. Cas. No. 15,646, it was held a misdemeanor to solicit another to commit a breach of the peace. So it has been held indictable at common law, independently of statute, to solicit a witness not to testify before the grand jury or on the trial of the case. *State v. Keyes*, 8 Vt. 57, 30 Am. Dec. 62 L. R. A.

450. In this case the court, by Judge Redfield, said: "It is equally well settled that an endeavor to induce another to commit a felony or misdemeanor is indictable as a common-law offense. . . . And we feel no hesitation in saying that the attempt to commit an offense, or the soliciting another to commit an offense, should (with few exceptions, not necessary to be enumerated here, resting upon peculiar grounds) be held indictable as misdemeanors at common law."

In *Com. v. Willard*, 22 Pick. 476, the court, in attempting to define those cases in which solicitations are indictable, said: "One consideration, however, is manifest in all the cases, and that is that the offense proposed to be committed by the counsel, advice, or enticement of another is of a high and aggravated character, tending to breaches of the peace or other great disorder and violence, being what are usually considered *mala in se*, or criminal in themselves, in contradistinction to *mala prohibita*, or acts otherwise indifferent than as they are restrained by positive law."

In a note to *State v. Butler*, 25 L. R. A. 434, the authorities are exhaustively collected, and, criticising the rule followed in some of the states, the learned editor, summing up the authorities, says: "But that rule does not allow for the growth of the common law, which is certainly a thing of growth. In fact, indictments for solicitation to crime are of comparatively modern origin, and in some cases have not been used until quite recently. The true rule would seem to be that suggested by Judge Lawrence in *King v. Higgins*, 2 East, 5, who made the question of indictability depend upon whether or not it is prejudicial to the community."

Adultery is a grave offense under the moral law. A solicitation to commit adultery if unsuccessful, is liable to lead to violence and bloodshed at the hands of the relatives of the woman; and if successful it defeats the end for which marriage was intended, and destroys the woman. It seems anomalous to say that a solicitation to commit a breach of the peace, or to disobey a subpoena, is at common law indictable, but that solicitations to adultery are no offense, although necessarily attended with more serious consequences to the community. It may therefore be safely concluded that solicitation to adultery is a common-law offense, and may be indicted as such.

But aside from this, § 1271, Ky. Stat. 1899, makes it a misdemeanor for anyone to use in the presence of another person "any abusive or insulting language, intending thereby to insult such other person or persons, or with the intent to provoke an assault." The proposal of the defendant to the plaintiff was equivalent to a charge of

unchastity, and was grossly insulting. It was intended as a charge of unchastity, and was therefore intended to insult her. If A said to B, "You have stolen my watch," he would not be excused on the ground that he did not expect B to take it as an insult. If the words used are insulting and are intended as an insult, there is an intention to insult, although there is no expectation that the insult will be resented. The defendant might therefore have been prosecuted under this statute. His act being punishable criminally, can it also be made the subject of a civil action for damages? In Bishop, Non-Contract Law, § 71, it is said: "The doctrine, in general terms, is that the civil wrong and the criminal are legally distinct things, though both may proceed from one act of the offender. If the injury is of a nature falling on the entire community, an individual, suffering from it only as others do, can maintain no action against the wrongdoer, even should it in degree casually press more heavily upon him than upon others. But he who suffers a special damage may have his suit, though by reason of the public harm the defendant is also indictable." This principle was approved by this court in *Henderson v. Clayton*, 22 Ky. L. Rep. 283, 53 L. R. A. 145, 57 S. W. 1, and *Hutchison v. Louisville & N. R. Co.* 108 Ky. 615, 57 S. W. 251. Section 466, Ky. Stat. 1899, also provides: "A person injured by the violation of any statute may recover from the offender such damage as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed."

It is insisted for the appellee that the petition shows no special damage, and authorities are cited to the effect that mental suffering, not accompanied with any physical injury or actionable wrong, is insufficient to constitute the basis of an action. But this rule does not apply to wrongs done maliciously or with insult, where the mental suffering is the natural and proximate consequence of the wrong, and there is, aside from it, a recognized cause of action. 8 Am. & Eng. Enc. Law, 2d ed. pp. 667-669. See also 1 Sedgw. Damages, § 47.

It is charged in the petition that the plaintiff was excited, unnerved, and damaged by the wrongs of the defendant. If she was made sick or lost time, this would be a special damage entitling her to maintain an action under the rule, although the sickness or loss of time was the result of the mental condition produced by the defendant's wrong; for his wrong was the primary cause of the trouble, and the damage was the proximate and natural result of it. 62 L. R. A.

One who is unnerved is in an abnormal condition or sick, and, if this condition was the proximate result of the defendant's act, the plaintiff has suffered special damages therefrom within the meaning of the rule. She may recover compensation for the injury she sustained, and, in addition to this, the jury may, in their discretion, award such sum by way of punitive damages as they may deem proper. For the action is in the nature of an action of trespass on the case for a malicious wrong, and punitive damages may be awarded as in actions for slander or malicious prosecution. The purity of woman and the sanctity of the marriage relation lie at the basis of our whole social fabric, and attempts to destroy them are grave offenses. The law is inadequate indeed if it leaves such offenses to be punished wholly by the relatives of the injured woman. This brings about bloodshed and disregard of the law itself. The actual injury that may be done to a virtuous woman by a wrong of this description is incalculable. If the plaintiff had suffered a miscarriage or sustained some direct pecuniary loss as the proximate result of the wrong, it would hardly be doubted that she might maintain an action for the damages thus sustained by her. But when she is crushed under the insult and unnerved and made sick, the damage or injury, though different in a degree, is none the less actual than in the case supposed. In 8 Am. & Eng. Enc. Law, 2d ed., it is said: "There has never been doubt that a defendant whose act amounts in law to a legal wrong is responsible in damages for all the loss which is both natural and proximate consequence of his wrongful act." P. 569. "Though an act of the plaintiff himself has intervened between the defendant's wrong and the injury suffered, the latter is not thereby excused, if the intervening act was the result of, or naturally and reasonably induced by, the defendant's earlier wrong." P. 578. The same rule is laid down in 1 Sedgw. Damages, § 129: "The true test would seem to be whether the action of the intervening agency was such as was to be expected to happen upon the defendant's act. If it were so to be expected, the result is not remote. In the case of a human agency, the intervention will generally be of a sort not to be expected. But, where the intervention was directly and naturally induced by the defendant's act, the consequence is not remote, though the intervening agency was human." The natural effect of an indecent proposal of this character to a virtuous woman would be to upset her nerves and unfit her for discharging for the time her domestic

tic duties. It would as truly make her sick as the administration of a nauseate drug, and such a result was reasonably to be expected. The injury in the one case is none

the less actual and none the less natural than the other.

I therefore dissent from the opinion of the court.

MICHIGAN SUPREME COURT.

Robert McCULLOUGH

v.

Burr GREENFIELD, Plff. in Err.

(.....Mich.....)

1. The possession by an officer of a warrant will not justify an arrest of the accused by the police department of another town under direction by telephone to it by the officer holding the warrant.
2. The liability of an officer for illegal arrest is not waived by pleading guilty of the offense for which the arrest was made.
3. Damages can be recovered only to the time of the lawful arrest, where a person within the jurisdiction of the court, for whom a warrant has been issued, is taken into custody and detained until the officer arrives with the warrant, when a legal arrest is made.
4. An officer is not liable in damages for using handcuffs on a prisoner who is unknown to him, where he has a considerable distance to go after dark, and has another person under his charge, there being nothing to show wantonness or malice in his conduct.

(June 23, 1903.)

ERROR to the Circuit Court for Kalamazoo County to review a judgment in favor of plaintiff in an action brought to recover damages for alleged false imprisonment. *Reversed.*

The facts are stated in the opinion.

Mr. Harry C. Howard, for plaintiff in error:

When the plaintiff on being arraigned, made no objection to the manner of his arrest, he did not claim it to be illegal, but pleaded guilty to the charge, and thereby waived any irregularity in the arrest.

Maxwell v. Deens, 46 Mich. 36, 8 N. W. 561; *Jones v. Foster*, 43 App. Div. 33, 59 N. Y. Supp. 738; *Cuniff v. Beecher*, 84 Hun, 137, 32 N. Y. Supp. 1067.

The putting on of handcuffs under the cir-

cumstances in this case was justified, and a reasonable exercise of the discretion reposed in the officer.

Firestone v. Rice, 71 Mich. 377, 38 N. W. 885; *Butler v. Washburn*, 25 N. H. 251.

Authority to make the arrest existing, the manner in which that power was exercised ought not to be held to be ground for civil action, unless hurt resulted to plaintiff therefrom, which would not necessarily have followed had the exact procedure contemplated by the statute been pursued.

Cabell v. Arnold, 86 Tex. 102, 22 L. R. A. 87, 23 S. W. 645.

Where one is arrested without justification false imprisonment exists only between the time of arrest and service of a valid warrant.

Harris v. McReynolds, 10 Colo. App. 532, 51 Pac. 1016.

Messrs. Thomas, Cummins, & Nichols, for defendant in error:

Unlawful imprisonment for a period of at least fifteen hours, and the unlawful imposition of handcuffs, were such substantial injuries as would not be compensated by a verdict for merely nominal damages.

Arrests cannot be made without warrant, except in cases of felony or of breaches of the peace committed in the presence of the officer.

Re Way, 41 Mich. 299, 1 N. W. 1021; *Robinson v. Miner*, 68 Mich. 557, 37 N. W. 21; *People v. Johnson*, 86 Mich. 175, 13 L. R. A. 163, 48 N. W. 870; *Drennan v. People*, 10 Mich. 184; *People v. McLean*, 68 Mich. 480, 36 N. W. 231.

This arrest and imprisonment being illegal, it follows that the officer making the same was liable for the damages occasioned thereby.

Cooley, Torts, 195; 12 Am. & Eng. Enc. Law, p. 722.

Every unlawful deprivation of liberty con-

NOTE.—For a case in this series somewhat similar to the one above, as to the validity of arrest without warrant on authority of letter from police officer of another state, see *Scott v. Eldridge*, 12 L. R. A. 379.

As to validity generally of arrest without warrant, see note to *State v. Hunter*, 8 L. R. A. 529; *State v. McAfee*, 10 L. R. A. 607; *Morris v. Kassling*, 11 L. R. A. 398; *People v. Johnson*, 13 L. R. A. 183; *Boutte v. Emmer*, 15 L. R. A. 63; *Com. v. Wright*, 19 L. R. A. 206; *State v.* 62 L. R. A.

Lewis, 19 L. R. A. 449; *Burroughs v. Eastman*, 24 L. R. A. 859; *Baltimore & O. R. Co. v. Cain*, 28 L. R. A. 585; *White v. State*, 37 L. R. A. 642; *State v. Taylor*, 42 L. R. A. 673; *Palmer v. Maine C. R. Co.* 44 L. R. A. 673; *Tillman v. Beard*, 46 L. R. A. 215; *State ex rel. McLauren v. McDaniel*, 50 L. R. A. 118; *Robertson v. State*, 52 L. R. A. 751.

As to liability of officer for making an arrest, see *Leger v. Warren*, 51 L. R. A. 193, and note.

fers a corresponding right of action for damages, either nominal or substantial.

Smith v. Clark, 53 N. J. L. 197, 21 Atl. 491.

The defendant, having caused, instigated, and procured this unlawful imprisonment, is liable in damages therefor.

12 Am. & Eng. Enc. Law, p. 751; *Burroughs v. Eastman*, 101 Mich. 426, 24 L. R. A. 859, 59 N. W. 817; *Ross v. Leggett*, 61 Mich. 445, 28 N. W. 695; *Carson v. Dessau*, 142 N. Y. 445, 37 N. E. 493.

The arrest and imprisonment of plaintiff having been illegal, the continuation thereof by defendant in person was likewise illegal, notwithstanding the fact that he had a valid warrant in his possession when he took plaintiff into his personal custody.

Mandeville v. Guernsey, 51 Barb. 99; *Cabell v. Arnold* (Tex. Civ. App.) 22 S. W. 62.

In criminal cases an officer has the right to use his discretion as to the means necessary in both the apprehension of an accused person, and his safe detention after such apprehension; but even in criminal cases he is liable for an abuse of such discretion.

Skidmore v. State, 2 Tex. App. 20.

He may not use handcuffs unless without them there is danger of an escape.

Cochran v. Toher, 14 Minn. 385, Gil. 293.

If no resistance is offered, or attempt to escape made, he has no right rudely and with violence to seize and collar his prisoner.

State v. Mahon, 3 Harr. (Del.) 568; *Burns v. State*, 80 Ga. 544, 7 S. E. 88.

Humiliation and disgrace should not be put upon a man simply as a precaution against the imaginary danger of escape from arrest when the offense with which he is charged is not even a misdemeanor.

Bouvier, Law Dict. p. 240; 8 Am. & Eng. Enc. Law, 2d ed. pp. 281, 553; *Schmeider v. McLane*, 36 Barb. 496; *Page v. Mitchell*, 13 Mich. 68, 86 Am. Dec. 75.

The cause of action was not waived by the plea of guilty.

Hopner v. McGowan, 116 N. Y. 410, 22 N. E. 558; *Murphy v. Kron*, 20 Abb. N. C. 259; *Josselyn v. McAllister*, 22 Mich. 300; *Schmeider v. McLane*, 36 Barb. 496, 4 Abb. App. Dec. 154; *Lane v. Holman*, 145 Mass. 222, 13 N. E. 602; *Williams v. Schillaber*, 153 Mass. 541, 27 N. E. 767; *Buzzell v. Emerton*, 161 Mass. 176, 36 N. E. 796.

Moore, J., delivered the opinion of the court:

This is a case for false imprisonment. In the spring of 1901, while engaged in distributing advertising matter in the city of Kalamazoo, the plaintiff was stopped by one of the city policemen and referred to the

city clerk's office for a license to distribute advertising matter, which he applied for and obtained. The defendant claims that, at the time the plaintiff was applying for the license, the defendant explained to him there was an ordinance of the city of Kalamazoo against nailing advertising matter on telephone poles, and the plaintiff promised, if he was permitted to have the license for distributing advertising matter, he would not tack placards upon the poles. The plaintiff denies having this conversation. The plaintiff, after obtaining his license, distributed his advertising matter, and on the last day of his sojourn in Kalamazoo nailed placards on a very large number of telephone, telegraph, and municipal lighting poles throughout the city, and immediately left for Battle Creek. The defendant reported the matter to the city attorney, and under his advice complaint was made, a warrant issued, and placed in the hands of the defendant for service. After the defendant obtained the warrant he telephoned to the police clerk at Battle Creek that he had a warrant for the arrest of the plaintiff and one McBride, and if they were in the city of Battle Creek to detain them until he could arrive. The plaintiff and McBride were arrested by Officer Hamilton, of Battle Creek, and detained at the police station for about three hours, when Mr. Greenfield, with his warrant, arrived and took the men into custody. About 8 o'clock, it being after dark, the defendant put upon the plaintiff and McBride handcuffs, boarded the interurban car for Kalamazoo, and, after changing cars twice *en route*, reached their destination late in the evening, about 10 or 11 o'clock. The plaintiff and his companion were detained at the jail at Kalamazoo until morning, when they were taken before Recorder Browne, where they each pleaded guilty, paid their fine, and left the city. Some months later the plaintiff instituted this suit. It was conceded the plaintiff was guilty of a violation of a valid ordinance, and no question is raised about the regularity of the warrant. The trial judge charged the jury, among other things, as follows: "I charge you that, under the undisputed evidence in the case, the arrest of the plaintiff at Battle Creek on April 25th, 1901, by Police Officer Hamilton of that city, and his detention in the jail at that place for the space of three hours or thereabouts, was illegal and without authority of law, and constituted a false imprisonment of the plaintiff. If this unlawful imprisonment of plaintiff at Battle Creek was at the request of and under the instructions of the defendant, Greenfield, it became and was in law his act, just as much as though he had done it himself, and he, defendant, Greenfield, is

responsible to plaintiff, McCullough, for all such damages as you may find he suffered during the time of such illegal detention." "The arrest and detention of the plaintiff at Battle Creek having been illegal, as I have charged you, and it being conceded by the defendant that the plaintiff was not restored to his liberty before being taken into custody by Mr. Greenfield, I instruct you that the illegal character of the detention continued until the arraignment of the plaintiff in the recorder's court of this city on the forenoon of April 20th, 1901." "An officer in making an arrest should avoid unnecessary harshness or violence. He has no right to use handcuffs unless in his honest judgment, under all the circumstances of the case, he is apprehensive of the escape of his prisoner if he does not use them. In this case, under the proofs offered by the defendant himself, I charge you that no justification is shown for handcuffing the young men together, and the act of doing so constituted an unjustifiable assault upon the plaintiff, for which defendant is liable to him in damages." "Now I feel warranted in instructing you, as a matter of law in this case, that the injury complained of is not technical, but real. The illegal deprivation of liberty in this case, and the illegal imposition of handcuffs, were real personal injuries, and require that you award plaintiff something more than nominal damages. How much more, it is for you to say in the exercise of your best judgment. I can only say that it should be such a sum as will fairly and fully compensate him for the injuries received. Beyond such a sum you should not go, nor should you stop short of that." The jury returned a verdict for \$50. The case is brought here by writ of error.

The first question presented is, Was the arrest at Battle Creek by the direction of the defendant illegal when the warrant was in the possession of the defendant at Kalamazoo? In the case of the *People v. McLean*, 68 Mich. 480, 36 N. W. 231, it was said: "McLean was charged simply with a misdemeanor, and he could not be arrested for the crime, after the commission of the act, without a proper warrant. The warrant was issued and delivered to the sheriff. The sheriff is authorized to take such assistance with him in making an arrest as he may deem necessary, and the warrant in his possession, while present and pursuing his object, will be a justification to his assistants in making the arrest. But he has no authority to send an undersheriff or deputy to one place to make an arrest without a warrant, while he goes to another for the same purpose with the warrant. He cannot send his deputy into one town or county while he gives pursuit in another. Under the ancient practice of hue and cry, before warrants were issued, this might be done in the pursuit of felons, but no hue and cry could be raised for a misdemeanor. We think it clear that in cases of misdemeanors the sheriff must be present, either in sight or hearing, directing the arrest, to justify a person not armed with the warrant to make the arrest." See also *Drennan v. People*, 10 Mich. 184; *People v. Johnson*, 86 Mich. 175, 13 L. R. A. 183, 48 N. W. 870; *Smith v. Clark*, 53 N. J. L. 197, 21 Atl. 491.

It is claimed by defendant that as the plaintiff, when arraigned, made no objection to the manner of his arrest, but pleaded guilty to the charge, by so doing he waived any irregularity in the arrest, and cannot recover. The authorities upon this proposition are not harmonious. In 12 Am. & Eng. Enc. Law, 2d ed. p. 743, it is said: "It has been held by a court of high authority that a party cannot maintain a civil action for damages for false imprisonment where his arrest has been followed by conviction in a criminal court and that conviction remains unreversed, unless such person establishes the fact that his conviction was obtained by fraud and conspiracy. But it is believed that this means no more than that, where there has been an arrest without warrant, conviction on the charge is, in general, prima facie evidence of probable cause; if more than this is intended, it is contrary to the weight of a majority of the best-considered cases. Indeed, the converse of the proposition, it would seem, has been expressly denied in the same state, viz., where there has been an arrest without warrant, a discharge by the police justice is prima facie evidence of want of probable cause." See also cases cited in the notes. We think the weight of authority does not favor the conclusion that the liability for the illegal arrest is waived by pleading guilty to the offense charged in the warrant.

Did the court err in holding that, after defendant personally took plaintiff into custody, his warrant did not protect him from that time until the plea of guilty was entered? There is a dearth of decisions in point, and the authorities upon this proposition are also disagreed. The case of *Mandeville v. Guernsey*, 51 Barb. 99, cited in support of the charge of the court, was one where a sheriff from the state of Pennsylvania arrested the accused in the state of New York and carried him into the state of Pennsylvania. The court held that not only did the sheriff have no authority to make the arrest in New York, but that he committed an offense against the laws of the state of New York when he removed the prisoner to the state of Pennsylvania. The case is very different from the one at bar.

62 L. R. A.

In that case the accused was beyond the reach of the process of arrest, and could be lawfully brought within the jurisdiction of the court issuing the warrant only by obtaining the requisition of the governor of Pennsylvania. In the case at bar the plaintiff was within the reach of process, and might be arrested by any person having a lawful warrant. The case was removed to the court of appeals (50 N. Y. 689), and affirmed by a divided court. No opinion was filed. In *Cabell v. Arnold* (Tex. Civ. App.) 22 S. W. 62, where an illegal arrest had been made, and the accused was afterwards delivered to an officer having a legal warrant, a judgment for damages for the illegal detention of the accused to the time he was delivered to the officer having the warrant was sustained. Many of the cases cited by counsel are civil cases, in which a different rule obtains than the one applicable to criminal cases. In *Holley v. Mia*, 3 Wend. 350, 20 Am. Dec. 702, it is said: "The warrant against John Doe did not authorize the arrest of any person other than John Doe. It was altered by inserting the name of the present plaintiff, and then it was a justification for all subsequent regular acts of all concerned in its execution." In *Harris v. McReynolds*, 10 Colo. App. 532, 51 Pac. 1016, which was an action for false imprisonment, the court used the following language: "But it is contended for the defendant that the false imprisonment of the plaintiff lasted only from the time of his arrest, at the verbal direction of the defendant, until the making of the complaint and the issue of the warrant, and that his detention in custody afterwards was not false imprisonment. The court was requested to so instruct the jury, but the request was refused, and error is assigned upon the refusal. If the process by which it was assumed to hold the plaintiff in custody was valid process against him, the instruction should have been given."

As before stated, the plaintiff, when taken into custody in the first instance, was within the jurisdiction of the court issuing the process. If the defendant in person had made the arrest, instead of procuring it to be made by the marshal of Battle Creek, it would have been a valid arrest; or if no arrest had been made in fact until the defendant took the plaintiff into custody, its validity could not have been questioned. I think it unreasonable to say that, because the first arrest was invalid, the second one was also invalid, and that the jury should have been instructed that plaintiff could recover damages only to the time of the lawful arrest.

Did the trial judge correctly instruct the jury in relation to putting the handcuffs 62 L. R. A.

upon the plaintiff? The record does not disclose any undue harshness or discourtesy done to the plaintiff by the officer, unless putting the handcuffs upon him is to be so regarded. In *Firestone v. Rice*, 71 Mich. 377, 38 N. W. 885, it is said: "The sheriff cannot stop when the man is unknown to him, at the moment of arrest, to inquire into his character, or his intentions as to escape, or his guilt or innocence of the offense charged against him. His duty is to take him, to safely keep him, and to bring his body before a magistrate. If he does this without wantonness or malice, it is not for a jury to find that his precautions were useless and unnecessary in the light of after-acquired knowledge of the true character and intent of the accused, and to punish the sheriff in damages for what honestly appeared to him at the time to be reasonable and right." See also *Butler v. Washburn*, 25 N. H. 257. The officer had two prisoners who were strangers to him under arrest. It was long after dark. He had a considerable distance to go with them. It was his duty to follow the mandate of his warrant. There was nothing in his conduct to indicate wantonness or malice, and the jury should have been so instructed, and that they should not find any additional damages because the prisoners were handcuffed.

The judgment is reversed, and a new trial ordered.

The other Justices concur.

Thomas B. BRADY, by Next Friend, *Plff. in Err.*,

v.

Sevilla KLEIN.

(.....Mich.....)

1. No action can be maintained by a licensee of a tenant upon the landlord's covenant to repair, for injuries caused by a defective condition of the premises.
2. Renting premises in a defective condition will not, where they do not constitute a nuisance, render the landlord liable for an injury thereby caused to a licensee of the tenant.

(June 23, 1903.)

NOTE.—As to liability of landlord for injuries to member of tenant's family by defective condition of premises, see also, in this series, *McGinley v. Alliance Trust Co.* 56 L. R. A. 334.

As to liability for injuries to subtenant's child, see *Smith v. State*, 51 L. R. A. 772.

As to liability for injury to tenant's guest or servant, see *McConnell v. Lemley*, 34 L. R. A. 609, and note; *Stenberg v. Wilcox*, 34 L. R. A. 615; *Whitmore v. Orono Pulp & Paper Co.* 40 L. R. A. 377; *Texas Loan Agency v. Fleming*, 44 L. R. A. 279; *Barman v. Spencer*, 44 L. R. A. 815; and *Towne v. Thompson*, 46 L. R. A. 748.

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Frederic T. Harward and Delbert J. Hinkley, for plaintiff in error:

When a landlord agrees to repair he is liable for injuries to third persons for a neglect to do so.

Shearm. & Redf. Neg. 4th ed. §§ 708, 709; *Stillwell v. South Louisville Land Co.* 22 Ky. L. Rep. 785, 52 L. R. A. 325, 58 S. W. 696; *Thomp. Neg.* § 1159; *Sontag v. O'Hare*, 73 Ill. App. 434; *Moore v. Steljes*, 69 Fed. 519; *Cooley, Torts*, 2d ed. p. 722; *Gridley v. Bloomington*, 68 Ill. 51; *Rauth v. Davenport*, 60 Hun, 73, 14 N. Y. Supp. 69; *Ostrander v. Capitol Invest. Bldg. & Loan Asso.* (Mich.) 9 Det. L. N. 34, 89 N. W. 964; *Mason v. Howes*, 122 Mich. 333, 81 N. W. 111.

And privity of contract is not necessary in order to recover.

Taylor, Land. & T. § 175; *Thomp. Neg.* § 1157; *Gridley v. Bloomington*, 68 Ill. 51; *Lowell v. Spaulding*, 4 Cush. 277, 50 Am. Dec. 775; *Payne v. Rogers*, 2 H. Bl. 350; *Nelson v. Liverpool Brewery Co.* L. R. 2 C. P. Div. 313; *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391; *Fisher v. Thirkell*, 21 Mich. 22, 4 Am. Rep. 422; *Moore v. Steljes*, 69 Fed. 519.

The landlord is liable to third persons where he has let the premises in a defective condition.

Taylor, Land. & T. 13th ed. 735; *Thomp. Neg.* § 1159; *Willcox v. Hines*, 100 Tenn. 538, 41 L. R. A. 278, 46 S. W. 297; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Owings v. Jones*, 9 Md. 108; *Albert v. State*, 66 Md. 325, 59 Am. Rep. 159, 7 Atl. 697; *Shearm. & Redf. Neg.* §§ 502, 709; *Johnson v. McMillan*, 69 Mich. 39, 36 N. W. 803; *Fisher v. Thirkell*, 21 Mich. 22, 4 Am. Rep. 422.

Mr. George Gartner, for defendant in error:

Aside from the contract of letting, even assuming that the doorsill was out of repair, the owner could not be held liable.

Hargreaves v. Deacon, 25 Mich. 1.

Hooker, Ch. J., delivered the opinion of the court:

The plaintiff is a young man about twenty years old, and this action is brought by his mother, and next friend, to recover damages occasioned by an injury, received through the alleged negligence of the defendant, when he was under three years of age.

The mother is the only witness by whom the injury and alleged negligence were

proved. She stated upon the trial that she had negotiations with the defendant in regard to renting a dwelling, and was allowed to look at the house. She returned and told defendant that it was all right, except that the sill of the door to the summer kitchen was rotted away, leaving a hole, and that upon the defendant's promise to fix it, she rented the house and paid a month's rent. Two or three weeks after, the plaintiff stepped into the hole and received a permanent injury. She admits that she paid the rent for two or three months, and then failed to do so, and that she did not say anything to the defendant about the injury to the child until she called for her rent and told her to vacate the house. She never mentioned it again. The defendant is an old lady of over eighty years of age. She testified that she heard of the accident from plaintiff's mother about the time it happened, and was told by her that the boy was hurt by a fall in the yard; that she never heard of this claim until the action was begun, a few months before she testified. The learned circuit judge directed a verdict for the defendant, and plaintiff has taken a writ of error.

The plaintiff's claim is said to rest upon two rules, either of which is supposed to be sufficient to entitle him to a recovery: (1) That when a landlord has covenanted to repair, a licensee of the tenant, injured through the defective condition of the premises, has a right of action against the tenant, who in turn may recover against the landlord upon his covenant, and that to avoid circuity of action he may sue and recover against the landlord. (2) That when one lets a tenement in a defective condition, he is liable to a stranger who is injured.

So far as the authorities cited by counsel show, the first proposition was first enunciated in the case of *Payne v. Rogers*, 2 H. Bl. 350. This injury was caused by plaintiff's falling through a hole in a foot pavement, and we may therefore infer that the defect was a public nuisance, and, under many cases, actionable, in favor of anyone injured, against the person whose negligence permitted it to remain. What was then said about avoiding circuity of action was unnecessary in that view of the case, and the case has been questioned by subsequent English cases. See *Russell v. Shenton*, 3 Q. B. 449; *Todd v. Flight*, 9 C. B. N. S. 377; *Ingwersen v. Rankin*, 47 N. J. L. 18, 54 Am. Rep. 109; *Phillips v. Burlington Library Co.* 55 N. J. L. 307, 27 Atl. 478; *Olyne v. Helmes*, 61 N. J. L. 386, 39 Atl. 767. See also *Pretty v. Bickmore*, L. R. 8 C. P. 401; *Guinnell v. Eamer*, L. R. 10 C. P. 658. *Nelson v. Liverpool Brewery Co.* L. R. 2 C. P. Div. 313, was a similar case, where a guest in the yard of an

inn was injured by the fall of a chimney which the landlord had agreed to repair. He was permitted to recover against the landlord, but it was not upon the ground of a promise, but because of his neglect in permitting the existence of a public nuisance. The case of *Lowell v. Spaulding*, 4 Cush. 277, 50 Am. Dec. 775, is similar. There one fell through a walk, and recovered against the city, and it sued the owner of the premises, who was held responsible for the existence of a public nuisance. There is an allusion to *Payne v. Rogers*, but it was unnecessary. *Sontag v. O'Hare*, 73 Ill. App. 432, allowed a recovery by an administrator for injury by deceased's falling from a porch through a defective railing. The only question pressed in the case was that the evidence failed to show that the injuries caused the death, though it is said in the opinion that the landlord's promise to deceased's husband to keep the premises in repair would make him liable if the injuries caused her death; citing *Mendel v. Fink*, 8 Ill. App. 378; *Platt v. Farney*, 16 Ill. App. 216. We think these cases hardly justify the statement. The case of *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391, was an injury from a defect in a pier, leased by the defendant, which was devoted to use by the general public, much as is an inn. Clearly it was a case of public nuisance. Our own case of *Fisher v. Thirkell*, 21 Mich. 14, 4 Am. Rep. 422, was the case of a scuttle in the sidewalk of a public street. The discussion in that case shows that a liability, had one been found, would have rested on negligence, i. e. nonperformance of a duty to the plaintiff, and not upon a contract to repair, though in many of the cases the contract to repair is essential to create the duty, which would otherwise rest solely upon the tenant.

In support of the second proposition, the plaintiff's counsel cites, among other cases, *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295. There it was held that one who owned a public pier, and rented it with a public nuisance upon it, was liable to a third person who was afterwards injured, although the tenant was bound to keep it in repair. Three judges dissented. The case of *Owings v. Jones*, 9 Md. 108, sustains the same rule

as to a public nuisance. *Albert v. State*, 66 Md. 325, 59 Am. Rep. 159, 7 Atl. 697, also involved a public nuisance. The discussion in the opinion shows that the rule is limited to cases of public nuisance. The case of *Willcox v. Hines*, 100 Tenn. 538, 41 L. R. A. 278, 46 S. W. 297, rests on another rule, viz., the liability of one to his tenant for letting premises with concealed dangers. This line of cases has no application in this case. The case of *Stillwell v. South Louisville Land Co.* 22 Ky. L. Rep. 785, 52 L. R. A. 325, 58 S. W. 696, and *Moore v. Steljes*, 69 Fed. 519, more nearly support the plaintiff's claim. Upon the other hand, when the accident arises from a defect known by the tenant, and one which is not a nuisance, the remedy against the landlord is upon his covenant, and must be brought by the tenant, as there is no privity between the landlord and a third party, nor does he owe him any duty. It is otherwise in case of a nuisance which the landlord should abate, for there the landlord owes the duty of care, and is liable for his negligence to all to whom he owes such duty. *Samuelson v. Cleveland Iron Min. Co.* 49 Mich. 169, 43 Am. Rep. 456, 13 N. W. 499; *O'Leary v. Delaney*, 63 Me. 585; *Delay v. Savage*, 145 Mass. 38, 12 N. E. 841; *Tuttle v. George H. Gilbert Mfg. Co.* 145 Mass. 175, 13 N. E. 465; *Quay v. Lucas*, 25 Mo. App. 7; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Wood, Land. & T.* p. 1288; *Sterger v. Van Sicklen*, 132 N. Y. 499, 16 L. R. A. 640, 30 N. E. 987; *Clyne v. Helmes*, 61 N. J. L. 359, 39 Atl. 767; *Fowles v. Briggs*, 116 Mich. 425, 40 L. R. A. 528, 74 N. W. 1046. In these cases the distinctions are fully discussed, and need not be repeated here. Most of the cases upon which plaintiff relies are not inconsistent with them. The statement that a landlord is liable to a third person, when he has promised to repair, is made in a general way, in some of the text-books, but will be found to be qualified in most cases, and when it is unqualified is clearly at variance with authority.

The judgment is affirmed.

Carpenter, J., did not sit. The other Justices concurred.

MISSOURI SUPREME COURT.

Peter EOKRICH, *Appt.*,
v.
ST. LOUIS TRANSIT COMPANY, *Respt.*
(176 Mo. 621.)

1. The jury, the right to trial by which

NOTE.—As to constitutionality of act providing for struck jury, and requiring party demanding it to pay expenses thereof, see, in this 62 L. R. A.

is continued inviolate by the Constitution of 1875, is the jury as it had existed prior to the time of the adoption of that Constitution, including the special jury of the common law, and not the jury provided for by the statutes at and prior to the adoption of the first state Constitution, where the state

series, *Lommen v. Minneapolis Gaslight Co.* 38 L. R. A. 437.

For case holding that constitutional right to

statutes merely prescribe the qualification of jurors and mode of their selection, without anything to indicate an intention to abolish the common-law jury.—especially when, prior to the adoption of the first Constitution, the common law had been adopted by statute.

2. A statute adopting the common law of England as part of the law of the state includes the common-law jury, both regular and special.
3. A law providing for a special jury is not made unconstitutional by requiring the fee to be deposited by one applying for it, which puts it out of the reach of a poor man to have a special jury.
4. The law providing for special juries is not rendered unconstitutional by the fact that the jurors are selected by the sheriff or jury commissioner, and not drawn by lot as the regular panel is.

(July 2, 1903.)

APPEAL by plaintiff from a judgment of the Circuit Court for the City of St. Louis in favor of defendant in an action to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. George D. Reynolds, with **Mr. Alfred Gfeller**, for appellant:

The clause "as heretofore enjoyed," as used in the Constitution of 1820, must be held to mean, not as that right was enjoyed at common law, but as it existed under the law in force in Missouri prior to 1820 and at the time of the adoption of that Constitution.

Bank of Missouri v. Anderson, 1 Mo. 244; *State ex rel. St. Louis, K. & N. W. R. Co. v. Withrow*, 133 Mo. 524, 34 S. W. 245, 36 S. W. 43; *State v. Hamey*, 168 Mo. 167, 57 L. R. A. 846, 67 S. W. 620; *Grand Rapids & I. R. Co. v. Sparrow*, 1 L. R. A. 480, 36 Fed. 210; *Stihvell v. Kellogg*, 14 Wis. 462; *Kopikus v. State Capital*, 16 Cal. 248; *Whitehurst v. Coleen*, 53 Ill. 247; *Ross v. Irving*, 14 Ill. 171; *Whallon v. Bancroft*, 4 Minn. 109, Gil. 70; *Lake Erie, W. & St. L. R. Co. v. Heath*, 9 Ind. 558; *Byers v. Com.* 42 Pa. 89; *Hove v. Plainfield*, 37 N. J. L. 145; *Proffatt*, Jur. 127, § 87.

Where the Constitution gives the right, it cannot be made by statute to depend upon any condition.

Cooley, Const. Lim. *410, note; *Greene v. Briggs*, 1 Curt. C. C. 311, Fed. Cas. No. 5,764; *Lincoln v. Smith*, 27 Vt. 328; *Norristown H. & St. L. Turnp. Co. v. Burket*, 26 Ind. 53; *Steck v. Colorado Fuel & Iron Co.* 142 N. Y. 236, 25 L. R. A. 67, 37 N. E. 1; *Matheus v. Tripp*, 12 R. I. 258; *Tribou v.*

Strowbridge, 7 Or. 156; *Edwardson v. Garnhart*, 56 Mo. 81.

The order of court and § 6566, Rev. Stat., are in violation of § 10, art. 2, Mo. Const. in that they close the court to those unable to pay the fee of \$75 "and such further sums as may be required to meet all expenses hereunder."

Miller v. Com. 88 Va. 618, 15 L. R. A. 441, 14 S. E. 161, 342, 979.

The rule of court and the statute are in violation of § 1 of the 14th Amendment to the Constitution of the United States, viz.: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Bush v. Kentucky*, 107 U. S. 110, 27 L. ed. 354, 1 Sup. Ct. Rep. 625; *Yick Wo v. Hopkins*, 118 U. S. 356, 368, 30 L. ed. 220, 225, 6 Sup. Ct. Rep. 1064.

The rule of court and the statute are invalid under the 1st section of the 14th Amendment to the Constitution of the United States in that they give arbitrary power to one man, a jury commissioner, to exclude fit persons, and whole classes of persons, from the panel, and to confine his selection of jurors to a privileged few.

Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064.

Messrs. Boyle, Priest, & Lehmann and **George W. Easley** for respondent.

Marshall, J., delivered the opinion of the court:

This is an action for personal injuries. When the case was set for trial in the circuit court, the defendant obtained an order of court for a special jury, and under the order deposited in court the sum of \$75 to cover the cost thereof. When the case was called for trial, and the special jury was called, the plaintiff challenged the array, and filed the following motions, in respect to which the following proceedings were had:

"Now comes Peter Eckrich, by vocation a common laborer, a citizen of the United States, and residing within the jurisdiction of the state of Missouri, the plaintiff in the above-entitled cause, and moves the court to quash the venire for a special jury ordered issued in said cause by this court upon mo-

trial by jury "as heretofore enjoyed" does not include right, which had existed by statute for many years, to have jury assess the punishment, see *State v. Hamey*, 57 L. R. A. 846. 62 L. R. A.

As to violation of constitutional right to trial by jury by statute providing that jury in criminal case shall be selected without special list, see *People v. Dunn*, 43 L. R. A. 247.

tion of the defendant, and made returnable on the day set for trial of this cause, for the following reasons, to wit:

"(1) The law and the established practice of this court, and the officers under which said *venire* for a special jury has been issued and executed, is unconstitutional and repugnant to the letter and spirit of the Constitution of the United States of America, and especially of section one (1) of the 14th Amendment thereof, because said law, and the practice of said court and its officers thereunder, abridges the privileges and immunities of the plaintiff as a citizen of the United States, and deprives plaintiff of his property without due process of law, and denies to plaintiff, a citizen and inhabitant of the state of Missouri, and within its jurisdiction, the equal protection of the laws in this:

"(a) Said law, and the practice of the court and its officers thereunder, commits to the unrestrained will of a single public officer, who holds an office not provided for by the Constitution of the state of Missouri, the power of selecting a jury in a manner contrary to the common law, and against the common right, as well as contrary to the general statutes of the state of Missouri.

"(b) It compels the plaintiff, and other persons similarly situated, to submit their causes to the exclusive determination of a jury not chosen indiscriminately from qualified jurors of the city of St. Louis, as all other jurors by law are required to be selected, but selected from a class of men reputed to be owners or controllers of great industries, and bankers, merchants, and employers of labor generally, whose interests and bias are antagonistic to plaintiff and other persons similarly situated, and it excludes from the panel laborers, mechanics, and artisans, and employees who have equal practical knowledge, and have equal intelligence, with the class above referred to, producing an unjust and illegal discrimination between citizens of the United States, and making an unequal and unfair class discrimination in the composition of the jury.

"(2) Because the law and practice of this court, under which said *venire* for the special jury has been issued, is unconstitutional and repugnant to the letter and spirit of the Constitution of the United States of America, and especially to the 7th Amendment thereof, and that the jury summoned to try this cause is not a common-law jury, as guaranteed to him by said amendment.

"(3) Because the law and rules of practice of the court, under which said *venire* of a special jury has been issued and executed, is unconstitutional and repugnant to the letter and spirit of the Constitution of the state of Missouri, and especially article 2, § 10, thereof.

of Missouri, and especially article 2, § 10, thereof.

"(4) Because the law and rules of practice of the court, under which said *venire* for a special jury was issued and executed, is unconstitutional and repugnant to the letter and spirit of the Constitution of the state of Missouri, and especially article 2, § 28, and that the jury summoned to try this cause is not a common-law jury guaranteed to him by the Constitution of the state of Missouri.

"(5) Because said law, and the rules and practice of the court under which said *venire* for a special jury has been issued and executed, is unconstitutional, and repugnant in letter and spirit to § 30, art. 2, of the Constitution of the state of Missouri, and that the jury summoned in this cause is so biased and prejudiced against plaintiff as to deprive him of due process of law.

"(6) Because the statute under which the *venire* for a special jury issued in this cause is so indefinite and uncertain, and conflicting with other statutes of the state of Missouri, as to render it null and void.

"(7) Because the jury summoned to try this cause has not been summoned in accordance with the general laws of the state of Missouri governing rules in civil causes."

After counsel had read the above motion to the court, the following took place in open court:

Mr. Gfeller: If it may please the court, I desire to introduce evidence in support of my motion to show the manner in which this jury has been selected and summoned.

The Court: In reference to the question of law, I don't see any necessity of taking any testimony. I will pass on that motion and overrule it.

Mr. Gfeller: Permit me to have the testimony of the jury commissioner introduced in support of the motion.

The Court: I don't see the necessity for that. The law defines his duties. You don't charge corruption on his part, so I don't see any occasion for taking his testimony.

To which ruling of the court in refusing to hear evidence in support of, and the overruling of, said motion to quash said special *venire*, plaintiff's counsel then and there duly excepted.

Mr. Gfeller: I desire to apply for a writ of prohibition in the supreme court of the state of Missouri, and, if necessary, carry the case to the United States Supreme Court. For this reason I desire to introduce this testimony in order to show how special juries are selected and summoned.

The Court: I am giving you the benefit

of the allegations stated in the motion as being true. Are you ready for trial in the case?

Mr. Gfeller: I am ready for trial.

The Court: Let the jury come forward.

Mr. Lon O. Hocker, attorney for defendant: An amended petition was filed on Saturday, and I have not filed any pleading to it.

Mr. Gfeller: I am willing that the cause may be continued to a certain day, and not be tried on its merits until this question has been passed on by the higher courts.

The Court: The jury will be discharged until February 11th, to appear here at that time without further notice.

Mr. Gfeller: I desire to have your honor's decision embodied in the record. I understand, if what is contained in this motion were true, you would overrule the motion anyway.

The Court: Yes.

Mr. Gfeller: I desire to have that embodied in the record.

Plaintiff properly saved exception to the ruling of the court.

Afterwards, at the February term, 1901, of the court, on February 11th, the cause was again called for trial, and the special jury selected by the jury commissioner under order of court of January 7th, made on motion of defendant, a list of which was theretofore returned into court, was called, the same having been duly summoned by the sheriff, and the following proceedings took place:

Mr. Gfeller: If the court please, I have presented an application for a writ of prohibition to the supreme court, and that court refused to grant it, on the ground that plaintiff must come there either by appeal or writ of error. I again ask your honor to quash the *venire* for the special jury ordered selected and summoned in this cause, for the reasons already urged, and for additional reasons stated in an additional motion to quash, which I ask leave to file and read.

The Court: You may file and read the motion.

Plaintiff's counsel filed and read his second motion to quash the special *venire* of jurors called in this cause, which motion is in words and figures as follows (omitting caption):

"Now comes Peter Eckrich, a common laborer and without means, the plaintiff in the above-entitled cause, and again moves the court to quash the special jury *venire* ordered by this court, selected by the jury commissioner and summoned by the sheriff of the city of St. Louis, and from which a

jury is to be selected to try this cause, for the following additional reasons, to wit:

"(1) Because the order of this court directing the jury commissioners to select said special *venire* does not state by what authority and under what statutes said order was made, nor how said *venire* is to be drawn and selected.

"(2) Because the order granting the defendant's application for a special jury has been made in pursuance of an established practice of the circuit court of the city of St. Louis, according to which applications for special juries are granted only upon condition that the applicant for such a jury deposit forthwith with the clerk of said court the sum of seventy-five dollars (\$75), and from time to time such further sums as may be required to meet all expenses under such order, thus producing, in force and effect, an unjust and unlawful discrimination against plaintiff and those who lack the means and are unable to deposit such sum of money for a special jury, and granting undue, unjust, and unlawful advantages and privileges to defendant in this cause and to those who are possessed of the means to enable them to comply with the rule and practice of the court, thereby obtaining for a money consideration a *venire* from which to select a jury to try their causes entirely different and distinct from the *venires* provided for by the general statutes and laws of the state of Missouri governing jury trials, contrary to the letter and spirit of article 2, § 10, of the Constitution of the state of Missouri, which provides that the courts of justice shall be open to every person, and certain remedy offered for every injury to the person, property, or character, and that right and justice should be administered without sale, denial, or delay.

"(3) Because the order of this court granting defendant's application for a special jury, upon condition that it deposit with the clerk of this court the sum of seventy-five dollars (\$75) and such further sums as may be required, is unconstitutional, and repugnant to the letter and spirit of § 1 of the 14th Amendment to the Constitution of the United States, in this: It abridges the privileges and immunities of plaintiff as a citizen of the United States, and deprives plaintiff of his property without due process of law, and denies to plaintiff, a citizen and inhabitant of the state of Missouri and residing within its jurisdiction, the equal protection of the law, in this: That defendant, itself a powerful corporation, employing a great force of laborers, by reason of its ability to deposit with the clerk the sum of seventy-five dollars (\$75.00) has obtained a *venire* for a special jury from which to se-

lect twelve (12) men to try this cause, who were not drawn indiscriminately from the names of the qualified jurors of the city of St. Louis, deposited in the jury wheel, as all other jurors by law are required to be drawn, but, to the contrary, a *venire* selected from a class of men reputed to be owners or controllers of great industries, and bankers, merchants, and employers of labor generally, and solely and exclusively from a class of men whose interests and bias are antagonistic to plaintiff, and that in selecting said *venire* the jury commissioner purposely and intentionally excluded from the panel laborers, mechanics, and artisans and employees, although they have equal intelligence with the class of men first above referred to, thus producing an unjust and illegal discrimination and class distinction between plaintiff and defendant as citizens of the United States, and making an unequal and unfair class discrimination in the composition of this jury.

"(4) Because the facts involved in this cause do not require trial by a special jury."

"The Court: I overrule your motion."

To which ruling of the court, in overruling said second motion to quash said special jury *venire*, plaintiff's counsel then and there duly excepted.

Mr. Gfeller: Plaintiff declines to proceed further in this cause.

The Court: If so, I dismiss this cause for failure to prosecute, at plaintiff's cost. It is so ordered. Mr. Sheriff, discharge the special jury in the cause of Eckrich against St. Louis Transit Company from further service.

To which order and ruling of the court in dismissing plaintiff's cause, plaintiff by his counsel then and there duly excepted. Judgment of dismissal and for costs entered. After proper steps taken, the plaintiff appealed.

1. The decisive question in this case is the constitutionality of the law allowing a special jury in civil cases, in cities having over 100,000 inhabitants, being § 6566, art. 23, chap. 91, p. 1553, Rev. Stat. 1899. That section is as follows: "In every city in the state of Missouri, having over one hundred thousand inhabitants, all courts of record in which juries are required shall have power, upon the application of either party, to order a special jury for the trial of any cause, if the application be made at least three days before the trial, and when ordered, the jury commissioner, as he may be directed by the court, shall select and furnish to the proper officer of said courts the names of the persons to be summoned for such special jury, and the said officer shall summon them according to the order of the court, and make out and deliver to each

party or his attorney, a panel of the jury so summoned; but the costs of such special jury shall be paid by the party so applying, irrespective of the result, unless the judge presiding at the trial shall at the close thereof, or within two days thereafter, certify that the costs of the special jury shall be taxed as other costs against the losing party," etc. The plaintiff's contention is that this law violates the 7th and 14th Amendments to the Constitution of the United States, and also §§ 10, 28, and 30 of article 2, of the Constitution of Missouri, and the two motions to quash the *venire* filed by the plaintiff, and set out in full herein, specify the grounds and reasons upon which the contention is bottomed.

Counsel for plaintiff, in very comprehensive, strenuous, and able briefs, have amplified their contention, so that their position may be summarized to be as follows:

First. The provision of § 28 of article 2 of the Constitution of 1875, that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate," and the provision of § 17 of § 1 of article 1 of the Constitution of 1865, "that the right of trial by jury shall remain inviolate," are mere continuations of, and must be construed in the light of, the provision of § 8 of article 13 of the Constitution of 1820, "that the right of trial by jury shall remain inviolate," and therefore a party litigant is entitled to a trial before such a jury as was authorized by the laws of Missouri at the date of the adoption of the Constitution of 1820, and any law passed since that date, authorizing a jury such as was not known to the law in 1820, is unconstitutional.

Second. That the jury guaranteed by the Constitution of 1820 was not such a jury as was known to the common law, but was such a jury as was known in Missouri under the territorial laws before the admission of Missouri into the Union as a state, and before the adoption of the Constitution of 1820, and that was such a jury as was authorized by the act of Congress, known as the "organic law," approved June 4, 1812, prescribing the law for the government of the Missouri territory, § 11 whereof was as follows: "That all free male white persons of the age of twenty-one years, who shall have resided one year in the said territory and are not disqualified by any legal proceeding, shall be qualified to serve as grand or petit jurors in the courts of said territory; and they shall, until the general assembly thereof otherwise direct, be selected in such manner as the said courts shall respectively prescribe so as to be most conducive to an impartial trial and least burdensome to the inhabitants of the said ter-

ritory." Geyer's Dig. p. 34. It is further contended by the plaintiff that by the territorial act of 1816 it was provided that "the common law of England, which is of a general nature, and all statutes . . . made prior to the fourth year of James I., . . . which common law and statutes are not contrary to the laws of this territory and not repugnant to or inconsistent with the Constitution and laws of the United States," should be deemed a part of the law in Missouri; but, as the common law in reference to juries is inconsistent with the law in Missouri prior to 1820, this feature of the common law never became a part of the law in Missouri. It is further contended that prior to 1820 the only special jury that was known to the law in Missouri was that provided for by § 18 of act August 20, 1813 (1 Terr. Laws, 1804-24, p. 276, chap. 93), which prescribed that, if a party to any pending suit made oath that he could not have a fair and impartial trial by a jury selected from the county, wherein the court was sitting, the court should order a special jury to be summoned from an adjoining county. Upon these predicates the contention is based that it was a Missouri jury, and not a common-law jury, that was guaranteed by the Constitution of 1820, and that the subsequent Constitutions were only intended as continuations of the provision of the Constitution of 1820, and therefore it is still only such jury as was authorized by the laws of Missouri prior to 1820 that is guaranteed or allowed by the Constitution of 1875; and, as such a special jury as is provided for by the section in question here (Rev. Stat. 1899, § 6566), was unauthorized by the Constitution of 1820, it is therefore unauthorized by the Constitution of 1875.

Third. That § 6566 aforesaid violates the Constitution of the United States, in that it is such a jury as only a rich man can pay for, and therefore a poor man is denied the equal protection of the law.

Fourth. That § 6566 violates § 10 of article 2 of the Constitution of Missouri, which provides that "the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property, or character, and that right and justice should be administered without sale, denial, or delay," in this: That a price beyond the reach of the poor man has been placed upon the enjoyment of the right to have a special jury, and therefore justice is sold.

Fifth. That § 6566 violates the Constitutions of the United States and of Missouri, and is repugnant to the principles of justice, in this: That it allows one man—the jury commissioner—to select the jury, and thereby opens the door for a dishonest commissioner to "fix" any jury.

62 L. R. A.

Sixth. These postulates necessarily lead counsel to the necessity of challenging the correctness of what they term the *dicta* in the case of *State ex rel. St. Louis, K. & N. W. R. Co. v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43, and to ask that what was there said by the majority of this court shall be overruled. Counsel are also forced to contend that the decisions of this court in *Vaughn v. Scade*, 30 Mo. 600, and *State ex rel. Kansas City & S. R. Co. v. Slover*, 134 Mo. 607, 36 S. W. 50, and of both the majority and minority in *State v. Hamcy*, 168 Mo. 167, 57 L. R. A. 846, 67 S. W. 620, are wrong, and that the only correct rule that has ever been announced in this state is that laid down in *Bank of Missouri v. Anderson*, 1 Mo. 244, and in the minority opinion in *State ex rel. St. Louis, K. & N. W. R. Co. v. Withrow*, 133 Mo. loc. cit. 523, 34 S. W. 245, 36 S. W. 43.

It will be observed that the position taken by counsel for plaintiff is extreme and far-reaching, and, if it is correct, the result would be that every verdict that has been rendered by a special jury in this state since 1835 has been an unconstitutional verdict. The adoption of such a view would be most revolutionary, and would be a sad reflection upon the intelligence and legal learning of the legislators who have enacted the laws that have been on our statute books since 1835, and of the bar and bench that invoked and enforced such laws. Such a view ought not to be lightly considered or adopted. A retrospect, as brief as the subject permits, of the origin, growth, and present condition of the law in Missouri in regard to the right of trial by jury, is both necessary and pertinent.

At common law the sheriff selected and summoned the jury pursuant to a writ of venire facias issued out of King's bench. and, if the sheriff was disqualified to act, the coroner acted, and, if he was disqualified, the court appointed two elisors to act. 12 Enc. Pl. & Pr. p. 273. Originally the sheriff used his own discretion as to the number to be summoned, and it was not until Stat. Wm. II., chap. 38, that the number was limited to 24. *Thomp. & M. Juries*, §§ 67, 79; 12 Enc. Pl. & Pr. p. 334, and cases in notes; *Id.* p. 273. The essentials at common law were that the jury should be composed of 12 men, that they should be impartial, and that their verdict should be unanimous. *State ex rel. Kansas City & S. R. Co. v. Slover*, 134 Mo. loc. cit. 612, 36 S. W. 50; *Thomp. & M. Juries*, § 4. There were two kinds of trial juries known to the common law,—the regular panel for the sitting or term of court, and the special jury. Speaking of the latter kind, *Thomp. & M. Juries*, §§ 12, 13, says: "Special juries appear to

have been first introduced in the King's bench upon trials at bar in causes of great consequence, or, as stated by Blackstone, 'when the causes were of too great nicety for the discussion of ordinary freeholders or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him.' Later the practice seems to have become quite general in all the courts of allowing them, upon simple application in any civil case, as a matter of course, or, at least, they seem to have been easily procured when the granting was within the discretion of the court.

. . . In making up the list from which a special jury is to be struck, the officer charged with this duty is not obliged to take the names in any order in which they stand upon the register of jurors. He may make a selection of names of persons who, from their position in the community, are more likely to be possessed of that intelligence which is sought in a jury of this kind." "By the English jury act [6 Geo. IV. chap. 50, § 34] the party applying for a special jury is fixed with the costs of the same, 'unless the judge before whom the cause is tried shall, immediately after the verdict, certify under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury.'" Thomp. & M. Juries, p. 15, § 13, ¶ 4. So a special or struck jury is allowed in nearly all of the states of the Union, "in order to obtain persons acquainted with the particular class of matters involved in the case," or when "it appeared necessary in order to obtain a fair trial, or when it appeared to be required by the 'importance or intricacy' of the case." 17 Am. & Eng. Enc. Law, 2d ed. pp. 1196, 1197; Thomp. & M. Juries, § 14, and statutes cited in notes.

The first law in Missouri relating to juries was act October 1, 1804 (1 Terr. Laws, 1804-24, p. 61, chap. 13, § 13), by which it was provided that in all criminal prosecutions "the trial shall be by a jury of 12 good and lawful men of the vicinage, and in civil cases the trial shall be by a jury, if either of the parties require it, and in all cases where neither of the parties shall require a jury, the law and the fact shall be determined and damages assessed by the court, and execution awarded as in other cases," etc. Section 15 of the act provided penalties for failure to attend when summoned as a juror, but there was no provision made as to how or by whom the jury should be selected or summoned, presumably leaving those matters as they had previously been regulated, however that was.

The next law in Missouri on this subject was act October 28, 1808 (1 Terr. Laws, 62 L. R. A.

1804-24, p. 198, chap. 60), under which the judges of the courts of common pleas were required to select, from a list, to be furnished by the collector of taxes, of all free white male persons, over twenty-one years old, whose taxable estate in real or personal property amounted to \$100, "60 honest and intelligent householders, farmers, merchants, and traders, inhabitants of this territory, not being clergymen, practitioners of physic, or attorneys of any court, sheriffs or their deputies, ferry keepers or constables, or such as be, or be reputed, persons of ill fame, but altogether such as be of the best fame, reputation, and understanding and credit in there [their] district." The names so selected were required to be written on separate pieces of paper of the same size, and the clerk was required, in the presence of the judges, the suitors, and others attending the court, to draw by lot the names of the jurors to serve at the next term of the courts of common pleas in St. Louis, St. Genevieve, St. Charles, Cape Girardeau, and New Madrid. The clerk was required to keep the pieces of paper on which such names were written in a box, and for the trial of all criminal cases, and of all civil suits in the general court, he was required to draw out 12 names as the jury to serve therein. Id. p. 200, § 5.

The next law in Missouri relating to juries was act October 25, 1810 (1 Terr. Laws, 1804-24, p. 238, chap. 74; Geyer's Dig. p. 272). Section 1 of the act provided: "The several courts within this territory before whom juries are required are hereby authorized to direct the respective sheriffs to summon a sufficient number of persons to perform the duties of jurors." Section 2 made every male resident of lawful age, except clergymen, physicians, attorneys, sheriffs, clerks of courts, ferry keepers, constables, and judges of courts of record, subject to jury duty, but required the courts to divide the task of sitting on juries as near as may be equally among all citizens, and, in order to "obtain the impartial administration of justice," gave the court power to direct the sheriff "to avoid persons of ill fame or those who labor under the influence of either party." Act October 24, 1808, was expressly repealed. Thus the sheriff was vested with the power of selecting and summoning the jury, with the qualification stated.

Then came act cong. June 4, 1812 (chap. 95, 2 Stat. at L. 746 [1 Terr. Laws, 1804-24, p. 12, chap. 4; Geyer's Dig. p. 34]), by § 11 whereof, which is fully set out *supra*, it was provided that all free male white persons of the age of twenty-one years, who have resided in the territory one year and

are not disqualified by any legal proceeding, shall be qualified to serve as jurors, "and they shall, until the general assembly thereof shall otherwise direct, be selected in such manner as the said courts shall, respectively, prescribe, so as to be most conducive to an impartial trial and least burdensome to the inhabitants of the said territory."

Circuit courts were first established in Missouri by act January 4, 1815 (1 Terr. Laws, 1804-24, p. 345, chap. 125), but nothing was said in that act about selecting jurors. Act January 21, 1816 (1 Terr. Laws, 1804-24, p. 444, chap. 159), created the superior court of the territory. Section 6 of the act made it the duty of the judges of the court, or any two of them, to issue their precept, directed to the sheriff or coroner, commanding him to summon 60 good and lawful men of his county, qualified by law, to serve as grand and traverse jurors at the next term of the superior court. By act cong. March 6, 1820, chap. 22 (3 Stat. at L. 545), Missouri was admitted into the Union, and the consent of the people of Missouri, in convention assembled, was given thereto on July 6, 1820. 1 Terr. Laws, 1804-24, p. 632, chap. 252.

Thereafter the practice act of January 11, 1822 (1 Terr. Laws, 1804-24, p. 841, chap. 363), was adopted, by the 42d section whereof it was provided that any party to a suit might "require a trial by jury," but, if neither party required a jury, the court should determine the law and the facts, or might refer the cause "to three or more indifferent and competent persons, whose report, if approved by the court, shall have the same effect as a verdict by a jury." Nothing was said about how the jury should be selected or summoned, nor whether it should be a common or special jury that a party might "require."

The next act was approved December 28, 1826 (2 Terr. Laws, 1824-36, p. 95, chap. 52), and was entitled "Jurors," the 3d section whereof required the party demanding a jury to deposit, at the time of the demand, the sum of 25 cents for each juror, which should be paid to the jurors as soon as the verdict was rendered, and which was taxed as costs against the losing party; but, if the party made affidavit that he was unable to make such deposit, he should nevertheless be entitled to demand a jury, and the jury fee should be taxed as costs. Nothing was said in this act about who should select the jury, nor of the character of the jury.

Next came act March 17, 1835 (Rev. Stat. 1835, p. 342), which was entitled "Jurors." The 1st section of the act provided: "All courts before whom juries are required may order the sheriff or other officer to summon

a sufficient number of jurors." The 14th section provided: "The court shall have power to order a special jury for the trial of any civil cause; in such case the sheriff shall summon 18 jurors, according to the order of the court, and make out and deliver to each party or his attorney, a list of the jury so summoned, and each party shall have the right to strike off three of the names on such list." The 15th section provided that, if a party should make affidavit that he could not have a fair and impartial jury to try the case on account of the unfriendliness or prejudice of the sheriff and coroner to him or his attorney, the court should appoint some disinterested and impartial person, "who shall act as elisor, and proceed to summon a fair and impartial jury." It will be noted how like to the common law this act was, and also that the 1st section is very similar to the act of 1810, *supra*, without the qualification as to the power of the sheriff in selecting the jury.

Sections 1 and 14 of the act of 1835 were carried almost literally into the revision of 1845. Rev. Stat. 1845, pp. 627, 628, chap. 91. Section 1 of the act of 1835 was carried literally, also, into the revision of 1855, and became § 2, chap. 88, p. 910, Rev. Stat. 1855. Section 14 of the act of 1835, relating to special juries, was also carried into the revision of 1855, the only change being that the sheriff was required to summon 24 persons for such special jury. Rev. Stat. 1855, p. 912, § 24. Sections 7 and 14 of the act of 1835 were also carried into the revision of 1865, and became §§ 19, 23, of chap. 146, p. 599, Gen. Stat. 1865, with the change from 18 to 24, above noted, that was made by the revision of 1855.

The act of March 15, 1873 (Acts 1873, pp. 46, 47), entitled "An Act to Provide for the Manner of Selecting and Summoning Grand and Petit Juries for Courts of Record," provided, by § 2, that "the county court of each county, at a term thereof, not less than thirty days before the commencement of the circuit court, or other court having civil and criminal jurisdiction, shall select the names of not less than 175 persons having all the requisite qualifications of jurors; and the names of such persons shall be written on separate slips of paper, placed in a box to be provided for that purpose, and thoroughly intermixed; and the court, in selecting such names, shall select, as near as practicable, the same number from each township in the county, according to population." Section 3 provided: "The clerk of the county court, so situated as to be unable to see the names on said slips, shall then, in the presence of said court, draw, by lot, from said box, the names of 18 persons, who shall

serve as a grand jury of the county, at the next term of the court for which said jury is drawn; and the said clerk shall then, in like manner, draw, by lot from said box the names of 24 persons, who shall serve as a petit jury at the next ensuing term of said court for which said petit jury is drawn." Section 6 provided that, if the regular panel be exhausted, the court should order the sheriff, or other proper officer, to summon a sufficient number of other competent and qualified persons to complete the panel, and, in executing the order, it required the sheriff to summon "sober, intelligent, and industrious persons to complete such panel; and he shall not summon any vagrant, common idler, or person having no visible means of support." This act changed the method of selecting the regular panel of petit jurors, and took away from the sheriff the power of selection that had been conferred upon him ever since the act of 1808, and vested that power in the county court, to be exercised by lot as described, and left the sheriff the power of selection only as to such jurors as became necessary after the regular panel was exhausted. This act had no application, however, to special juries, and left their selection to the sheriff, as it was provided for by § 23, chap. 146, p. 599, Rev. Stat. 1865.

The aforesaid provisions of the act of 1873 as to the regular panel were re-enacted by the act of March 28, 1874 (Acts 1874, pp. 97, 99, §§ 2, 3, 7). This act also left the provisions of the Revised Statutes of 1865 as to special juries unaffected.

The act of March 15, 1875 (Acts 1875, p. 80), providing for the selection of the regular panel of petit jurors, repealed the provisions of the acts of 1873 and 1874, vesting the power of selection in the county court, with the power in the sheriff only to select further jurors after the regular panel was exhausted, and re-enacted, almost literally the provisions of §§ 1 and 14 of the act of 1835, and again vested the power of selection of both the regular panel and the special juries in the sheriff. Acts 1875, pp. 80, 81, §§ 19, 20, 23.

In the revision of 1879 the act of 1875 seems to have been entirely overlooked, and the provisions of the act of 1874 were carried into the revision of 1879, with certain amendments thereto which are not important to this inquiry, and §§ 2, 3, and 7 of the act of 1874 aforesaid became §§ 2784, 2785, and 2788 of chap. 43, Rev. Stat. 1879. Thus the county courts were again given the power of selecting the regular panel, and the sheriff was given only the right to select those necessary to fill up after the regular panel was exhausted. But a new section

was added to the law, and was numbered § 2802 to that chapter, which provided: "Either party to a cause pending in the circuit court, or court of common pleas or criminal court of any county, and triable by a jury, shall be entitled, as of course, to an order for a special venire on motion made therefor, three days before that on which the case is set for trial; but the cost of such special jury shall be paid by the party so applying, irrespective of the result, unless the judge presiding at the trial shall, at the close thereof, or within two days thereafter, certify that the case was one for the trial of which a special jury should have been ordered, in which case the costs of the special jury shall be taxed, as other costs against the losing party. This section shall apply to cities having over 100,000 inhabitants, as fully as to all other parts of the state."

Nothing is said in this section as to who shall select the special jury, nor is there any provision requiring a special jury to be drawn from the list of jurors made up by the county court. Therefore § 23 of the act of 1875 (Acts 1875, p. 81) remained in force, and the sheriff had to select them. The last sentence of § 2802, Rev. Stat. 1879, making the new section apply to all cities of over 100,000 inhabitants, as well as to the whole state, was evidently added because of act April 11, 1879 (Acts 1879, p. 28), which provided that in all cities of this state having over 100,000 inhabitants the judges of the circuit and criminal courts should appoint a jury commissioner, who was required to make up a jury list, and put the names of the qualified jurors, on separate slips of paper, in a wheel, and should draw a jury from the wheel, by lot, whenever the court ordered a jury. Acts 1879, p. 33, § 16. This act said nothing about special juries. Hence the significance of the last sentence of § 2802, Rev. Stat. 1879.

The provisions of §§ 2784, 2785, 2788, and 2802, Rev. Stat. 1879, were carried into the Revised Statutes of 1889, and became §§ 6067, 6068, 6073, and 6089, respectively, of the Revised Statutes of 1889; and those sections were in turn carried into the revision of 1899, and became §§ 3769, 3770, and 3775, 3791, Rev. Stat. 1899.

The act of April 11, 1879, regulating juries in cities of over 100,000 inhabitants, was amended by the act of March 17, 1885 (Acts 1885, p. 74), which provided for special juries in such cities. This act is like § 2802, Rev. Stat. 1879, and, in addition, made §§ 17 to 25 of the act of April 11, 1879, in relation to the summoning and service of common jurors, applicable also to special juries. This act passed into the Revised Statutes of 1889, and became § 29 of

article 21 of the appendix to volume 2, at page 2169. Rev. Stat. 1889; the balance of that article being the act of April 11, 1879, aforesaid. This act passed also into the revision of 1899, and became article 23 of chap. 91, Rev. Stat. 1899; the act of 1885 aforesaid, relating to special juries in cities of over 100,000, becoming § 6566, Rev. Stat. 1899, which is the section whose constitutionality is challenged in this case, and being § 29 of article 21 of the appendix to Rev. Stat. 1889, which is set out in full in *State ex rel. St. Louis, K. & N. W. R. Co. v. Withrow*, 133 Mo., at page 511, 34 S. W. 245, 36 S. W. 43, and which underwent adjudication in that case.

Thus it appears that from 1808 to 1873 the sheriff was vested with the power of selecting all juries, regular as well as special; that by the acts of 1873 and 1874 the power to select regular jurors was transferred from the sheriff to the county courts, but the provisions of the Revised Statutes of 1865 (§ 23 of chap. 146), which vested in the sheriff the power to select special jurors, remained in full force; that the act of 1875 again placed the power of selection of both regular and special juries in the sheriff; that the revision of 1879 gave the power to select the regular panel to the county court, and added a new section (2802) providing for special juries, but did not specify who should select them; that the same is true of the revisions of 1889 and 1899; that the act of 1879 provided for the appointment of a jury commissioner in all cities having over 100,000 inhabitants, and prescribed for his making up a jury list and drawing the regular panel from a wheel, nothing being said about special juries; that the act of 1885, which became § 29 of article 21 of the appendix to the Revised Statutes of 1889, and afterwards became § 6566, Rev. Stat. 1899, relating to special juries in cities of over 100,000 inhabitants, required the jury commissioner in such cities to select the special jurors; and that under the decision of this court in *State ex rel. St. Louis, K. & N. W. R. Co. v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43, the jury commissioner was not required to draw the special jury from the wheel, by lot, but had a right to select them from the list of qualified jurors that he was required by law to keep. So that the power to select special juries is, and has always been, vested in the sheriff in all parts of the state outside of cities of over 100,000 inhabitants; and inside of such cities it is, and ever since 1885 has been, vested in the jury commissioner. It thus appears that at common law, and in Missouri from 1835 to this date, special juries have been provided for by law, and 62 L. R. A.

that the sheriff always has selected them, except since 1885 in cities of over 100,000 inhabitants, where the jury commissioner selects them. There is no substantial difference between the character of special juries at common law and in Missouri.

This court has uniformly held that the provisions of the Constitutions of 1820 and 1865, that the right of trial by jury shall remain inviolate, and the provision of the Constitution of 1875, that the right of trial by jury as heretofore enjoyed shall remain inviolate, means the right of trial by jury as it existed at common law. In *Vaughn v. Scade*, 30 Mo. 600, Scott, J., said: "The term 'trial by jury' was well known and understood at the common law, and in that sense it was adopted into our Bill of Rights. Of course, the nonessentials of that institution, such as concern the qualifications of jurors, the mode of summoning them, and many other such matters, were left to the regulation of law. The Constitution is preserved in retaining the substance of that form of trial as it was known and practised among those from whom we have derived it." The same rule was laid down by Sherwood, J., speaking for the majority of the court in *State ex rel. St. Louis, K. & N. W. R. Co. v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43, and by Gantt, J., in *State ex rel. Kansas City & S. R. Co. v. Glover*, 134 Mo. 607, 36 S. W. 50, and by Gantt, J., speaking for the majority of the court, in *State v. Hamcy*, 168 Mo. 167, 57 L. R. A. 846, 67 S. W. 620. The only utterances from this court, or any of its members, to the contrary, are what was said by McGirk, Ch. J., in *Bank of Missouri v. Anderson*, 1 Mo. 244, by Barclay, J., in his dissenting opinion in *State ex rel. St. Louis, K. & N. W. R. Co. v. Withrow*, 133 Mo., loc. cit. 523, 34 S. W. 245, 36 S. W. 43, and by Sherwood, J. (in which the writer hereof concurred), in the dissenting opinion in *State v. Hamcy*, 168 Mo. loc. cit. 204, 57 L. R. A. 846, 67 S. W. 620.

Judges McGirk and Barclay agree with the contention of the plaintiff herein that the Constitution of 1820 does not guarantee a common-law jury, but only such a jury as was prescribed by the territorial laws of Missouri prior to the adoption of the Constitution of 1820, and that the only special jury that was spoken of in those laws was a special jury called from an adjoining county, when a party litigant disqualified by affidavit the people of the county in which the court was sitting. The dissenting opinion in *State v. Hamcy*, 168 Mo. 204, 57 L. R. A. 846, 67 S. W. 620, held that the Constitution of 1875 was an original organic instrument, and not a mere continuation of

the Constitution of 1820, and that the provision that the right of trial by jury as heretofore enjoyed should remain inviolate meant as that right was enjoyed according to the laws of the state of Missouri, which included the common law and the English statutes enacted prior to the fourth year of James I., except as modified by our statute, and was not limited to the right of trial by jury as it was known to the common law. *Creve Cœur Lake Ice Co. v. Tamm*, 138 Mo. loc. cit. 388, 39 S. W. 791. See also, to the same effect, *Perry v. State*, 9 Wis. 19. But, so far as the case at bar is concerned, there is no difference of opinion under either the majority or the minority opinion in the *Hamey Case*. For special juries were known to the common law, and were selected by the sheriff or the coroner or two elisors, and special juries have been provided for by the laws of Missouri, in express terms, ever since the act of 1835, and in the country they are selected by the sheriff and in cities of over 100,000 inhabitants they are selected by the jury commissioner.

In England under Stat. 6 George IV., chap. 50, § 34, the cost of the special jury is taxed against the party applying for it, unless the trial judge after the trial certifies that it was a proper case for a special jury; and the same has been substantially the law in Missouri since 1835. Under Rev. Stat. 1879, § 2802, the party applying for the special jury was required to pay the costs thereof, irrespective of the result. Similar provisions, requiring the applying party to pay for the special jury, are also contained in the laws of Delaware (Del. Rev. Code 1874, p. 661, chap. 109, § 18), Indiana (2 Ind. Rev. Stat. 1876, p. 159, § 1, note), Ohio (Ohio Rev. Stat. 1880, § 5189), New York (N. Y. Code Rem. Jus. 1876, § 1069), Michigan (Mich. Comp. Laws 1871, § 6005), and New Jersey (N. J. Rev. 1877, p. 528, § 18). "The power of the legislature to require payment of a reasonable jury fee as a condition to entitle a party to a jury trial, and to provide that the failure to do so shall constitute a waiver of the jury, is undoubted." 12 Enc. Pl. & Pr. 249.

The plaintiff, however, attempts to break the connection between the common-law right of trial by jury and the right of trial by jury in Missouri since 1835, by invoking act Cong. June 4, 1812 (chap. 95, 2 Stat. at L. 743), and by saying that there have been no lawful special juries in Missouri since 1835, because all of the laws authorizing them were violative of the Constitution of 1820. Act Cong. June 4, 1812 (chap. 95, 2 Stat. at L. 743), simply prescribed the qualifications for jurors (which was evidently intended to nullify the ter-

ritorial act of Missouri of 1808 prescribing a property qualification for jurors, but which act, as already herein pointed out, was repealed by the territorial act of 1810), and then provided that, until the general assembly of the territory of Missouri should otherwise direct, the jurors should be selected in such manner as the courts might prescribe. It will be easily and readily seen that this act was not intended to have the effect of establishing a new jury system, nor of abolishing special juries known to the common law, any more than of abolishing any other kind of a jury that was known to the common law. The territorial laws enacted prior to 1820 are in the same condition. They simply provided that a party should be entitled to a trial by jury, and, when a jury was demanded, the court should order the sheriff to summon one. No particular kind of a jury was specified, and no intimation can be gleaned from the act of Congress or from these territorial laws that any other kind of a jury than such a jury as was known at common law was intended. That was the only kind of a jury the fathers of our country knew or had any respect for. Therefore, when the act of 1816 was passed, adopting the common law of England and the statutes of England passed prior to the fourth year of James I. as a part of the law of Missouri, the common-law juries, regular and special, were adopted, and became a part of the system of our laws and of the machinery of our courts. This being true, they were the kinds of juries that the Constitution of 1820 guaranteed. There were no Missouri juries, as distinguished from common-law juries, prior to the adoption of the Constitution of 1820, and therefore the foundation of the plaintiff's whole contention is untenable.

The fact that a party applying for a special jury is required to deposit the cost thereof, and that it puts it out of the reach of a poor man to have a special jury, does not make the law obnoxious to the Federal Constitution. "The preservation of the common-law right to trial by jury in both civil and criminal cases is guaranteed by the Federal Constitution, as well as by the fundamental law of the several states. It is well settled that the Federal provision is a restriction only on the general government and its officers, and the states may constitutionally abolish, alter, or amend the existing right of trial by jury." 6 Am. & Eng. Enc. Law, 2d ed. p. 974, and cases cited in notes. The requirement of such a deposit no more violates the equality clause of the Federal Constitution than the fact that a rich man can employ the highest priced lawyers, while the poor man can only afford

to employ the lower-priced lawyers, violates the constitutional guaranty that a man shall be entitled to defend by himself or by counsel. The law furnishes the jury to every man on the same terms. The inequality consists in the unequal financial ability of the parties to avail themselves of the benefits of the law.

Neither does the fact that the sheriff in the country, or the jury commissioners in the large cities, have the power to select the special jury, and that they are not drawn by lot, as the regular panel is, make the law unconstitutional. Such matters depend wholly upon the legislative will. The power of selection must be lodged somewhere, in one or more persons, and it is for the legislative wisdom to provide whether the power shall be vested in the sheriff, as it was at common law and is in Missouri outside of the large cities, or in a jury commissioner in the large cities, or in a body composed of more than one. Experience does

not justify the fear expressed by the plaintiff of having juries "fixed," because the power is vested in a single officer; nor does the selection by the officer, and not by chance or lot, make the law unconstitutional. *Perry v. State*, 9 Wis. 19.

Special juries are allowed by the laws of the United States in the Federal courts. Section 805, U. S. Comp. Stat. 1901, p. 626 (Act April 29, 1802, chap. 31, § 30, 2 Stat. at L. 167), provides: "When special juries are ordered in any circuit court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several states."

These considerations show that *the judgment of the Circuit Court is right, and it is therefore affirmed.*

All concur, except **Robinson, J.**, absent.

Petition for rehearing denied July 2, 1903.

ILLINOIS SUPREME COURT.

CLEVELAND, CINCINNATI, CHICAGO,
& ST. LOUIS RAILWAY COMPANY,
Appt.,

v.

Charles JENKINS.

(174 Ill. 398.)

1. A usage or custom, to be binding, must be so uniform, long established, and generally acquiesced in, and so well known, as to induce the belief that parties contracted with reference to it if nothing was said to the contrary, and that the failure to conform to it would be an exception.
2. Courts will take judicial notice of the general business affairs of life, and of the manner in which ordinary railroad business is conducted, and of the everyday practical operation of railroads.
3. A duty to give a letter of recommendation or a clearance card to an employee who is discharged or quits is not imposed upon the employer by common law.

NOTE.—Duty to give recommend or clearance card to discharged employee.

- I. Duty to give character, 922.
- II. Duty to give clearance card.
 - a. Of corporation, 925.
 - b. When combination exists among corporations, 925.
 - c. When a uniform custom to do so is shown, 928.
- III. Legislation, 930.
- IV. Summary, 931.

I. Duty to give character.

There is no doubt that by the common law 62 L. R. A.

4. Proof of isolated instances is not sufficient to establish a usage or custom.
5. An instruction that the jury shall find for plaintiff in certain contingencies is erroneous, unless it confines them to the evidence.
6. Letters given by railroad companies to discharged employees are not admissible to establish a custom of another road to give such letters, unless it is in some way connected with the letters given, or knows and approves of their issuance.
7. A rule of a railroad company as to an investigation in case of a suspended employee is not part of a contract with an employee whose employment began before the rule was passed.

(October 24, 1898.)

A PPEAL by defendant from a judgment of the Appellate Court, Fourth District, affirming a judgment of the Circuit Court for Wabash County in favor of plaintiff in

a master is under no legal obligation to give a testimonial of character to his servant. This was settled in *Carrol v. Bird* (1800) 3 Esp. 201, 6 Revised Rep. 824, an action on the case brought by a plaintiff whose wife was dismissed from defendant's service, and afterwards failed to obtain employment with another party, who was ready and willing to employ her upon the presentation of satisfactory information regarding her character, on account of defendant's refusal to give her a character. Upon the admission of plaintiff's counsel that he had no precedent for such an action as the one brought, Lord Kenyon said that there was no such case, and that the action could not

an action brought to recover damages for defendant's refusal to give plaintiff a clearance card upon discharging him from its employment which resulted in his inability to procure employment elsewhere. *Reversed.*

Statement by Phillips, J.:

This was an action on the case, brought by Charles Jenkins against appellant in the circuit court of Wabash county. The declaration charges that the plaintiff has been a faithful employee of the defendant for ten years as a conductor on one of the freight trains on the line of its railroad running from Cairo to Danville, Illinois; that he was discharged about November, 1893, without cause, and although, by the regulations and customs of the defendant, a letter or clearance card is usually given to discharged employees, in order that they may secure employment on other roads, it being essential for that purpose, such letter or clearance card was refused to him although he had often applied for it, whereby he had failed to secure employment; that defendant and other railroad companies had a rule or custom, which is charged to be a conspiracy, not to employ a discharged employee of another road without such a letter or clearance card; that after his discharge, and failure, on request, to receive such card, the plaintiff applied to various railroad companies for employment, but was uniformly refused on account of not having such card, to which he was entitled; that he had been receiving \$85 per month from the defendant for his services as conductor previous to his discharge, and that he was qualified and competent to earn the same wages on other roads, and would have done so had he received such card; that by reason of such failure and refusal on the part of defendant he was unable to secure employment, and

compelled to quit such line of work, to his loss and damage. The declaration contains one count, and avers a cause of action in case arising out of a contract. It avers the usage or custom existing upon the road of defendant and other roads, whereby a discharged employee is entitled to such letter, showing the time of service, reason for discharge, etc.; thus averring a contractual relation, out of which, as alleged, arose the duty, when such contractual relation was severed, to give a letter or clearance card for the purpose stated. The theory proceeded upon by plaintiff, as charged in the declaration, was that after his discharge he was entitled to such a clearance card, which was refused him, and without which he could not secure employment on other roads, whereby occurred the damage stated. To this declaration defendant pleaded the general issue. It appears from the record that shortly before the plaintiff's discharge he had been indicted by three separate indictments by the grand jury of Johnson county, Illinois,—two for larceny and one for embezzlement. Upon the confession or statement of one of the station agents of appellant company, who had also been indicted by the grand jury for larceny in taking from cars certain goods, at various times, which were being transported, the plaintiff, Jenkins, was implicated. Upon being thus indicted, as before stated, he was suspended by the superintendent of the appellant road, and subsequently was discharged. Upon the trial of the criminal charges in the circuit court of Johnson county, on two of the indictments Jenkins was acquitted, and one indictment against him was nolle. On different occasions, before and after the disposition of the indictments against him, he made application for the clearance card, which was refused. A jury in the trial court found

be supported by law; that by some old statutes regulations were established respecting the character of laborers, but that in the case of domestic and menial servants there was no law to compel the master to give the servant a character; that it might be a duty which his feelings would prompt him to perform, but that there was no law to enforce the doing of it.

Later, in *Handley v. Moffat* (1872) 17 Ir. R. 7 C. L. 104, 21 Week. Rep. 231, an action brought for the improper dismissal of a servant by the master without the giving of a certificate of character, it was argued that the master was liable under the Irish statute, 2 Geo. I., chap. 17, p. 4, providing that, on the discharge or leaving of any servant, the master or mistress should give a certificate in writing, under his or her hand, that the person therein named was his or her servant, and was discharged from the said service, and should in the said discharge certify, if desired, or if the master or mistress thought fit, the behavior of the servant; but, it appearing that

the statute also provided that, if the master or mistress refused to give a discharge, the servant might procure a certificate from a justice of the peace or magistrate of the town, "to all intents and purposes as good as if the same had been given by the master or mistress." It was held that the act which created the duty also gave the remedy for its violation, and that the party aggrieved had no other, since (citing *Carroll v. Bird*, 3 Esp. 201, 6 Revised Rep. 824) there is no obligation at common law, on the part of a master, to give his servant any discharge at all. The court stated that since the passing of the statute above referred to, over one hundred and fifty years before, no action had been brought like the one at bar.

It is said, *obiter*, in *Pullman v. Hill* [1891] 1 Q. B. 524, 60 L. J. Q. B. N. S. 299, 64 L. T. N. S. 691, 39 Week. Rep. 263, by Lord Esher: "It is not the legal duty of the master to give a character to the servant, but it is his moral duty to do so."

Neither is the master obliged in any event,

for the plaintiff, and assessed his damages at the sum of \$875. Motion for new trial was overruled, and judgment entered on the verdict. On appeal to the appellate court for the fourth district this judgment was affirmed, and from that judgment of affirmance this appeal is brought to this court on a certificate of importance.

Messrs. C. S. Conger, John T. Dye, and H. M. Steely, for appellant:

A conspiracy cannot be proved by showing acts of the alleged conspirators done separately; but the conspiracy itself must be shown as an independent fact, before the acts of one conspirator are admissible against the other for any purpose.

Shields v. McKee, 11 Ill. App. 188; Greenl. Ev. § 111; *Jones v. Hurlburt*, 39 Barb. 403; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898.

The master is under no legal obligation to give a testimonial of character to his servant. If he does, it will be presumed that he speaks the truth, or what he believes to be true.

Parsons, Contr. p. 528; *Cooley*, Torts, p. 330.

A custom of issuing clearance cards by railroad companies is not established by showing an occasional issuance of such cards, but it must be so generally and universally done as to make the failure to do it an exception.

Turner v. Dawson, 50 Ill. 85; *Leggat v. Sand's Ale Brewing Co.* 60 Ill. 158; *Wilson v. Bauman*, 80 Ill. 493.

Messrs. Mundy & Organ and Cullop & Kessinger for appellee.

Phillips, J., delivered the opinion of the court:

The gravamen of the declaration in this

case is that the plaintiff was discharged, and refused a clearance card or letter, to which he was entitled, without which he could not obtain employment on any other road, and that he failed to obtain such employment, whereby he suffered damages. The declaration avers a cause of action on the case arising out of a contract. It avers a contractual relation, out of which, as alleged, arose the duty, when such contractual relation was severed, to give a letter or clearance card for the purpose stated. Unless the law imposes on appellant, in some form, the duty to give appellee, as one of its employees, a letter of recommendation or clearance card, his action in this case cannot be sustained. If a legal duty is imposed upon the employer to give to a discharged employee, or one voluntarily leaving his service, a letter of recommendation, such duty must arise either by the common law, by statute, by contract of employment, or by such a generally established usage or custom as would demand it be done. Such usage, however, must be so well known and uniformly acted upon as to raise a fair presumption it was intended to be incorporated in the contract of employment. A distinction is to be made between what is known, in terms, as a clearance card, and a letter of recommendation. This distinction is apparent, not only from the evidence in this case, but also from the knowledge which courts have of the general conduct and management of railroad business and affairs. It is the duty of courts to take, and they will take, judicial notice of the general business affairs of life, and of the manner in which ordinary railroad business is conducted, and of the every-day practical operation of them. *Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627; *Smith v. Potter*, 46 Mich. 258, 41 Am. Rep. 161, 9 N. W. 273.

to deliver to the servant, upon his departure, the character brought by him at the time he entered the master's service, according to *Moult v. Halliday*, 77 L. T. N. S. 794 [1898] 1 Q. B. 125, 67 L. J. Q. B. N. S. 451, 46 Week. Rep. 318, 63 J. P. 8, where the question is discussed, not with the force of a holding, however, but *arguendo*, as follows: "During the hearing before the county-court judge the question was incidentally discussed of the reasonableness of a suggested custom of handing over the character brought by a servant, who was leaving at the end of the first month, to the new master or mistress into whose employment the servant desired to enter. I cannot say I think that would be a reasonable custom. There is no obligation on a master or mistress to give a character to a servant, but, if a character is given, it should be a true one. A character may be true this month and false next. A servant may come into service with a good character, and yet during the first month circumstances may come to the master's knowledge which show that it was undeserved." 62 L. R. A.

and should be forfeited. It would be a scandalous thing if the master was bound after that to hand over the character which he knew was false. If the good character which the servant brought with her is handed over, it must be handed over in good faith. I think, therefore, that such a custom would be unreasonable, and, indeed, not honest, and therefore bad."

By the merchant shipping act of 1894 (57 & 58 Vict.), chap. 60, § 129, it is provided that a ship's master shall, upon the discharge of every certificated officer whose certificate of competency had been delivered to and retained by the ship's master, return the certificate to the officer, and if without reasonable cause he fails to do so, that he shall be liable to a fine not exceeding £20.

In *Thornton v. Suffolk Mfg. Co.* 10 Cush. 382 (*infra*, II. c), the question of the obligation of an employer to give "a line" or honorable discharge, arising out of general custom so to do, is discussed.

From the evidence produced on this question, and from this judicial notice which we take of the ordinary general management of railroads, it is apparent that what is known as a clearance card is simply a letter, be it good, bad, or indifferent, given to an employee at the time of his discharge or end of service, showing the cause of such discharge or voluntary quittance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment. Such a card is in no sense a letter of recommendation, and in many cases might, and probably would, be of a form and character which the holder would hesitate and decline to present to any person to whom he was making application for employment. A letter of recommendation, on the contrary, is, as the term implies, a letter commending the former services of the holder, and speaking of him in such terms as would tend to bring such services to the favorable notice of those to whom he might apply for employment.

As stated, an action for failure to give an employee either of the above forms of letters must be based either upon the common law or the statute, or arise out of the contract of employment, or be required by usage or custom. By the common law no such duty was imposed upon the employer. In the American & English Encyclopedia of Law (vol. 14, p. 799) it is said: "It is not legally compulsory on a master or mistress to give a discharged servant any character, it matters not how much the servant is entitled to character in fairness, or how cruel the refusal may be." In Townshend, Slander & Libel, 4th ed. p. 426, it is said: "On examination it will be perceived that this right of an ex-employer to give, as it is termed, a character, to his ex-employee, is nothing more than a consequence of the

right to communicate one's belief. . . . No one is under any obligation to make such a communication; he does not owe it as a duty, either to the employer or the employee, to make any communication on the subject." In the case of *Ohio & M. R. Co. v. Knasson*, 37 N. Y. 224, which involved a similar question, in the opinion it was said: "If I know that a villain intends to defraud or in any way injure my neighbor, it is doubtless my duty, as a good citizen and as a Christian man, to put him on his guard. But there is no rule of law which renders me liable for his loss in case of my neglect of this duty. It is a moral duty, simply, not recognized by law." In Smith on Master and Servant (Text-Book ed. pp. 380, 381) it is said: "It is clear, however, that, in the absence of any specific agreement to that effect, there is no legal obligation binding a person who has retained another as a servant to give that person any character at all on dismissal, and that no action will lie against him for refusing to do so." In *Carrol v. Bird*, 3 Esp. 201, it is set forth in the declaration that the plaintiff's wife, having been retained by the defendant as a servant, was dismissed from the service; that, after she was so dismissed, she applied to a person of the name of Stewart for the purpose of being retained and hired as a servant; that Mrs. Stewart was ready and willing to have hired and taken her into her service if the defendant would have given her a character, and such character was satisfactory; that it was the duty of the defendant, by law, to have given her such character as she deserved; that the defendant, not regarding her duty, wholly refused to give her any character whatever, by reason of which the said Mrs. Stewart refused to hire her into service. In the opinion rendered in this cause Lord Kenyon said: "There was

II. Duty to give clearance card.

a. Of corporation.

In an action by a discharged employee against a railroad company for its refusal to furnish him papers stating the cause of his discharge, in consequence of which he was unable to secure other employment, it appeared that the employee was involved in a collision, and discharged because regarded by the company as negligent. The court made no specific decision in regard to the right to refuse the written reasons, merely holding that if the company, on investigating into the cause of the collision, had reasonable ground to believe that the employee was negligent, it had a perfect right to discharge him. This is, therefore, only a passive decision in conformity with the common-law rule that no legal obligation exists, on the part of a master, to furnish any information bearing upon the character or record of an employee who quits or is discharged, to enable him to secure other

employment. *Busby v. Pittsburg, C. C. & St. L. R. Co.* 9 Ohio S. & C. P. Dec. 823.

b. Where combination exists among corporations.

From the common-law right of a master to refuse his servant a character is evolved the right of a railroad company, or other corporation of that nature, to refuse to issue a clearance card to an employee who quits or is discharged; and since what one person may lawfully do two or more persons may join in doing; and since it is also the right of every employer to employ or refuse to employ whomsoever he may wish,—the further doctrine is evolved that railroad companies may agree together to refuse, in their discretion, or in certain specified cases, in the absence of an express or implied agreement to the contrary, to issue clearance cards to their employees who quit or are discharged, and to refuse to employ those unable to present a clearance card from former employers. This doctrine is clear.

no case, nor could the action be supported by law. By some old statutes regulations were established respecting the characters of laborers, but that in the case of domestic and menial servants there was no law to compel the master to give the servant a character; it might be a duty which his feelings might prompt him to perform, but there was no law to enforce the doing of it." A character is not given for the benefit of the ex-employee, although he may be either injured or benefited by reason of such character being given; nor does the right to give such a character arise out of a duty to the employee, but the right or moral duty, such as it is, is a duty in the interest of society and the public good, and neither the proposed employer nor the employee has a legal right to demand it. Such communications have been made, not only by an ex-employer, but also by any person possessing the information and the belief that such information is true. They may be made either with or without request, in the interest of the public good and as a moral duty to society, when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such a relation to him as to make it a reasonable duty, or at least proper, that he should give the information. *Sunderlin v. Bradstreet*, 46 N. Y. 188, 7 Am. Rep. 322; *Mott v. Dawson*, 46 Iowa, 533; *Townshend, Slander & Libel*, 4th ed. 395-397; 13 Am. & Eng. Enc. Law, pp. 415, 416; *Bacon v. Michigan C. R. Co.* 66 Mich. 166, 33 N. W. 181. In *Parsons*, Contr. p. 328, the author says: "The master is under no legal obligation to give a testimonial of character to his servant." It is also a well-known rule of law that no man is compelled to enter into business relations with any other person unless he desires so to do, and it is also as well

established that upon the dissolution of such business relations no man shall be compelled to divulge to the public his reasons, good or bad, for such dissolution. In *Cooley, Torts*, p. 328, it is said: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern." A further citation of authorities is unnecessary to establish that by common law no liability was imposed upon the master to issue any form of character to his servant. By statute no duty is imposed upon the employer to give to an employee a clearance card, nor does any right to demand such accrue to the employee. Therefore, if any cause of action exists to the appellee in this case, it must arise out of his contract of employment, or there must be shown and established such a custom or usage as would clearly entitle him to such. Under such views of the subject-matter involved in this case, where no action, either by law or by statute, accrued to the plaintiff, it was necessary for him to produce, in the first instance, evidence tending to show that a usage or custom existed on appellant's railroad, at the time of his contract of employment, to give to each discharged employee, or those voluntarily quitting its service, a clearance card or certificate of recommendation, and tending to show he was entitled to it under his contract of employment.

The fact that the master requires certificates of recommendation from persons seeking employment is certainly no reason why he should be legally compelled to give certificates to those leaving his employment. In this case the testimony produced, showing,

ly presented in *New York, C. & St. L. R. Co. v. Schaffer*.

But it may be that such a combination or agreement between a number of corporations is rendered unlawful by the motive with which the rules agreed upon are enforced. This theory is indicated in the charge of the judge in *Mattison v. Lake Shore & M. S. R. Co.* 3 Ohio N. P. 190, an action by a discharged employee against a railroad company for damages on account of the enforcement of rules by the railroad company, adopted by it in common with all other trunk lines in the United States, whereby he was prevented from obtaining employment elsewhere in his chosen vocation as a railroad man. The court charged that, if the railroad company combined with other railroad companies for the purpose of preventing employees which it had discharged from obtaining employment with other companies, and adopted the rules in question, one of which was to refuse employment to any railroad man who could not present a clearance card from his last employer, not for the purpose, only, of

enabling it to conduct its own business, but with the intention and for the purpose of preventing the employees it had discharged from obtaining employment in the other companies; and that their enforcement would have that effect,—then that the adoption of such rules would be unjustifiable, and, in law, malicious. The verdict arrived at is not given, nor any statement of the facts, merely the charge of the court being reported. In a prior hearing upon demurrer to the petition, reported in 2 Ohio N. P. 276, the same doctrine is advocated, and the holding made that a petition which alleged a wrongful and malicious combination of railroad companies to prevent a discharged employee of one company from obtaining employment with the other railroad companies, to his damage, etc., constituted a good cause of action.

In *McDonald v. Illinois C. R. Co.* 187 Ill. 529, 58 N. E. 463, the case went off on a question of pleading. The declaration, after alleging a conspiracy between the railroad companies having lines running into Chicago, to the

or tending to show, that appellant required certificates of recommendation from persons seeking employment with it, does not, in any manner, tend to establish the fact that it gave to persons leaving its employment certificates of like character. For the purpose of establishing the existence of a usage or custom under which appellee was entitled to a clearance card, a number of witnesses were offered on the trial. The witness Baker had worked for the predecessor of the appellant road, but had never worked for appellant. At the time he quit its employ he had not received a clearance card, nor had he ever seen but one such card issued by the appellant road, and that by a master mechanic. Another witness (Bedell) had worked for appellant, but on retiring from its service had received no card, and apparently, from his testimony, was refused one. Still another witness (Shearer), offered by appellee, had never worked for appellant, but had worked for other companies, and testified that he did not know positively what custom or usage existed. The witness Hunt worked for appellant, and on retiring from its service, in 1894, asked for a clearance card, but did not get one. Shields, another witness, worked for appellant in 1891, and on retiring from its service received a letter of recommendation, which was introduced in evidence. The letter is purely personal in its character, and shows on its face it was written and intended for the witness, and was not a general form which would be given to other employees. This witness had never seen any other card or letter issued by the appellant except his own. He produced a number of letters of recommendation, or, as they might be termed, clearance cards, from other roads, which were admitted over the objection of the appellant, with the understanding the appellant road

should be connected with them in order to make them admissible, and that it should be shown they were issued by other roads in accordance with an understanding or agreement in which appellant took part. No such connection was made, however, and such letters issued by other roads were not admissible. For the purpose of proving the usage or custom on the part of the appellant road, therefore, the only evidence offered was one letter, purely personal in its character, and the statements of several witnesses that such a custom or usage existed, but without any apparent knowledge on which to make such statements. No other evidence was produced tending to show that appellant issued such cards or letters, or that it required them before employing its servants. A number of the witnesses above named, offered by the appellee, testified that on leaving the service of appellant they had received no such letters or cards. The positive and direct testimony of the superintendent of the appellant road—the person charged with the duty of issuing such clearance cards or letters of recommendation if any were to be issued—is that no custom or usage existed, and that it was of rare occurrence that an employee leaving its service received a letter of any character.

To establish a usage or custom, it is not sufficient to prove certain isolated instances. The usage must be positively established as a fact, and not left to be drawn, as a matter of inference, from transactions. 27 Am. & Eng. Enc. Law, p. 728. A usage which is to govern a question of right should be so certain, uniform, and notorious as probably to be known to and understood by the parties as entering into their contract (*United States v. Duval*, Gilpin, 356, Fed. Cas. No. 15,015), and cannot be proved by a single, isolated instance (*Dean v. Swoop*, 2 Binn.

effect that the employees of any and all said companies would not be employed by any of them without a clearance given by the railway company by which any employee was last employed, alleged that the defendant company refused to give the plaintiff employee such an instrument as would "enable him to obtain employment in the railroad business." The plaintiff insisted that the point for decision was whether it was lawful for all the employers in any line of industry to combine to punish a man who leaves their service during a strike by refusing him employment, unless his former master emancipates him by giving his consent to his employment. But the court held that no such question was presented by the pleadings; that the declaration did not charge that the railroad company refused to grant plaintiff a "clearance card," but merely alleged a refusal to give such an instrument as would "enable him to obtain employment in the railroad business;" and the court pointed out that the company was under no obligation to give such a document; thus impliedly admitting the 62 L. R. A.

duty to give a clearance card, which, however, in the language of CLEVELAND, C. C. & ST. L. R. CO. v. JENKINS, the court stated was in no sense a letter of recommendation, and in many cases might be of a form and character which the holder would hesitate and decline to present to any person to whom he was making application for employment. And therefore, there being no statement in the declaration that the company refused to grant the plaintiff a "clearance card" setting forth truthfully all the facts proper to be stated in a clearance card, it was held that the declaration failed to state a cause of action.

In *Thornton v. Suffolk Mfg. Co.* 10 Cush. 382 (*infra*, II. c.), it appears that there was an understanding among the various Lowell mills to refuse employment to those who could not present an honorable discharge from their last employer, but the court held that that made no difference in the employee's rights if he did not deserve an honorable discharge.

72. See also *Janney v. Boyd*, 30 Minn. 319, 15 N. W. 308; *Taylor v. Mueller*, 30 Minn. 343, 15 N. W. 413). So, also, it is held that particular instances of a certain practice in a bank do not establish a usage (*Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289), nor instances in one or two banks other than the one concerned in the alleged usage (*Chesapeake Bank v. Swain*, 29 Md. 501). In *Herring v. Skagg*, 73 Ala. 446, it was held that a custom is a fact, and is as capable of proof as any other fact; that it may be proved by evidence of facts and instances in which it has been acted upon, but is not proved by evidence that it was acted upon in a few particular instances of dealing, nor is such evidence admissible to establish its existence. It is apparent, therefore, that a custom or usage, to be binding, must be so uniform, long established, and generally acquiesced in, and so well known, as to induce the belief that parties contracted with reference to it, if nothing is stated to the contrary, and that the failure to conform to it would be an exception. *Bissell v. Ryan*, 23 Ill. 567; *Wilson v. Bauman*, 80 Ill. 493. A custom must be general and uniform. It must be certain, reasonable, and sufficiently ancient to afford the presumption that it is generally known (*Turner v. Dawson*, 50 Ill. 85), and must not be in opposition to any principle of general policy, nor inconsistent with the terms of the agreement between the parties or against the established principles of law. Besides this, it must be generally known and established, and so well settled and so uniformly acted upon as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to it and in conformity with it. *Turner v. Dawson*, 50 Ill. 85; *Packard v. Van Schoick*, 58 Ill. 79; *Papin v. Good-*

rich, 103 Ill. 86. If it should appear, therefore, from the evidence, as it does in this case, that the foregoing elements are not established, and only a few isolated instances are shown to prove a usage or custom, the court, as a matter of law, should have held that a usage or custom was not thereby established. The evidence must clearly show the rule as above stated, and that a failure to conform with such custom would be unusual.

At the close of the plaintiff's evidence the defendant moved the court to instruct the jury to find for the defendant, which motion was accompanied by an instruction. This motion was renewed at the close of all the evidence in the case. The legal question is therefore presented to this court whether or not there was, at the close of plaintiff's testimony, evidence tending to establish the material averment in the declaration necessary to be proved, and also whether or not, at the close of all the evidence, it was sufficient upon which to base a verdict if rendered. The rule in this regard is so well established that no citation of authorities is necessary. There was no evidence tending to show any general custom or usage existing on the appellant road and entered into between it and other roads, as alleged in the declaration. It is clear the evidence on that question was not sufficient to support a verdict, and the motion offered at the close of plaintiff's evidence, and renewed at the close of all the evidence, and accompanied by an instruction to find for the defendant, should have been allowed and the instruction given.

Complaint is also made of the first instruction given for appellee, which tells the jury that, under certain contingencies, "you should find for the plaintiff, and fix his damages at such sum as you think right, not

c. When a uniform custom to do so is shown.

It has been attempted in a few instances to establish an employer's liability for injuries resulting from his failure or refusal to give a character or clearance card, on the ground of the existence of a general custom or usage in that regard which became a part of the contract of employment in law, by implication, without expression, out of which arose the duty on the part of the employer, when such contractual relations were severed, to give a letter or clearance card for the purpose stated. But the distinction is clearly brought out in *Thorn-ton v. Suffolk Mfg. Co.* 10 Cush. 382, that an implied agreement so arising out of a general custom or usage obligates a master to give a certificate of good character only when the conduct of the operative has been such in all respects that it would be true. In this action, which was, in form on contract for the breach of an agreement, evidence was offered to show a custom that, if an employee faithfully performed her duties for at least twelve

months, at the expiration of that period, upon giving a fortnight's notice, she would be entitled to leave and to receive from her employers a "line" or honorable discharge, without which, on account of an understanding among the various Lowell mills, she could not obtain employment in any of them. The court, in sustaining a nonsuit, says: "The ground relied on is that, in consideration of services, the employer engages that, if the operative remains in the service a certain time, he would give her honorable discharge; or, in other words, that her service and conduct have been good and satisfactory. Were such a contract made in express terms, intended to be absolute, it seems to us that it would be bad in law, as plainly contrary to good morals and public policy. Such a discharge is a certificate of a fact; but if the fact is otherwise, if the conduct of the operative has not been satisfactory, it would be the certificate of a falsehood, tending to mislead, and not to inform other employers. . . . If an assurance of an employer, on engaging a servant, that at the end of

exceeding the amount claimed in the declaration." No reference is made to the evidence in the case. This form of instruction is erroneous, and has been frequently condemned by this court. *Chicago, R. I. & P. R. Co. v. Austin*, 69 Ill. 426; *Freeport v. Isbell*, 83 Ill. 440, 25 Am. Rep. 407. In the latter case, where an instruction concluded, "The jury should give the plaintiff such damages as they, under their oaths, can say will be a fair compensation for said injury, not exceeding, however, the sum of \$10,000, the amount claimed in the plaintiff's declaration,"—this court said: "The law required the jury to determine the liability of the defendant from the evidence, and from that alone; and an instruction which would permit them to enter into an open field of investigation cannot be sustained." The instruction was erroneous in not confining the jury to the evidence in considering their verdict.

The second instruction given for appellee is subject to the same criticism, and was also erroneous, and should not have been given without modification. Errors are also assigned as to the other of appellee's instructions, but it is not necessary in the condition of this record to discuss them.

It is also assigned as error by appellant that the letter of character or recommendation written by officials of other roads were improperly admitted in evidence against appellant. The specific objection made by appellant to this evidence was its incompetency unless appellant should be in some way connected with such letters; that it should be shown to have had knowledge and approval of their issuance, and be shown to have been a participant in a common plan or understanding that letters of such character should be given to discharged employees of such roads, and that such letters

be required as a condition precedent to employment. For no other purpose could these letters issued by officials of other roads be admitted as evidence against this particular appellant. If such a common understanding or conspiracy as charged in the declaration existed, and was unlawful, it was certainly necessary to in some manner connect appellant with it. This the appellee entirely failed to do, and the letters should not have been permitted to go to the jury.

In this case it is not shown, or even attempted to be shown, that appellee, at the time of his contract of employment with appellant, and as an incident of such employment, received any assurance that he would, at the time of his expiration of service, receive any clearance card or letter of recommendation from the appellant railroad. A rule in force on appellant's road, and known as "rule 13," was offered in evidence, which reads as follows: "If a conductor is taken off his run for any cause, he shall be granted a full investigation, hearing, and decision within five days, at which time he shall have the right to have another conductor of his own selection to appear and speak for him, and shall have the right to appeal from the decision of a special to the general officers of the road. If exonerated, he shall receive pay for time lost." Appellant contends, and properly so, that this rule had no application to appellee's case. It was meant and intended to apply to cases in which a conductor, for some violation or infraction of appellant's rules or reported improper conduct, should be suspended. In this case appellee had been indicted by the grand jury of Johnson county for an alleged violation of the criminal law of the state. The only proper vindication was by a *nolle* of those indictments, or an acquittal by a trial jury. Such could not reasonably oc-

the time he will give him a certificate of good character if he should then think him entitled to it, could in any respect be deemed a contract, and not the promise of an ordinary act of courtesy, it would be no breach of such contract to aver and prove that the servant, after the termination of the service, demanded such certificate and was refused it." And further, the court stated that the fact that, on account of the understanding among the various Lowell companies, the certificate of good character was of so much more importance than elsewhere made no difference in the servant's rights.

CLEVELAND, C. C. & ST. L. R. CO. v. JENKINS is also based upon the same theory of an implied contract arising out of a general custom or usage, and in the lower court, 70 Ill. App. 415, where it was successfully maintained, the court held that, where a usage exists to issue, on discharge, and demand the presentation before employment, of clearance cards, that usage becomes a part of the contract of employment by implication, out of which arises the duty, 62 L. R. A.

when the contractual relations are severed, to give a clearance card. This decision is perhaps not inconsistent with *Thornton v. Suffolk Mfg. Co.* 10 Cush. 382, *supra*, if a distinction is made between a clearance card and a certificate of good character, as indicated in CLEVELAND, C. C. & ST. L. R. CO. v. JENKINS, where it is stated that a clearance card is simply a letter, be it good, bad, or indifferent, given to an employee at the time of his discharge or end of service, showing the cause of such discharge or voluntary quitance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment." The reversal in CLEVELAND, C. C. & ST. L. R. CO. v. JENKINS of the lower-court decision seems to have been made on the ground that the general custom of issuing clearance cards was not sufficiently established, and the decision cannot, therefore, be deemed antagonistic to the doctrine that, a general custom or usage to issue clearance cards having been once established, employers must conform thereto.

cur in five days, nor could appellant, by its rule, fix any time. Its own investigation would stand for naught. The other provisions of the rule show clearly it has no application to this kind of a case. This rule could in no sense be said to constitute any part of the contract of employment, as it only appears to have been adopted in 1890, and appellee had been in the service of the company some six years or more before that time. There being no other evidence tending to show appellee was entitled to a clearance card as part of his contract of employment, his action could not be maintained on that ground.

Another rule said to have been in existence on appellant's road is averred in the declaration. No such rule appears in the record, however. A rule numbered 11 (presumably this rule) was offered to be introduced by plaintiff below in rebuttal, not for the purpose of showing the effect of the rule, but to contradict the statements of two witnesses of defendant who had been asked whether or not such a rule was in existence. From the record it would appear that the rule, if in force, applied to en-

gineers and brakemen, but not to conductors; and the court on this ground, or for the reason that the contradiction would be as to immaterial matter, refused to admit it. No cross errors are assigned by appellee upon the action of the court in so doing, but an examination of the record indicates the trial court committed no error in that respect. Had such a rule applicable to conductors, providing for the issuing of clearance cards, as alleged in the declaration, been offered and established as a part of plaintiff's case, a different question might have been presented for the consideration of this court. In the condition of this record, however, where no usage or custom was shown to exist under which appellee could recover, and no provision incident to his contract of employment imposing upon appellant the duty to issue a clearance card or certificate, his action must fail.

For the errors herein indicated, *the judgment of the Appellate Court for the Fourth District and the judgment of the Circuit Court of Wabash County are reversed, and the cause remanded.*

Hebner v. Great Northern R. Co. 78 Minn. 289, 80 N. W. 1128, was an action of libel brought by a discharged employee against a railway company on account of its manner of complying with his request for a "clearance card," which the court says, "It was also the custom of the company to issue, on the request of any person who had left its employ," etc. In regard to the nature of a clearance card, the court also says that "the real purpose of the service card is to assist men to obtain employment when going from one company to another, although such a card might prove a very serious obstacle to securing a new position when presented by a man discharged for cause, or supposed cause, because the reason for such discharge would be stated. It is also beyond question that such a card may or may not be shown by one seeking employment, for this is a matter optional with the holder."

It is said, *obiter*, in *Hundley v. Louisville & N. R. Co.* 105 Ky. 162, 48 S. W. 429: "Suppose it was the custom of the railroads, when an employee was discharged without cause, to give him a card or statement to that effect, and, if he did not have such a card or statement, he could not get employment with other railroad companies, then that custom would enter into every contract of employment; and, if a company wrongfully refused to give it to the discharged employee, and in consequence of which refusal he was injured, a cause of action would lie for the damages sustained. For such breach of duty the employee could maintain an action *ex contractu* or *ex delicto* at his option."

III. Legislation.

Legislation to compel a corporation to give to discharged employees the reasons of their discharge was held unconstitutional in *Wallace v. Georgia, C. & N. R. Co.* 94 Ga. 732, 22 S. E. 579, and an action founded thereon by a discharged L. R. A.

charged employee, for the recovery of \$5,000 as penalty fixed by the statute for noncompliance with its requirement, it was held, could not be supported. The court remarks: "A statute which undertakes to make it the duty of incorporated railroad, express, and telegraph companies to engage in correspondence of this sort with their discharged agents and employees, and which subjects them in each case to a heavy forfeiture, under the name of damages, for failing or refusing to do so, is violative of the general private right of silence enjoyed in this state by all persons, natural or artificial, from time immemorial, and is utterly void and of no effect. Liberty of speech and of writing is secured by the Constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred. Statements, or communications, oral or written, wanted for private information, cannot be coerced by mere legislative mandate at the will of one of the parties and against the will of the other."

In Indiana, Kansas, and Montana, however, similar legislation exists, without, so far as appears, having been criticized by the courts of those states.

In *Crall v. Toledo & O. C. R. Co.* 7 Ohio C. C. 132, a discharged railroad employee attempted to recover in a civil action against the company for a refusal, upon demand, to give a reason in writing for the discharge, under an act providing, among other things: "And if any employee is discharged he may, at any time within ten days after receiving a notice of his discharge, demand the reason of said discharge, and said railway or railroad company thereupon shall furnish said reason to said discharged employee in writing." But, it appearing that certain other acts were, in the same law, expressly specified as unlawful, and a penalty indicted therefor to be recovered in a civil action, and that the act nowhere de-

OHIO SUPREME COURT.

NEW YORK, CHICAGO, & ST. LOUIS
RAILROAD COMPANY, *Plff. in Err.*,

v.

Frank SCHAFFER.

(65 Ohio St. 414.)

*1. A master is under no legal obligation to give to his discharged servant a statement of his service, and whether or not it was satisfactory; and a discharged railroad employee cannot maintain an action for damages against the company which discharged him, for refusal to furnish him with a clearance or statement of the record of his service, although he may have been unable to obtain other employment in consequence of such refusal by the company.

2. It is the right of every person, natural or artificial, to employ or refuse to employ in his business whomsoever he may wish; and he cannot be called upon to answer for his judgment in that regard by the public or individuals, nor can the motives which prompt his action be considered. A

*Headnotes by the Court.

clared that the failure of the railway company to furnish the reason of the discharge should be unlawful, the court held that such failure was not an offense, in the light and sense of the act, which would constitute a cause of action.

By the merchant shipping act of 1894 (57 and 58 Vict.) chap. 60, §§ 128, 129, a ship master is required, under penalty, to give a discharged seaman a certificate of discharge specifying the period of service and time and place of discharge; and in some instances he is required to give a report of the conduct, character, and qualification of the discharged seaman, or expressly state in a prescribed form that he declines to do so.

Vallance v. Falle (1884) L. R. 13 Q. B. Div. 109, 53 L. J. Q. B. N. S. 459, 51 L. T. N. S. 158, 32 Week. Rep. 769, 5 Asp. Mar. L. Cas. 280, 48 J. P. 519, was an attempt to recover damages for the withholding of the certificate of discharge under the above statute; but it was held that, upon the true construction of the act, it could never have been intended that withholding the certificate would furnish the ground for an action; that the only remedy was by proceeding for the penalty specified.

IV. Summary.

Notwithstanding the few decisions on the question, there is no doubt that, at common law, a master is under no legal obligation to give a character to his servant. This rule stands unquestioned by text writers and decisions. The duty must arise, therefore, as the court observes in CLEVELAND, C. C. & ST. L. R. CO. v. JENKINS, by statute or express agreement, or by an implied agreement, such as one arising out of a general custom or usage. But even though there exists a uniform custom to give an honorable discharge to an employee who has faithfully performed his duties, this will not obligate the 62 L. R. A.

railroad company may lawfully refuse to continue in its employ a person who has engaged in a strike affecting its interests, or who has shown himself to be negligent, incompetent, inefficient, or dishonest.

(January 21, 1902.)

ERROR to the Circuit Court for Huron County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for refusal to give him a clearance. *Reversed.*

Statement by Davis, J.:

In the second cause of action the plaintiff, in substance, alleges that prior to the 1st day of January, 1895, he was in the employ of the defendant company, performing the work of a brakeman, at the rate of \$60 per month, and that on or about the latter part of December, 1894, while in the employ of the defendant company, he applied for and was granted a leave of absence for about thirty days, and that when he reported for

master to do so in cases where it is, in his opinion, undeserved. A distinction should here be made between a "character" or "recommend" and a "clearance card." The former, according to the generally accepted meaning of the term, is a document containing words of approval of and satisfaction with the employee's ability, conduct, or character, while a clearance card, to refer again to CLEVELAND, C. C. & ST. L. R. CO. v. JENKINS, "is simply a letter, be it good, bad, or indifferent, given to an employee at the time of his discharge or end of service, showing the cause of such discharge or voluntary quitance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment." Thus, it must be admitted that there is good reason for the doctrine, which, however, has not been much more than impliedly advocated, that, a uniform custom to issue clearance cards once being established, the master must issue them to employees who quit or are discharged, since out of the uniform custom arises the implied agreement to do so, which, without expression, becomes a part of the contract of service.

The doctrine that railroad or other corporations of that nature may, in the absence of express or such an implied agreement as is above referred to, combine together to refuse, in their discretion, or in certain agreed instances, to issue clearance cards to their employees, and then to refuse to employ men who cannot show a clearance card, presents a harsh situation to the employee; but it has been evolved from the common-law rule that the master is under no legal obligation to give his servant a character, and that what is lawful for one person to do, it is not unlawful for several to agree together to do, and from the further undoubted right of an employer to employ, or refuse to employ, whomsoever he may desire. However, a great combination of railroad corporations,

work again, on or about the 1st day of February, 1895, he was informed by the defendant company that he had been discharged; and he avers that he was discharged from the service of the defendant without any just cause whatever. He says that during the year 1894 there was on many of the railroads in the United States a strike, which is commonly known as the "A. R. U. strike," and that at the time of this strike (that is, in the summer of 1894) this plaintiff was working for the defendant company as a brakeman in the yards at Bellevue, and took no part in the strike; that he continued to work for the defendant up to the latter part of December, 1894, when he was granted a leave of absence by the defendant. He says that prior to the 6th of August, 1894, the defendant entered into a conspiracy, agreement, and understanding with certain other railroad companies having lines of road running into the city of Chicago, and also other railroad companies, the names of which are unknown to this plaintiff, that they would furnish to each other information as to all the employees who had committed offenses, or were charged with having committed offenses, or who had quit work during the said strike, and also as to all their employees who were members of the American Railway Union, and that said companies entered into the further conspiracy, agreement, and understanding that such employees of any and all of said companies would not be employed by any of the said companies without the release and consent from the railroad company by which the employee was last employed, commonly called by railroad men a "clearance." He avers that the object and purpose of such alleged conspiracy and agreement was to maliciously and wilfully interfere with such employees who had previously terminated their employment with, or been discharged from the employment of,

either of said companies. Plaintiff further says that he had worked for the defendant company prior to the time of his last employment as above stated, and that when he left that employment he was given a certificate or a statement of his service for the company. There are other allegations in the petition with regard to a custom of the defendant to grant such letters, but these are omitted for the reason that they are not material in the present contention. Plaintiff says that since the conspiracy aforesaid it is impossible for anyone to secure employment unless he first presents the consent of the company for whom he last worked, or a clearance card showing that the applicant was in no way connected with the said strike; that he has repeatedly asked the officers of said company for such letters or clearance or consent, and that the company has failed and refused to furnish him therewith, and that, at the time he so requested the defendant, the defendant promised and agreed to send his record to anyone employing or desiring to employ the defendant, but the plaintiff says that the defendant has failed and refused to furnish the record; that since his discharge he has made application for employment to various railroad companies, which have refused to consider his application unless he would first bring the consent of the defendant, or a clearance, as above mentioned. He further says that the defendant wilfully and maliciously, and in pursuance of said conspiracy, agreement, and understanding, and with intent wilfully and maliciously to prevent the plaintiff from securing employment, refused to give the plaintiff the said letters, consent, or clearance that would enable him to secure employment in the railroad business, and because thereof, and for no other cause, he has been denied the right to contract for or take employment of any of the companies

for instance, is thus furnished with such overwhelming power against its employees that it is not improbable that it will be deemed advisable to curb the extent thereof somewhat by the doctrine advanced in the charge to the jury in *Mattison v. Lake Shore & M. S. R. Co.* 3 Ohio N. P. 190 (*supra*, II. b), that if the combination is entered into, not only for the purpose of enabling the different corporations to conduct their business, but to punish and prevent discharged employees from obtaining other employment, then the motive is malicious and unjustifiable in law.

Legislation to require a corporation to give, upon demand, its reasons for discharging employees, has been declared unconstitutional in Georgia (*supra*, III.) on the ground that it is violative of the general private right of silence, which, as a correlative of liberty of speech and writing, is secured by the Constitution; but in at least Indiana, Kansas, and Montana similar legislation stands uncriticized by the courts of those states. In Ohio, however, 62 L. R. A.

er, a similar statute was rendered ineffective by the construction put upon it by the court.

The Georgia decision and reasons upon which it is based cannot be lightly passed over, for it seems to be the one element needed to round out and make all sides of this question symmetrical and consistent, and bring into stronger relief the fact that it is purely, from the legal standpoint, a matter of contract, express or implied, and not the subject of legislative interference, or even a matter in which courts can grant relief, unless, perhaps, in those cases where the element of malice appears; and as to this question, whether malice can render unlawful that which is otherwise lawful, see note, *Effect of bad motive to make actionable what would otherwise not be*, to *Passaic Print Works v. Ely & W. Dry-Goods Co.* ante, 673.

In its more complex forms, this whole question is also more or less closely connected with that of blacklisting employees, the decisions in regard to which are collected under a separate note.

of the United States, and been prevented from obtaining employment and supporting himself by his trade or occupation. For all of which he claims to have been damaged in the sum of \$5,000, and asks judgment therefor. The first cause of action stated in the plaintiff's second amended petition was demurred to for the reason that the same did not state facts sufficient to constitute a cause of action in favor of the plaintiff, which demurrer was overruled. The defendant answered, specially denying the material allegations of the petition, except that during the summer of 1894 there was a strike on certain railroad lines, and that the plaintiff was not engaged in the strike, and averring that the plaintiff was dismissed from the defendant's service for a just cause and after proper investigation. Plaintiff replied, denying that he was discharged for just cause and after investigation. On the trial the issues thus made up by the pleadings were modified by the court when the case was submitted to the jury, in this: First, that the first cause of action was withdrawn from the jury with the consent of the plaintiff's counsel; second, averments contained in the second amended petition, to the effect that it was customary for the defendant to grant letters giving a statement of services rendered, were taken from the consideration of the jury by the charge of the court, because there was not evidence to establish any such custom. It appears in the testimony that the plaintiff had been twice suspended while in the service of the defendant company, namely, in March and in May, 1894, for breach of duty as an employee, and that on the 26th day of December, 1894, and just prior to the time that the leave of absence was granted to the plaintiff, there had been a collision of the train on which the plaintiff was a brakeman in the switching yards at Bellevue, and which it was claimed was occasioned by the negligence of the plaintiff, Schaffer, and that on the following day (the 27th day of December) a passenger train ran through a misplaced switch in the Bellevue yards, for the condition of which the plaintiff was claimed to be responsible. The jury returned a verdict in favor of the plaintiff in the sum of \$5,000, on which judgment was entered by the trial court. The circuit court affirmed the judgment of the common pleas court, and this proceeding is prosecuted to reverse the judgments of the two lower courts.

Messrs. John H. Clarke and C. P. & L. Wickham, for plaintiff in error:

The law of master and servant must be changed to the point of revolution before courts will enter upon an inquiry in case of the discharge of a servant to determine 62 L. R. A.

whether it was just or not; assuredly this is true where there is no claim of fraudulent conduct in the discharge, and where the claim for damages springs from silence, not from such misrepresentation as amounts to slander or libel.

Busby v. P. C. & St. L. R. Co. 41 Ohio L. J. 119; *Wallace v. Georgia, C. & N. R. Co.* 94 Ga. 732, 22 S. E. 579; *Cleveland, C. O. & St. L. R. Co. v. Jenkins*, 174 Ill. 398, *ante*, 922, 51 N. E. 811.

There was clearly no obligation upon the defendant, independent of the agreement, or conspiracy complained of, to give to the plaintiff a letter or clearance when he was discharged.

Cleveland, C. O. & St. L. R. Co. v. Jenkins, 174 Ill. 398, *ante* 922, 51 N. E. 811.

If the plaintiff had no legal claim to be employed by any of the railroad companies uniting in the agreement complained of, what legal right of his was invaded by the making of the agreement complained of? And if no legal right of his is invaded he cannot be entitled to damages.

Letts v. Kessler, 54 Ohio St. 73, 40 L. R. A. 177, 42 N. E. 765; *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 369, 23 Am. Rep. 751; *Cooley, Torts*, 2d ed. p. 332; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Dels v. Winfree*, 80 Tex. 400, 16 S. W. 111; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, *sub nom. Bohn Mfg. Co. v. Northwestern Lumbermen's Assn.* 21 L. R. A. 337, 55 N. W. 1119; *Vegelahn v. Gunther*, 167 Mass. 92, 35 L. R. A. 722, 44 N. E. 1077; *Macauley Bros. v. Tierney*, 19 R. I. 255, 37 L. R. A. 435, 33 Atl. 1; *Clemmitt v. Watson*, 14 Ind. App. 38, 42 N. E. 367; *Allen v. Flood* [1898] A. C. 1; *Wallace v. Georgia, C. & N. R. Co.* 94 Ga. 732, 22 S. E. 579.

Messrs. Jesse Vickery and Willis Vickery, for defendant in error:

The right to labor for the purpose of earning the necessities of life ought to be vouchsafed to every man, and anything that interferes with that right ought not to be tolerated in a court of justice.

A black-list is part of the paraphernalia of a strike. It may be said to represent the malignant hate and revenge of the parties resorting to it. In its purposes and effects it is closely allied to a boycott. In fact it is sometimes resorted to in aid of a boycott. A "black-list" is defined to be "a list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list, or those among whom it is intended to circulate."

Cogley, Strikes & Lockouts, pp. 293, 294.

When an employee voluntarily quits the service of his employer, or is dismissed therefrom, it is a criminal conspiracy for

his former coemployees, or the employees of some other employer, to combine to prevent, or attempt to prevent, him from obtaining employment elsewhere.

Id. p. 295.

Employees have no right to combine to infringe any of the legal rights of the employees, or to oppress them.

Id. p. 301, § 18; *Mattison v. Lake Shore & M. S. R. Co.* 2 Ohio N. P. 276; *Doremus v. Hennessy*, 176 Ill. 608, 43 L. R. A. 797, 52 N. E. 924, 54 N. E. 524; *Lucke v. Clothing Cutters' & T. Assembly, No. 7507, K. of L.* 77 Md. 396, 19 L. R. A. 408, 26 Atl. 503; *Hundley v. Louisville & N. R. Co.* 105 Ky. 162, 48 S. W. 429; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890.

An act lawful in an individual can be the subject of civil conspiracy when done in concert, when there is direct intention that injury shall result from it, or when the object is to benefit the conspirators to the prejudice of the public or to the oppression of individuals, and when such prejudice and oppression are the natural and necessary consequence.

Cote v. Murphy, 159 Pa. 420, 23 L. R. A. 135, 28 Atl. 190.

If the plaintiff engaged in a lawful business in earning his livelihood by the patronage of others, it is unlawful for a railroad corporation to so use its power of employing and discharging persons seeking employment from it as to cause those who are dealing with the plaintiff to desist from doing so, or to prevent those who are inclined to deal with the plaintiff from doing so.

Graham v. St. Charles Street R. Co. 47 La. Ann. 214, 27 L. R. A. 416, 16 So. 806.

The absolute right of a person to refuse to have business relations with any person whomsoever, whether the refusal is based upon reason or is the result of whim, caprice, prejudice, or malice, must be limited to the individual action of the party who asserts the right.

Delz v. Winfree, 80 Tex. 400, 16 S. W. 111; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Van Horn v. Van Horn*, 52 N. J. L. 284, 10 L. R. A. 184, 20 Atl. 485; *Casey v. Cincinnati Typographical Union*, 12 L. R. A. 193, 45 Fed. 135; *Chiple v. Atkinson*, 23 Fla. 206, 1 So. 934.

Although a conspiracy may not be indictable under the statute, a combination to injure the public or individuals is *per se* wrongful, and the fact that it is not made a statutory offense does not change the civil consequences.

Longshore Printing Co. v. Howell, 26 Or. 527, 28 L. R. A. 464, 38 Pac. 547; *Greenhood*, Pub. Pol. 651.

The right to labor is a property right.

Froer v. People, 141 Ill. 171, 16 L. R. A. 62 L. R. A.

492, 31 N. E. 395; *Ritchie v. People*, 155 Ill. 104, 29 L. R. A. 79, 40 N. E. 454; *Alleyer v. Louisiana*, 165 U. S. 585-589, 41 L. ed. 834-836, 17 Sup. Ct. Rep. 427.

There was sufficient evidence to show that a conspiracy had been formed substantially as alleged in the petition. Any act or declaration made by any of the conspirators in the furtherance of that conspiracy was competent to be introduced in evidence.

Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898; *State v. Winner*, 17 Kan. 298; *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286; 3 Grenl. Ev. § 93; *Hogue v. McClinck*, 76 Ind. 205; *Smith v. Freeman*, 71 Ind. 85; *Smith v. People*, 25 Ill. 21, 76 Am. Dec. 780; *Buffalo Lubricating Oil Co. v. Standard Oil Co.* 106 N. Y. 669, 12 N. E. 825; *American Fur Co. v. United States*, 2 Pet. 365, 7 L. ed. 453; 1 Taylor, Ev. 486.

Davis, J., delivered the opinion of the court:

It is important to note in this case, as was stated by the trial judge in his charge to the jury, that there was no obligation, by custom or express agreement, to give to the plaintiff a clearance. If, therefore, an obligation to furnish a clearance existed at all, it must have arisen by implication of law; and the whole contention is whether the law imposed such an obligation upon the defendant, under the facts disclosed in this record. The plaintiff alleges that he was unable to obtain employment after his discharge by the defendant, by reason of the failure and refusal of the defendant to furnish, on request, the plaintiff's record of service, or a consent and clearance. As there is no testimony in regard to "consent," that expression of the pleader may be disregarded. The term "clearance" is mentioned in the amended petition as a "card showing that the applicant was in no way connected with said strike;" that is, with the railroad strike in 1894, known as the "A. R. U. strike." The plaintiff, when on the witness stand, stated that "a clearance is a paper showing the place of employment, kind of employment, the time, and whether the service was satisfactory or not. . . . If it was satisfactory, it would be a clearance; it would enable a man to go and show to a railroad company that it was all right; and, if his work was unsatisfactory, it would be otherwise,—he had best not show it." The trial judge charging the jury, said: "A statement of his record with his last employer, as the plaintiff claims, in brief, was a paper or clearance that it was agreed should be required. It is claimed that this was required so that a railroad company might know whether or not he was engaged in the A. R. U. strike." So that the gist of the com-

plaint is that the plaintiff was prevented from obtaining employment by the malicious refusal of the defendant to furnish the plaintiff with "a statement of his record with his last employer." Upon the first offer of testimony by the plaintiff, the defendant objected to the introduction of any testimony in the case, on the ground that there was no case made in the pleadings such as would authorize any recovery. The court overruled the objection, reserving the decision of the question whether the plaintiff had pleaded a good cause of action until the testimony was all in. In submitting the case to the jury, the court charged, in substance, that, if the defendant agreed, combined, or conspired with other railroad companies, that neither they nor any of them would employ any man who did not furnish a clearance (that is, a statement of his record from his former employer), and if the defendant, in accordance with such agreement, combination, or conspiracy, refused to furnish such statement of his record, with intent to prevent the plaintiff from obtaining employment from any or all of said railroad companies, then the plaintiff may recover. This instruction to the jury embodies the plaintiff's theory of his case and, if it is not sound law, the plaintiff was not entitled to a judgment, whatever may have been the findings of the jury upon the issues of fact which were submitted to them.

Recurring to the second amended petition, upon which the case was tried, it appears that it is not alleged that the defendant agreed or conspired with other railroad companies to refuse to give to the plaintiff or to any other discharged employee a statement of his record, nor is there a scintilla of proof of such a combination; but, on the contrary the distinct claim is that such refusal was the individual, malicious act of the defendant. It is the undoubted and unabridged natural right of every individual not to employ, or to refuse to employ, whomsoever he may wish, and he cannot be called upon to answer to the public or to individuals for his judgment. Nor can the motives which prompt his action be considered. In general terms, such right is as much inherent in corporate bodies as in natural persons. But whatever one person may lawfully do, two or more persons may join in doing. There can be no such thing as a conspiracy to do a lawful thing, unless by unlawful means. If one railroad company may lawfully refuse to continue in its employ a person who has been engaged in a war upon its interests, called a "strike," or who has shown himself to be negligent, incompetent, inefficient, or dishonest, there does not appear to be any good reason why a number of railroad companies might not agree among

themselves to not employ such a person. Indeed, there are obvious reasons, public and private, why they should do so. For example, it would be very inconsistent and unjust if, while holding railroad companies to strict accountability for the negligence of their servants, we should restrict them in the natural right to protect themselves in the matter of the selection of their employees. That such a combination or agreement may be lawfully made and executed is held in the following well-considered cases: *Macauley Bros. v. Tierney*, 19 R. I. 255, 37 L. R. A. 455, 33 Atl. 1; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, *sub nom. Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.* 21 L. R. A. 337, 55 N. W. 1119; *Brewster v. C. Miller's Sons Co.* 101 Ky. 368, 38 L. R. A. 505, 41 S. W. 301; *Deltz v. Winfree*, 80 Tex. 400, 16 S. W. 111. And see *Cooley, Torts*, 2d ed. 329. If, therefore, the jury found the affirmative of the issue of fact submitted,—whether the defendant combined with other companies in an agreement not to employ any person who did not furnish a statement of his record with his former employer,—it would afford no basis for recovery, unless it should appear that this agreement which is *prima facie* valid, was brought about by some illegal act of the defendant. If the defendant, by fraud, falsehood, or force, had brought about a refusal to employ the plaintiff, it would have committed a positive wrong against the plaintiff, which would have been actionable. Of this, however, there is not a scintilla of proof. But an agreement to tell the truth about the plaintiff, or a refusal to say anything about him, would not make an otherwise legal concert of action an illegal one, and authorize a recovery against the defendant. Says Field, Ch. J., in *Vegeahn v. Guntner*, 107 Mass. 103, 35 L. R. A. 722, 44 N. E. 1079: "I am not convinced that to persuade one man not to enter into the employment of another, by telling the truth to him about such other person and his business, is actionable at common law, whatever the motive might be." The supreme court of Georgia, in passing upon the constitutionality of a statute which required certain classes of corporations to communicate to their discharged employees the reasons for discharge, under heavy penalty, in the name of "damages," said: "A statute which undertakes to make it the duty of incorporated railroad, express, and telegraph companies to engage in correspondence of this sort with their discharged agents and employees, and which subjects them in each case to a heavy forfeiture, under the name of damages, for failing or refusing to do so, is violative of the general private right of silence enjoyed in this state by all persons, natural or artificial, from

time immemorial, and is utterly void and of no effect. Liberty of speech and of writing is secured by the Constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred. Statements or communications, oral or written, wanted for private information, cannot be coerced by mere legislative mandate at the will of one of the parties and against the will of the other." *Wallace v. Georgia, C. & N. R. Co.* 94 Ga. 732, 22 S. E. 579.

The theory of the circuit court that silence, or refusal to render a statement on request, is in the nature of a slander, and, if its effect is to prevent the person from obtaining employment, it is an actionable wrong, is untenable. As stated at the outset, there was between these parties no contract for a statement, and there is no statute in Ohio requiring it. Indeed, it is doubtful whether one could be made that would be valid. *Wallace v. Georgia, C. & N. R. Co.* 94 Ga. 732, 22 S. E. 579. It is conclusively shown in *Cleveland, C. O. & St. L. R. Co. v. Jenkins*, 174 Ill. 402, 405, ante, 922, 51 N. E. 811, that no such duty is imposed on the employer by the common law. For convenience of reference, some of the authorities there cited are quoted here: "On examination it will be perceived that this right of an ex-employer to give, as it is termed, a character to his ex-employee, is nothing more than a consequence of the right to communicate one's belief. . . . No one is under any obligation to make such a communication. He does not owe it as a duty either to the employer or the employee to make any communication on the subject." *Townshend, Slander & Libel*, 4th ed. 426. "It is not legally compulsory on a master or mistress to give a discharged servant any character, it matters not how much a servant is entitled to character in fairness, or how cruel the refusal might be." 14 Am. & Eng. Enc. Law, p. 799. "It is clear, however, that, in the absence of any specific agreement to that effect, there is no legal obligation binding a person who has retained another as a servant to give that person any character at all on dismissal, and that no action will lie against him for refusing to do so." *Smith, Mast. & S. Text-Book* ed. 380, 381. "The master is under no legal obligation to give a testimonial of character to his servant." 2 *Parsons, Contr.* *43, *44.

Without pursuing this discussion further, it may be said that the views of the courts below respecting the law governing this case, and as given in the charge to the jury, were entirely wrong, and that upon the facts which the jury were authorized to find upon the issues submitted to them, and which 62 L. K. A.

they are presumed to have found, the judgment ought to have been for the defendant. *Reversed*, and judgment for defendant.

Burket, Spear, and Shauck, JJ., concur.

Minshall, Ch. J., concurring specially:

I concur in the judgment, and the syllabus as framed, but do not concur in the view expressed in the opinion that companies may enter into an agreement among themselves not to employ persons who have engaged in what is known as a "strike." Such an agreement is against public policy, as tending to encourage idleness and cause poverty among workmen, by depriving them of the means of earning a livelihood for themselves and their families. Each company should be at liberty to employ such persons as, in its judgment, may seem best, unrestrained by any agreement with other companies. A particular company may be disposed to employ persons, although they may have been engaged in a strike, and would do so but for the fact that it is restrained by its agreement with other companies from doing so. It seems to me that such an agreement is clearly against public policy, and should not be recognized by the courts. To do so would, in effect, make engaging in a strike an offense punishable by exclusion from employment. The reason I concur in the judgment and syllabus is, I fail to discern from the record that there was any evidence tending to show that the defendant had entered into an agreement with other companies not to employ persons who had been engaged in the railroad strike of 1894. All it did was to refuse to give the plaintiff a "clearance" when requested. This it might reasonably do, for reasons stated in the opinion.

Rehearing denied.

Neil OVERHOLSER, *Plff. in Err.*,
v.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.

(68 Ohio St. 236.)

*1. The National Home for Disabled Volunteer Soldiers is a corporation created by Congress for the purpose of performing an appropriate and constitutional func-

*Headnotes by the COURT.

NOTE.—As to the similar question of nature of incorporated institutions belonging to the state, see note to *State ex rel. Little v. Board of Regents*, 29 L. R. A. 378; also *Lane v. Minnesota State Agri. Soc.* 29 L. R. A. 708; *Sterling v.*

tion of the Federal government, and for national purposes only; and as such it is a part of the government of the United States, and cannot be sued in an action sounding in tort.

2. The grant of power to sue and be sued at law and in equity applies to such matters only as are within the scope of the other corporate powers of the defendant, and it does not authorize such corporation to be sued for a tort.

(April 28, 1903.)

ERROR to the Circuit Court for Montgomery County to review a judgment reversing a judgment of the Court of Common Pleas in plaintiff's favor in an action brought to recover damages for injuries to plaintiff's property, which were alleged to have been caused by water and sewage wrongfully discharged thereon by the defendant. *Affirmed.*

Statement by **Davis, J.:**

This action was begun by a petition in the court of common pleas of Montgomery county, of which the following is a copy: "The plaintiff, Neil Overholser, says that the defendant, the National Home for Disabled Volunteer Soldiers, is a corporation duly incorporated and organized under the laws of the United States, under § 4825, and the following sections of chapter 3, title 59 of the Revised Statutes of the United States. Said corporation owns and controls, under said laws, a large body of land, located in Jefferson township, Montgomery county, Ohio, covered with barracks, dwellings, hospitals, gas, and other manufactories, with all the necessary and convenient accommodations for the support of over 5,000 persons in what is known as the 'Central Branch of the National Soldiers' Home,' and has possession of about 700 acres of land, the management and control of over 5,000 inmates, and all the machinery, manufacturing, and general apparatus of said institution, including sewerage. The plaintiff says that upon said land the defendant has constructed, for the use of said home, a number of tanks in which it is accustomed to keep in storage a large quantity of crude oil for use for lighting, heating, and manufacturing purposes; that it has also constructed upon said grounds a number of artificial lakes or reservoirs, in which it has collected large bodies of water, not naturally subject to be collected upon said grounds; that, among other things, said home owns and controls and manages a large hospital, in which there are continually under treatment a large number

of the inmates of said institution, from which a large quantity of sewerage results, which is carried away and disposed of by said defendant. The plaintiff says that he is the lessee of a tract of land, comprising about 12 acres, located partly in Dayton, Ohio, and partly in Harrison Township, Montgomery county, Ohio, at the corporation line of said city, and between it and the said Central Branch of the National Soldiers' Home; that a creek or branch, sometimes known as 'Dry Hollow,' leads down from the land of said defendant, which is located upon an elevation above that so leased by plaintiff, to and across the land so leased. On the 4th day of June, 1896, the lands so leased by the plaintiff were all in a high state of cultivation, he having planted the same in garden truck of various kinds, and devoted a great deal of care and attention to the same, so that all of the crops growing thereon were in good, sound, healthy condition, many of same being almost ready for market. On that day, through the negligence of the employees of the defendant, and without any fault or contributory negligence on the part of the plaintiff, a large quantity of water which had been artificially collected by the defendant in one or more of the lakes aforesaid was, without right so to do on the part of the defendant, discharged into the said Dry Hollow, and precipitated in a flood upon the lands so leased by the plaintiff. At the same time, through the negligence of the defendant, without any right on its part so to do, without any fault or neglect on the part of the plaintiff, a large quantity of oil was discharged from the cisterns and reservoirs in which the defendant had collected the same, and in addition thereto a large quantity of sewerage, consisting of vile, noxious, and foul-smelling substances, arising from said hospital and the use of same by defendant, were carried down and collected by it in artificial sewers, and all of said substances were discharged by the defendant into the said Dry Hollow, and, together with and by means of said volume of water, were carried down and lodged and discharged upon the lands so leased by the plaintiff as aforesaid. As a result, more than 6 acres of his lands were wholly submerged, and after the subsidence of the water the foul substances aforesaid were left and deposited thereon in such a way and to such an extent that a large part of his crops, consisting of potatoes, red beets, turnips, cucumbers, beans, and peas, etc., were utterly and wholly destroyed, and

the remainder were so soaked and permeated with the foul substances aforesaid as to be rendered utterly unfit for market or for use in any way. The plaintiff says that the defendant, having undertaken to collect the water, oil, and other substances on said ground, was bound to so restrain and control the same as not to permit their escape to the damage of the plaintiff. The plaintiff says that he has been damaged by reason of the premises in the sum of \$300, for which, with interest, he asks judgment."

Defendant answered as follows: "Said defendant admits its incorporation, that it owns and controls the real estate (over 500 acres) described in plaintiff's petition, and the averments as to the number of inmates cared for by defendant. The tanks and artificial bodies of water are located on the real estate as described in plaintiff's petition. Admits the ownership of the real estate in plaintiff as set out in plaintiff's petition. Denies each and every other allegation in said petition contained. Wherefore, prays to be dismissed for its costs herein."

The trial in the court of common pleas resulted in a verdict for the plaintiff. A motion for a new trial was made and overruled, and a bill of exceptions taken, and judgment on the verdict for plaintiff. On petition in error in the circuit court, the judgment of the court of common pleas was reversed, as follows: "This day came on the above cause for hearing upon the petition in error, and was argued by counsel. Upon consideration of the same, the court finds there was error in the charge of the court as to the degree of care required of the plaintiff in error; also in refusing to charge as requested by the plaintiff in error, in special charge No. 10. The court further being of the opinion that, upon the pleadings and the facts in the case, there was no liability upon the part of the plaintiff in error, it being part of the government of the United States, it is ordered that the judgment rendered be reversed, and that the petition of the plaintiff in error be dismissed at the cost of defendant in error, and that this cause be remanded to the court of common pleas for execution. To all of which findings, and to which judgment and order, the above-named defendant in error, Neil Overholser, by his attorneys, excepts."

To reverse this judgment of the circuit court, a petition in error is filed in this court. Among the assignments of error is the following: "Said circuit court erred in finding that the defendant in error is part of the government of the United States, and that for this reason there was no liability upon its part to the plaintiff in error."

62 L. R. A.

Messrs. Young & Young, for plaintiff in error:

The home is subject to the jurisdiction of the state courts.

Re O'Connor, 37 Wis. 379, 19 Am. Rep. 765; *Renner v. Bennett*, 21 Ohio St. 431.

The petition states a cause of action for which the home is liable to be sued.

Anthony v. Adams, 1 Met. 284; *Laurence v. Fairhaven*, 5 Gray, 110; *Perry v. Worcester*, 6 Gray, 544, 66 Am. Dec. 431; *Parker v. Lowell*, 11 Gray, 353; *Wheeler v. Worcester*, 10 Allen, 591; *Proprietors of Locks & Canals v. Lowell*, 7 Gray, 223; *Hildreth v. Lowell*, 11 Gray, 345; *Haskell v. New Bedford*, 108 Mass. 208; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Hannon v. St. Louis County*, 62 Mo. 313; *Chapin v. Holyoke Y. M. C. A.* 165 Mass. 280, 42 N. E. 1130; *Glarin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675; *Donaldson v. General Public Hospital*, 30 N. B. 279; *Levingston v. Lurgan Union, Ir. Rep.* 2 Cl. 202; *Mersey Docks & Harbour Board v. Gibbs*, L. R. 1 H. L. 93, 11 H. L. Cas. 686.

Messrs. McMahon & McMahon, for defendant in error:

The national home is a mere branch of the government, to which is confided the care of its disabled soldiers.

Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397; *Renner v. Bennett*, 21 Ohio St. 431.

The United States has not consented to be liable to suits founded on torts for wrongs done by its officers, though in the discharge of their official duties.

Belknap v. Schild, 161 U. S. 10-17, 40 L. ed. 599-601, 16 Sup. Ct. Rep. 443.

The remedy is against the officer, who must respond, in proper cases, out of his private means.

Conwell v. Voorhees, 13 Ohio, 524, 42 Am. Dec. 206.

A marked distinction has been recognized between municipalities and other quasi corporations in liability for torts or mere acts of negligence of officers or employees.

Western College of Homeopathic Medicine v. Cleveland, 12 Ohio St. 375; *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 363; *Springfield v. Spence*, 39 Ohio St. 668; *Robinson v. Greenville*, 42 Ohio St. 629, 51 Am. Rep. 857; *Frederick v. Columbus*, 58 Ohio St. 538, 51 N. E. 35.

Other classes of corporations—with full power to sue and liability to be sued—have also been held exempt in Ohio.

Hamilton County v. Mighels, 7 Ohio St. 119; *Grimwood v. Summit County*, 23 Ohio St. 600; *Finch v. Board of Education*, 30

Ohio St. 37, 27 Am. Rep. 414; *Conwell v. Voorhees*, 13 Ohio, 524, 42 Am. Dec. 206; *Dunn v. Brown County Agri. Soc.* 46 Ohio St. 93, 1 L. R. A. 754, 18 N. E. 496.

The decisions in other states are in harmony with the rule in Ohio.

Williamson v. Louisville Industrial School, 95 Ky. 251, 23 L. R. A. 200, 24 S. W. 1065; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *Benton v. Boston City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Hearn v. Waterbury Hospital*, 66 Conn. 98, 31 L. R. A. 224, 33 Atl. 595.

Davis, J., delivered the opinion of the court:

The controlling question in this case is whether the defendant can be sued for a tort. It is a well-established principle in our jurisprudence that no suit can be maintained against the United States, or against its property, in any court, without express authority of Congress. In some of the cases it has been held that, for the purposes of jurisdiction, there is no distinction between suits against the government directly, and suits against its property. *Stanley v. Schwalby*, 147 U. S. 508, 37 L. ed. 259, 13 Sup. Ct. Rep. 418; *Stanley v. Schwalby*, 162 U. S. 255, 269, 270, 40 L. ed. 960, 965, 16 Sup. Ct. Rep. 754. The defendant is admitted to be a corporation. Territorially, it is within the jurisdiction of the state of Ohio; but, by the act of Congress ceding that jurisdiction, it is provided that nothing contained in that act shall be construed to impair the powers and rights in and over said territory theretofore conferred upon the board of managers of the National Asylum for Disabled Volunteer Soldiers. These powers and rights were conferred upon the President of the United States, the Secretary of War, the Chief Justice, and nine others chosen from time to time by Congress, constituting "a board of managers of an establishment for the care and relief of the disabled volunteers of the United States Army, to be known by the name and style of 'The National Home for Disabled Volunteer Soldiers,' and have perpetual succession, with powers to take, hold, and convey real and personal property, establish a common seal, and to sue and be sued in courts of law and equity; and to make by-laws, rules, and regulations, not inconsistent with law, for carrying on the business and government of the home, and to affix penalties thereto." Congress reserved the right to at any time amend, alter, or repeal the laws relating to the National Home for Disabled Volunteer
62 L. R. A.

Soldiers. This eleemosynary corporation, as it has already been denominated by this court (*Renner v. Bennett*, 21 Ohio St. 442), therefore remains in all respects, as it was originally, an institution of the government of the United States for the administration of a charity of the United States. It continues to be, as it always has been, maintained by the funds of the government of the United States. All of the property held in its name was paid for by the United States; and that it is performing an appropriate and constitutional function of the general government nobody doubts, for at this time it is too late to question the power of Congress to create corporations for such purposes. *Osborn v. Bank of United States*, 9 Wheat. 738, 859, 872, 6 L. ed. 204, 233, 236; *M'Culloch v. Maryland*, 4 Wheat. 316, 411, 422, 4 L. ed. 579, 602, 605; *Luxton v. North River Bridge Co.* 153 U. S. 529, 38 L. ed. 810, 14 Sup. Ct. Rep. 891. But, as was remarked by Chief Justice Marshall in *Osborn v. Bank of United States*, 9 Wheat. 860, 6 L. ed. 233, this corporation is not a private corporation, but "a public corporation created for public and national purposes." It is "an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States.' It is not an instrument which the government found ready made, and has supposed to be adapted to its purposes, but one which was created in the form in which it now appears, for national purposes only." A suit against a public corporation, having no other powers than the performance of a function of the government, and accomplishing no other object, is plainly a suit against the government and its property, although nominally it is a suit against the corporation only. This principle was applied by this court in *Finch v. Board of Education*, 30 Ohio St. 37, 47, 27 Am. Rep. 414, in which it was held that, in the absence of a statute creating the liability, a board of education, which was incorporated by an act of the general assembly passed March 9, 1849 (47 Ohio Laws, p. 205), was not liable in its corporate capacity for damages resulting from its negligence in erecting and maintaining a school building. It was held that the defendant was "a public agent employed in administering the common-school system of the state," and that there is no principle of the common law by which the action could be supported. In *Hamilton County v. Mighels*, 7 Ohio St. 109,—a case in which the liability for tort of mere governmental agencies, in the absence of express consent of the sovereignty, is denied,—

Brinkerhoff, J., clearly distinguished municipal corporations and counties as follows: "Municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the people who compose them. Counties are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to, by the people it embraces. The latter is superimposed by a sovereign and paramount authority. A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people. A county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are in fact but a branch of the general administration of that policy." This is exactly the distinction which we make here between the defendant in this case and municipal or commercial corporations.

The general doctrine in regard to the liability of the government for torts is thus stated: "Even the state or the general government may be guilty of individual wrongs, for, while each is a sovereignty, it is a corporation, also, and as such capable of doing wrongful acts. The difficulty here is with the remedy, not with the right. No sovereignty is subject to suits, except with its own consent. But either this consent is given by general law, or some tribunal is established with power to hear all just claims. Or if neither of these is done, the tort remains, and it is always to be presumed that the legislative authority will make the proper provision for redress when its attention is directed to the injury." Cooley, Torts, 122, 123. The United States has consented to be sued on its contracts, either in the court of claims, or in a circuit or district court of the United States, but it has not yet consented to be liable to actions for torts. *Belknap v. Schild*, 161 U. S. 17, 40 L. ed. 601, 16 Sup. Ct. Rep. 443. Therefore we are not persuaded by the argument that the power conferred upon this corporation, of suing and being sued both at law and in equity, must be construed as a consent by Congress that this particular

governmental agency may be sued upon any cause of action, whether sounding in contract or in tort. On the contrary, we are constrained, upon all considerations, to regard this as imposing the power and liability to sue and be sued in respect to such matters only as are within the scope of the other corporate powers of the defendant. The National Home for Disabled Soldiers was not given the right to commit wrongs upon individuals. It was not contemplated that it would do so. It was created and is perpetuated by the Federal government for a very different purpose. Hence it cannot be inferred that Congress meant to impose a liability upon this corporation so unusual, so different from its general policy, and so different from the liabilities imposed on other public agencies. The defendant has no corporate fund, nor any property applicable to the payment of a judgment in such an action as this. A judgment could not be satisfied, except by seizing upon the property and funds supplied by the general government for the purpose for which the defendant was created, and without which it must cease to exist. Execution against the defendant would not only bring on conflict between the state and Federal governments, but, if allowed, it would tend to the destruction of this splendid national charity. It is no answer to these considerations to say that a judgment in damages for the tort would be an ascertained basis for an appeal to Congress for satisfaction, for, as is said by the eminent author already quoted, it is to be presumed that the sovereign is always ready and willing to do justice, and a judgment in the courts, when unauthorized by the government, would not only be altogether vanity,—an empty result,—but would be an indecorous assumption of the right to advise the general government as to its duty, and of the right to make the judgment the basis of a demand, precluding inquiry by the general government as to its ultimate liability. The courts can be better employed than in doing a useless thing. We therefore conclude that the right to sue the National Home for Disabled Volunteer Soldiers for a tort was never contemplated nor conferred. In *Finch v. Board of Education*, 30 Ohio St. 37, 47, 27 Am. Rep. 414, this court so construed the power "to sue and be sued" contained in the charter of the board of education. Likewise in *Hamilton County v. Mighels*, 7 Ohio St. 109, 114—117.

The judgment of the Circuit Court is affirmed.

Burket, Ch. J., and Shauck, Price, and Crew, JJ., concur.

CLEVELAND, CINCINNATI, CHICAGO
& ST. LOUIS RAILWAY COMPANY,
Plff. in Err.

v.

OHIO POSTAL TELEGRAPH CABLE
COMPANY *et al.*

(68 Ohio St. 306.)

*1. In a proceeding instituted in the probate court by a magnetic telegraph company, under the provisions of §§ 3456 to 3459, inclusive, Rev. Stat. 1892, for the purpose of appropriating to its use a part of the right of way of a railroad company organized under the laws of Ohio, it is necessary and jurisdictional for that court to hear and determine, and so enter of record, that the easement sought to be appropriated by such telegraph company will not in any material degree interfere with the practical uses to which the railroad company is authorized to put such right of way. The burden of proof to establish that fact is upon the telegraph company, and, until the court has so determined, it is without jurisdiction to order an appropriation, and impanel a jury for the assessment of compensation to the railroad company.

*2. When the necessary preliminary facts are found as prescribed by the statute, and the case proceeds to an inquiry as to the compensation due the railroad company, the measure of compensation is the amount of decrease in the value of the use of the right of way for railroad purposes which will result from the easement appropriated and used by the telegraph company.

(May 19, 1903.)

ERROR to the Circuit Court for Crawford County to review a judgment affirming a judgment of the Court of Common Pleas awarding compensation to defendant for a less amount than it demanded, after reversing a judgment of the Probate Court in a proceeding to acquire a right of way for a telegraph line along the railway right of way. *Reversed.*

Statement by Price, J.:

On August 30, 1899, the defendant in error the Ohio Postal Telegraph Cable Company filed in the probate court of Crawford county its petition against the plaintiff in error and the holders of certain trust deeds securing certain bonded indebtedness owing

*Headnotes by the Court.

NOTE.—As to right to condemn right of way for telegraph line over railroad right of way, see also, in this series, *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* 41 L. R. A. 403, and *Fort Worth & R. G. R. Co. v. Southwestern Teleg. & Teleph. Co.* 60 L. R. A. 145.

As to right of railroad compensation for such location of telegraph line, see *American Teleph. & Teleg. Co. v. Smith*, 7 L. R. A. 200, and *note*.

On the general question as to right to appropriate by eminent domain property already tak-

by the railway company, the purpose and prayer of which petition were to obtain by appropriation the right of the Ohio Postal Telegraph Cable Company to enter upon and occupy, for the erection and operation of its telegraph line, 5 feet of the right of way of the plaintiff in error, from the city of Cleveland, Ohio, to the state line at Union City; the 5 feet to be of the outer and southerly part of said right of way. The right to make the appropriation is asserted under the provisions of §§ 3456 to 3459, inclusive, Rev. Stat. 1892. The plaintiff in that proceeding in the probate court alleged its corporate capacity under the laws of Ohio, and that the railway company owns a right of way for railroad purposes, about 100 feet in width from Cleveland to Union City, and that the petitioner needed a line of telegraphic communication between these cities and beyond, and that the most direct, safe, and practicable route for the construction of its line is on and along the right of way of said railway company, and that the board of directors of the telegraph cable company had duly adopted a resolution declaring it to be necessary to appropriate the right to use 5 feet of the southerly side of the right of way, and that it had been unable to agree with the railway company as to the compensation to be paid. The petition further details the character of poles to be erected, the wires to be strung, and other fixtures which the telegraph cable company would place on the strip so to be appropriated; also "that the erection of the line of telegraph upon the right of way will not in any material degree interfere with the practical or usual and ordinary uses to which said railway company is authorized to put such right of way." The petition was afterwards amended to claim the right of appropriation from a point $\frac{1}{2}$ mile west of Berea station, in Cuyahoga county, on the southerly side of the right of way, to Shelby station, in Richland county, thence across the right of way to the northerly side thereof, and to continue on the northerly 5 feet of the right of way to Union City, on the state line. After service had been duly made, the railway company filed an answer, upon which the preliminary hearing was had in the probate court. The answer is a general

en for public use, see, in this series, *notes to Barre R. Co. v. Montpelier & W. River R. Co.* 4 L. R. A. 785; *Cary Library v. Bliss*, 7 L. R. A. 765; and *Miffin Bridge Co. v. Juniata County*, 13 L. R. A. 431; also *Butte, A. & P. R. Co. v. Montana Union R. Co.* 31 L. R. A. 298; *Chicago, M. & St. P. R. Co. v. Starkweather*, 31 L. R. A. 183; *Re Stewart*, 33 L. R. A. 427; *Diamond Jo Line Steamers v. Davenport*, 54 L. R. A. 859; and *Denver Power & Irrig. Co. v. Colorado & S. R. Co.* 60 L. R. A. 383.

denial of each and every allegation in the petition and the amendments made thereto.

It is stated in briefs of counsel that on the hearing the Ohio Postal Telegraph Cable Company introduced as part of its evidence the charter issued to it by the state of Ohio, the organization of the company thereunder, election of officers, and certain proceedings of its board of directors declaring the necessity for appropriating the portion of the right of way, and that thereupon the railway company sought to defeat the right of the telegraph cable company to institute the proceedings by showing that there had been no payments made upon any of its capital stock, without which it could transact no business. This latter point seems to have failed, no doubt because it is immaterial; and, after hearing the evidence offered, the probate court made the following findings and order:

Tuesday, January 16, 1900.

This cause having been continued from the — day of November, A. D. 1899, being the day theretofore fixed by the court for the hearing of this cause, until the 27th day of November, A. D. 1899, upon said last-named date came the plaintiff by its attorneys, and also the defendant the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company, by its attorneys, and this cause came on for hearing upon the petition of the plaintiff filed herein, and the answer of said defendant railway company, all of the defendants having been duly and legally served with process or by publication herein, and upon the questions of the existence of the corporation, its right to make the appropriation, its inability to agree with the owners of the property, and the necessity for the appropriation, and the same was heard upon the evidence offered by the parties, and was argued by counsel, and the court, not being fully advised in the premises, took the same under advisement; and now, on this 16th day of January, A. D. 1900, the court, being fully advised in the premises, do find that the plaintiff is a corporation, and has a legal right to make the appropriation of the property described in the petition, as prayed for; that the plaintiff is unable to agree with the owners of the property as to the amount of compensation to be paid therefor; and that there is a necessity for such appropriation as prayed for in the petition; and the court, proceeding as directed by statute, orders and directs that a jury be drawn as required by law, returnable at a time to be hereafter fixed by the court. To all of which findings of the court the defendants at the time excepted.

Charles Kinnering,
Probate Judge.

The railway company filed a motion for a new trial March 3, 1900. This motion was overruled on March 22, 1900, and a bill of exceptions as to the proceedings on preliminary hearing was allowed for the railway company April 23, 1900. After making the findings and order of January 16, 1900, the probate court ordered a jury to assess to the railway company compensation on account of the appropriation. A jury was drawn and impaneled, and the case heard. A verdict of \$8,750 was returned by the jury and confirmed by the court. The motion for new trial filed by the telegraph cable company was overruled. One of the grounds of the motion was that the verdict was excessive. Error was prosecuted in the court of common pleas by the postal telegraph cable company to reverse the probate court and obtain a new trial. The court of common pleas found error, and reversed the judgment of the probate court, and set aside said verdict, but retained the case for trial in the court of common pleas as to the question of compensation. Trial was had to a jury in that court, and a verdict for \$500 compensation returned March 25, 1901, which verdict was confirmed on March 30, 1901. During the trial, exceptions were taken to the exclusion of evidence offered by the railway company, and also exceptions to the charge of the court, and for refusing to charge as requested. Error is prosecuted in this court by the railway company to reverse the judgments of the lower courts.

Messrs. E. A. Foote and John T. Dye,
for plaintiff in error:

The power claimed is the right to condemn property already dedicated to a public use,—property, therefore, which could not be appropriated under general powers of eminent domain.

Little Miami R. Co. v. Dayton, 23 Ohio St. 510.

The judgment of condemnation in this case deprives the railroad company of exclusive privileges and rights, and compels it to consult the convenience and rights of a stranger, and adds materially to its responsibilities.

Pierce, Railroads, p. 159.

No compensation for an estate or easement acquired through condemnation proceedings would be just or adequate which did not give the owner of the original estate the precise amount in money that his property had been depreciated in value.

Sater v. Burlington & Mt. P. Pl. Road Co. 1 Iowa, 586.

In the absence of market value the court or jury will estimate value from every fact and circumstance from which value can be inferred.

3 Sedgw. Damages. 8th ed. § 1163; *Murray v. Stanton*, 99 Mass. 348; *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54, 20 Atl. 407; *Fairfax v. New York C. & H. R. R. Co.* 73 N. Y. 167, 29 Am. Rep. 119; *Green v. Boston & L. R. Co.* 128 Mass. 221, 35 Am. Rep. 370; *Shenango & A. R. Co. v. Braham*, 79 Pa. 447; *Trout v. Kennedy*, 47 Pa. 387; *Erie & P. R. Co. v. Douthet*, 88 Pa. 243, 32 Am. Rep. 451.

Compensation in condemnation proceedings is to be made as though the property had been sold and the purchaser had paid the reasonable price asked.

Cooley, Const. Lim. 6th ed. p. 691; *Fletcher v. Peck*, 6 Cranch, 87, 145, 3 L. ed. 162; *Somerville & E. R. Co. v. Doughty*, 22 N. J. L. 495.

If the market is reduced to one purchaser who insists upon having the particular property, then the value of that property to the particular purchaser ought to be a matter for consideration.

Little Rock Junction R. Co. v. Woodruff, 49 Ark. 381, 5 S. W. 792; *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206.

Mr. H. D. Estabrook also for plaintiff in error.

Messrs. Henry Newbegin & Robert Newbegin and Frank L. Loesch, for defendants in error:

The finding of the probate court on the jurisdictional question of the right to make the appropriation is not subject to review.

Ohio Postal Teleg. Co. v. Cleveland, C. C. & St. L. R. Co. 8 Ohio N. P. 122; *Covington & C. Bridge Co. v. Magruder*, 63 Ohio St. 455, 59 N. E. 216; *Cincinnati & E. R. Co. v. Bailey*, 39 Ohio St. 170; *Powers v. Hazelton & L. R. Co.* 33 Ohio St. 429.

The finding and decision of the probate court as to the necessity and right of the appropriation were not a final order.

Luxton v. North River Bridge Co. 147 U. S. 337, 37 L. ed. 194, 13 Sup. Ct. Rep. 356; *Southern R. Co. v. Postal Teleg. Cable Co.* 179 U. S. 641, 45 L. ed. 355, 21 Sup. Ct. Rep. 249.

The measure of damages is for the use of the property of which the owner is deprived by the appropriation, and not for the value of the land itself.

Dodson v. Cincinnati, 34 Ohio St. 276; *Lake Shore & M. S. R. Co. v. Cincinnati S. & C. R. Co.* 30 Ohio St. 604; *Toledo & O. C. R. Co. v. Fostoria*, 7 Ohio C. C. 293.

Nor can speculative values be considered.

Powers v. Hazelton & L. R. Co. 33 Ohio St. 429.

Under the statute of Ohio it was as competent to construct a telegraph line along a railroad as a highway crossing over it. 62 L. R. A.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

The measure of damages is the extent to which the value of the use by the railroad company is diminished by the use of the same by the telegraph company for its purposes.

St. Louis & C. R. Co. v. Postal Teleg. Co. 173 Ill. 508, 51 N. E. 382; *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* 76 Miss. 731, 45 L. R. A. 223, 26 So. 370; *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.* 104 Fed. 624; *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.* 23 Utah, 474, 65 Pac. 735; *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.* 114 Fed. 787; *Union P. R. Co. v. Colorado Postal Teleg. Cable Co.* 30 Colo. 133, 60 Pac. 564.

The damages were merely nominal.

Mobile & O. R. Co. v. Postal Teleg. Cable Co. 101 Tenn. 62, 41 L. R. A. 403, 46 S. W. 571; *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* 120 Ala. 21, 24 So. 408.

Price, J., delivered the opinion of the court:

The controversy between the parties to this case opened in the probate court of Crawford county in August, 1899, and it has been carried on with unremitting vigor through that and the intervening courts, and its various phases have been elaborately presented to this court in briefs. Some of the arguments and a large amount of statistical and historical matter found in the almost unlimited brief for plaintiff in error are wholly superfluous, and we are asked to pass upon numerous questions which counsel discuss therein, many of which are no longer material, and tend only to obscure, if not to lose sight of, the necessary vital points found in the record. Sifting the wheat from the chaff of the case, the subject of our labor may be divided into two branches: (1) The proceedings had on the petition of the Ohio Postal Telegraph Cable Company against the railway company in the probate court for the purpose of appropriation to its use of part of its right of way, and which is called the "preliminary hearing;" (2) the questions arising on the trial before the jury for the assessment of compensation to the railway company.

1. It is forcibly pressed upon our attention by counsel for defendant in error that, by reason of the neglect of plaintiff in error, the proceedings at the preliminary hearing are not before us, because its motion for a new trial was not filed within the statutory time in such cases, and that the bill of exceptions purporting to contain the preliminary proceedings was not prepared and allowed within the time prescribed by statute. And we are cited to the record of the

court of common pleas, where we find that, for the above reasons, that court struck from the files the bill of exceptions, and dismissed the petition in error filed therewith by the railway company. And we further find that the circuit court affirmed the court of common pleas in so doing. This is complained of in this court as erroneous, in case No. 7,778, between the same parties, and which is a close companion of this case, and, as such, will be decided presently. 68 Ohio, 328, 87 N. E. 1096. However, we do not regard that controversy as very important now, and we may and do ignore the bill of exceptions, as being properly stricken from the case; and yet we have remaining in the record a vital question as to the jurisdiction acquired by the probate court, and this is exhibited in the certified transcript of that court, which was a necessary part of the record in each of the reviewing courts, and also of the record in this court. This is properly so, in order that we may have a continuous chain of the controversy from its inception in August, 1899, down to the last verdict and judgment of the trial court, in March, 1901.

An issue was made up between the defendant in error and the railway company, when the latter denied each and every allegation of the petition asking the appropriation. The petition was more than the ordinary petition to appropriate the property of another, and it was so necessarily, because the statute under which the petitioner was proceeding required averments of fact not usual or required in other cases of appropriation. After fully describing what ground it desired to use, and what it expected to place and erect on the premises desired, and other facts to give the court jurisdiction to hear the case, it is alleged: "Plaintiff says that the erection of said telegraph line upon said right of way of said railway company will not in any material degree interfere with the practical or usual and ordinary uses to which said railway company is authorized to put such right of way, but that if this honorable court, nevertheless, shall be satisfied that the construction of said line in any place will interfere in any material degree with such use of the right of way by the defendant railway company, this plaintiff hereby offers and stands ready at all times to construct and erect the line at such other places and in such manner as this honorable court shall direct and require." This language, as a part of the petition, would naturally occur to the pleader on the reading of the statute under which the telegraph cable company was proceeding. The act authorizing the steps taken by defendant in error was passed March 31, 1865 (62 Ohio Laws, p. 72), and, so far as we know judi-

cially, has had a silent and harmless existence until it was invoked in this case. By § 3456, Rev. Stat. 1892, a magnetic telegraph company may enter upon any land, whether owned by an individual or corporation, for the purpose of a preliminary survey and examination, with a view to locating and erecting its lines, and that it "may appropriate so much thereof as may be deemed necessary for the erection and maintenance of its telegraph poles, piers, abutments, wires, and other necessary fixtures, and for stations, and the right-of-way over such lands and adjacent lands sufficient to enable it to construct and repair its lines." The next section (3457) limits the right of occupation by the telegraph company, so that it may not interfere with buildings and inclosures belonging to the landowner. It is provided in § 3458: "When lands sought to be appropriated for lines of magnetic telegraph are held by a corporation incorporated under any law of this state, whether held by purchase, or in virtue of any appropriation authorized by its charter or by any law of this state, the right of the company to appropriate such lands shall be limited to such use of the same as shall not in any material degree interfere with the practical uses to which the company is authorized to put such lands under its charter. . . ." Because of this express limitation on the right to appropriate the lands of an Ohio corporation, it was incumbent upon the telegraph cable company to plead in its petition a proposed condition which would be within the statutory limitation, and it so pleads, as we have quoted from that petition. Therefore, when the railway company denied, as it did, each and every allegation in the petition, the averment quoted was put in issue, and the burden of proof was upon the petitioner to satisfy the probate court of the truth of that, as well as other jurisdictional averments. It is not difficult to see how important the inquiry would be on this subject of probable conflicting uses. In this case the property to be used is the right of way of a railroad company holding an Ohio charter, as the petition avers, and it devolved upon the petitioner to satisfy the probate court that the use and occupancy it desired would not "in any material degree interfere with the practical uses to which the company is authorized to put such lands under its charter." This recognizes the well-settled rule that property devoted to one use cannot be subjected to another use unless it be consistent with the first. The briefs of counsel are silent on this subject, and we cannot find in them any statement tending to show whether or not any evidence was introduced on the preliminary hearing touching this question;

and, unless we look into the forbidden bill of exceptions, we cannot know with absolute certainty. But we have a right to assume that no such testimony was offered or received, because the record of the probate court is entirely silent and contains no finding upon the subject, and in this we think that record is fatally defective.

Section 3459, Rev. Stat. 1892, provides that "the right of such company to use lands held by a railroad company, for the permanent structures of said telegraph, shall be limited to the land which lies within 5 feet of the outer limits of the right of way of the railroad company, where it is practicable to erect the line within those limits; when the company seeks to appropriate lands that lie beyond those limits, its petition must set forth the facts, showing that it is impracticable to erect such line within said limits. . . . The probate court shall in all instances determine, if it be controverted by the railroad company, whether the erection of the line at the place or places designated will in any material degree interfere with the practical uses to which such railroad company is authorized to put such land, and if the court is satisfied that it will so interfere, it shall reject the petition, or require the structure to be erected at such other place or places, as the court shall direct. . . ." In the case at bar the telegraph company desired to appropriate to its use the outer 5 feet of the right of way of the railroad company, and it alleged that such use would not interfere in any material degree with the practical uses of the right of way by the railroad company. This was controverted by the latter company by answer in the probate court. On the controversy, the above statutes make it the duty of that court to determine, as a jurisdictional fact, whether or not the desired use and occupancy will interfere in any material degree with the practical uses the railroad company has a right to make of its right of way. The court had no discretion on the subject, because the statute is mandatory. It is a wise provision, and is intended to ascertain, to some extent, at least, in advance of calling of a jury to assess compensation, whether the desired use will be compatible with the rights of the railroad company. How does the record stand on this point? As seen from the entry copied in the statement of this case, the probate court made no finding on the issue joined as to the conflicting use. The findings are such only as are made in the ordinary case for the appropriation of property, as follows: "Now, on this 16th day of January, A. D. 1900, the court, being fully advised in the premises, do find that the plaintiff is a corporation, and has a legal right to make the

appropriation of the property described in the petition as prayed for; that the plaintiff is unable to agree with the owners of the property as to the amount of compensation to be paid therefor; and that there is a necessity for such appropriation, as prayed for in the petition; and the court, proceeding as directed by statute, orders and directs that a jury be drawn," etc. These findings are such as are contemplated by § 6420, Rev. Stat. 1892, which is a part of the general act for appropriation of property. But the telegraph company, in order to avail itself of that act, to enter upon and appropriate the use of a part of a right of way from another corporation, must bring itself within the provisions of the law which authorize such a proceeding, and plead and prove the additional jurisdictional fact upon which the court can authorize the appropriation. The facts were pleaded, but no hearing was had upon them, as we assume, for the court did not pass upon them. We regard the finding required in § 3459, *supra*, as essentially jurisdictional, and that it would be the chief stone in the foundation upon which the telegraph company must base its right to institute and conduct the inquiry as to compensation to the owner; and where this chief stone, prescribed by statute to be laid at the preliminary hearing, is absent, the superstructure will not withstand attack, especially when made in a direct proceeding. Adopting the above course of reasoning, we are of opinion that the probate court did not obtain jurisdiction to order the appropriation and make the order of an inquiry of compensation before a jury. If the petitioner made no proof under § 3458, Rev. Stat. 1892, the petition should have been rejected.

2. What we have said under the first branch of the case might well terminate our labor; but, as the reversal will take the case back to the probate court for a new preliminary hearing on the petition and answer, it is best to dispose of the grave contention concerning the true measure of damages to be adopted for the guidance of the jury, if the case should reach that stage, and require, as it would, an inquiry and assessment of compensation. The record of the trial on this subject in the lower court discloses many vain efforts on the part of the railroad company to introduce some evidence of the threatened invasion of its rights, and its injurious consequences. It succeeded in qualifying some of its witnesses to give testimony as to the value of its right of way with and without the encumbrance of the telegraph company, but they were not allowed to state what the difference in value would be. Various other forms of inquiry were resorted to in order to reach the mea-

ure of compensation, but none were satisfactory to the court, and in the end there was no evidence admitted upon which the jury could pass. Therefore the verdict of the jury was rendered practically without any evidence, except it be the charge of the court. Some of the evidence offered was properly excluded, but, in all the rulings of the court upon the constant controversies over the introduction of testimony, the court was content with sustaining objections, and at no time did it undertake to lay down any rule by which counsel might be guided. And after the close of all vain efforts, the court, after reading the petition and answer, gave the following and only charge: "The court charges you that the damages sustained by the railroad company by such use of said 5-foot strip by the plaintiff, the telegraph company, can only be nominal damages. Nominal damages in this case may be anywhere from \$100 to \$500. Your verdict will be for the defendant for such damages as you find it has sustained, within the above limits." The jury took the suggestion of the court, and returned a verdict for \$500. In our judgment, the instruction is not the law of the case, nor is it even a faithful remembrance of the meaning of "nominal damages." It is said that the trial court obtained the above standard of compensation from the following and similar cases cited in brief of defendant in error: *Mobile & O. R. Co. v. Postal Tele. Cable Co.* 101 Tenn. 62, 41 L. R. A. 403, 46 S. W. 571; case between same parties before supreme court of Alabama, 120 Ala. 21, 24 So. 408; *Postal Tele. Cable Co. v. Oregon Short Line R. Co.* 104 Fed. 623; case between same parties, 49 C. C. A. 663, 111 Fed. 842; *Postal Tele. Cable Co. v. Oregon Short Line R. Co.* 23 Utah, 474, 65 Pac. 735; *St. Louis & O. R. Co. v. Postal Tele. Co.* 173 Ill. 508, 51 N. E. 382; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581. We have examined those cases, and the facts upon which they stand, and the rule held in most of them is entirely different from the instruction given by the trial court in this case. True, in two of the cases the judges deciding them use the term "nominal damages" as the standard of recovery, but it was a conclusion from the facts of the case in hand, and not as a rule of law to govern in other cases. The two cases referred to are *Mobile & O. R. Co. v. Postal Tele. Cable Co.* 101 Tenn. 62, 41 L. R. A. 403, 46 S. W. 571; same parties, 120 Ala. 21, 24 So. 408. But they quote and approve the rule adopted in the other cases, which we will briefly notice. In *Postal Tele. Cable Co. v. Oregon Short Line R. Co.* 104 Fed. 623, *supra*, Beatty, District Judge, held: "The compensation which

a telegraph company is required to pay for the right to construct and maintain its line upon the right of way of a railroad company is the amount of decrease in the value of the use of such right of way for railroad purposes which will result." That case went to the circuit court of appeals, where it was affirmed, and is found in 49 C. C. A. 663, 111 Fed. 842, *supra*. Other questions than compensation were involved, on which the district court was affirmed, and the court of appeals would not reverse alone because it was claimed the amount of compensation was inadequate; that question being peculiarly one for the trial court, rather than a court of error. In *Postal Tele. Cable Co. v. Oregon Short Line R. Co.* 23 Utah, 474, 65 Pac. 735, *supra*, the court found as a fact that the part of right of way sought to be condemned by the telegraph company was idle property, and not then used for any purpose by the railroad company, and hence the opinion as to nominal damages. In *St. Louis & O. R. Co. v. Postal Tele. Co.* 173 Ill. 508, 51 N. E. 382, *supra*, the court favored the rule as stated in syl. 13: "The measure of damages where a telegraph company condemns a right of way for its line along and upon a railroad right of way is the value of the land actually taken for placing the poles, and the extent to which the value of the use of the portions between poles and under the wires, for railroad purposes, is diminished by their use by the telegraph company." In *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, the city of Chicago instituted proceedings to open and extend one of its public streets over the tracks of the railroad, and one of the controversies was over the measure of compensation and damages. The case reached the Supreme Court of the United States, as found in 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581. In the consideration of the amount of compensation allowed to the railroad company in the state courts, the Supreme Court of the United States decided that it could not examine the evidence to determine whether the verdict was inadequate or not, inasmuch as its review was confined to fundamental questions of law. As to the lawful measure of compensation on the facts of that case, the court held the following proposition: "In a proceeding in a state court in Illinois to ascertain the compensation due a railroad company, arising from the opening of a street across its tracks—the land, as such, not being taken, and the railroad not being prevented from using it for its ordinary railroad purposes and being interfered with only so far as the right to its exclusive enjoyment for purposes of railroad tracks was diminished in value by subject-

ing the land within the crossing to public use as a street—the measure of compensation is the amount of decrease in the value of its use for railroad purposes caused by its use for purposes of a street; the use for the purposes of a street being exercised jointly with the company for railroad purposes.” Other cases cited for defendant in error are not materially different, and we will not review them. Enough is seen in all of them to determine that the competent evidence of the injury and inconvenience to be incurred by creating the second easement are to be the basis of just compensation, and, unless the facts show that no substantial damage will be sustained by the railroad company, the court is not warranted in charging the jury that merely nominal damages can be recovered.

The petition for the appropriation in this case detailed the size, height, and character of poles to be erected on the right of way, or the 5-foot strip thereof, and the other fixtures to be placed along the line. Full inquiry was competent at the trial for compensation to develop what the real situation would be when the telegraph company would have its line completed and in operation. The width and character of the right of way of the railroad along the entire line to be so encumbered is also competent, so that the jury might have as fully as possible what the new use by the telegraph company will be. Of course, it will not and cannot appropriate in fee simple any part of such right of way, nor abridge the right of the railroad company to the use of its entire right of way, except so far as it may be necessary for the new easement to be created and used for a line of telegraph; that is, to plant and erect poles, string the wires, and make a complete line of telegraphic communication, as detailed in the petition for appropriation, and the right to enter and go along the line to make needed improvements and repairs inside the foregoing limits. Another observation in this connection should not be overlooked, and in this respect the statutes of this state may be unlike those of states from which above cases have been taken. Our general assembly has imposed on railroad companies certain duties in caring for and maintaining their rights of way, so that the public, and especially adjoining landowners, may not suffer from fires which start on railroad premises. Other restrictions are placed upon the use and condition of the right of way. Whatever these imposed obligations may be, we think they may be properly taken into account, inasmuch as the telegraph company does not assume them, nor are they imposed upon it by reason of its 62 L. R. A.

joint occupancy of a part of the right of way. It seems quite reasonable that when a telegraph company, by virtue of the statute, condemns to its use a part of the premises of one of the trunk-line railroads of the country for the distance appearing in this case, more than mere nominal damages or compensation may be involved. From the best light we have upon the law applicable to this case, we believe the measure of compensation should be the amount which the right of way of the railroad company for railroad purposes is diminished in value by the proposed easement of the telegraph company, or, in other words, the amount of the decrease in the value of the use of such right of way for railroad purposes which will be caused by the appropriation of an easement on the same for the purpose of erecting and maintaining a telegraph line thereon. It may be said that this rule should be modified or limited in its application, because of the provision in the statute authorizing the appropriation, whereby the railroad company at any future time may notify the telegraph company that it needs for railroad purposes a part or all of the ground occupied by it, in which event the telegraph company is required to yield possession and locate elsewhere. We think there should be no such modification for that reason. The appropriating company, desiring to avail itself of a statute containing such a provision, assumes all the risks of being ousted in whole or in part, and ventures upon gaining possession and holding it against the will of the railroad company. The latter does not welcome the new companion, and it may, in course of time, be asked to give way to the needs of the railroad. But it may not comply, and litigation will follow to secure full possession to the owner of the right of way. Of the probability of these sequences, the telegraph company has full knowledge, and it cannot insist that such probable results should mitigate the compensation to be paid for the right of appropriation.

In conclusion, we find that the trial court erred in the charge to the jury, and the circuit court erred in affirming the judgment of the former.

The judgments of the Circuit Court, the Court of Common Pleas, and the Probate Court are reversed, and the cause is remanded to the Probate Court for a new preliminary hearing on the petition, and answer thereto, and for further proceedings according to law.

Burket, Ch. J., and Spear, Davis, Shauk, and Crew, JJ., concur.

Edward LANGENBAUGH *et al.*, *Pliffs.* in
Err.,
v.

Hugh T. ANDERSON.

(68 Ohio St. 131.)

*1. In an action against the lessor and lessees in an oil and gas lease to recover for the burning of plaintiff's building on a lot adjoining the leased premises through the alleged negligence of the lessees, whereby oil escaped from a tank on the latter, and flowed under the building, and thence down the slope of the hill to a creek, where it came in contact with a fire, which followed back the trail of oil and burned said building, and the plaintiff's petition on which issue is joined alleges that such escape of oil resulted from the negligent acts and omissions of duty on the part of the lessees in not safely keeping and caring for the oil, it is error for the court to withdraw from the jury all consideration of the issues joined on the allegations of negligence, and limit its inquiry to the questions: "First. Is crude oil stored in tanks a highly explosive and dangerous substance, and a constant menace to property in its vicinity? Second. Did the defendants, or either of them, store crude oil in tanks on Mrs. Scott's property adjoining plaintiff's property, and, if so, was the storage of such oil there the proximate cause of burning plaintiff's property?" On the contrary, the case should have been submitted to the jury on the questions of negligence put in issue by the pleadings.

2. In the trial of such action, where it appears from the evidence that the lessor leased the lot for the purpose of producing oil or gas therefrom, reserving to herself one eighth of the oil produced and delivered in tank or the pipe lines, but reserving no control or right to direct the manner of drilling, or of the erection of tanks on the leased premises, but who surrendered complete possession and control thereof to the lessees during the term of the lease, such lessor is not liable to the owner of property to which oil escapes to its injury, solely through the negligence and omission of duty on the part of the lessees; and refusing to so charge when requested by the lessor is reversible error.

(March 31, 1903.)

ERROR to the Circuit Court for Harrison County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to

*Headnotes by the COURT.

NOTE.—As to liability for negligence in respect to oil generally and injuries caused thereby, see *Kinnaird v. Standard Oil Co.* 7 L. R. A. 451; *Hauck v. Tide Water Pipe Line Co.* 20 L. R. A. 642; *Brady v. Detroit Steel & Spring Co.* 26 L. R. A. 175; *Goodlander Mill Co. v. Standard Oil Co.* 27 L. R. A. 583; *Fuchs v. St. Louis*, 34 L. R. A. 118; and *Stone v. Boston & A. R. Co.* 41 L. R. A. 794.

As to liability of landlord to third person 62 L. R. A.

recover damages for injuries alleged to have been caused by oil escaping from defendants' storage tank. *Reversed.*

Statement by **Price, J.:**

The plaintiff brought suit to recover the value of a residence owned by the plaintiff in the village of Scio, which he claims was destroyed by fire on the night of March 18, 1899, through the fault of the defendants. The facts stated in the amended petition, and relied upon for recovery, are, in substance, that plaintiff below, on and prior to January, 1899, was the owner of a part of lot 6 in the village of Scio, and that Mary Scott was the owner of the adjoining lot, both being in the main part of the village, where houses (mostly wooden structures) were close together, as was well known to the defendants; and that on the 26th day of January, 1899, Mary Scott entered into a written contract with her codefendants, by the terms of which she leased to her codefendants her lot for oil and gas purposes, vesting in them the right to drill thereon for oil or gas; and that the defendants all knew of the danger to adjoining property in operating said adjoining lot for said purposes. Mary Scott, the lot owner and lessor, was to receive as royalty, or consideration for said lease, one eighth of the oil that might be produced from said lot, delivered in tank or in pipe lines, the balance of the oil to be the property of the lessees. The plaintiff alleges that the business of drilling for oil and gas on the premises leased was hazardous and dangerous to adjoining property; and, further, that the lessees drilled a well on the lot of Mrs. Scott some time prior to March 18, 1899, which was then producing oil in large quantities, and that defendants suffered much of the oil to escape and mix in the ground, so that it became combustible, and that in the night of that day an elevated tank, which had been constructed for the temporary storage of the oil, fell over upon the ground, and that the oil therefrom saturated the ground further with oil, and that other large quantities of the fluid from the overturned tank ran over the ground and down a ravine or depression until it reached an open fire, from which it was ignited, and the fire thus caused burned rapidly back along the line of its escape, and communicated with the plaintiff's

for condition of premises in possession of tenant, see *Lee v. McLaughlin*, 26 L. R. A. 197, and note; *Henson v. Beckwith*, 38 L. R. A. 716; *Whitmore v. Orono Pulp & Paper Co.* 40 L. R. A. 377; *Canandalgua v. Foster*, 41 L. R. A. 554; *Texas Loan Agency v. Fleming*, 44 L. R. A. 279; *Waterhouse v. Joseph Schlitz Brewing Co.* 48 L. R. A. 157; *West Chicago Masonic Assn. v. Cohn*, 55 L. R. A. 235; and *Gardner v. Rhodes*, 57 L. R. A. 749.

building near said tank, and entirely destroyed it, to his damage, \$1,500.

The plaintiff next states: "That the damage thus caused to him was the direct result of the wrongs and negligence of the defendants in these, to wit: (1) It was unlawful to locate an oil well, or contract for or permit the same to be drilled, upon the lot aforesaid of the defendant Mary Scott, located as it was in such dangerous proximity to the buildings of the plaintiff, and where, if the oil should escape, it would naturally spread out over the ground, and, flowing downward, would become ignited from the fires below. . . . (2) In substance, that the surroundings were not properly protected with adequate means of controlling and confining the oil produced because there was no provision whatever made for preventing the flow of said oil down to the open fires below on other lots in case of accident to the tank; and, further, that the tank was elevated upon insufficient supports, by reason of which it overturned. (3) The temporary tank was negligently and improperly built and supported, and when filled with oil was liable to topple over, and that its supports were insufficient. (4) That when said well was drilled there was in force an ordinance of the village of Scio, requiring 'that the oil produced from any well within the village should, until transported out of the village, be securely confined, and kept in suitable tanks, so as to prevent the same from escaping upon the grounds or other property within the corporation, and that each tank, before used, should have dug surrounding it a ditch or excavation of sufficient size or dimensions, and to be so located that, in case of accident to the tank, the oil therein would flow into such ditch or excavation. . . .' The plaintiff alleges a failure to comply with this ordinance. (5) The plaintiff further alleges that the defendants, although aware of the dangers from said well, neglected to keep a proper watch or guard at all over said well at night."

Having thus stated the acts of negligence, the prayer of the petition reads: "Wherefore, and by reason of the several acts of negligence and wrong herein set forth, plaintiff says he has been wrongfully and negligently injured by the defendants in the sum of \$1,500, his damages so as aforesaid sustained, for which he asks judgment."

Mary Scott, the lessor of her codefendants, by answer admitted her ownership of the lot which she leased to coplaintiffs in error for oil and gas production, and that they drilled a well upon said lot as alleged, but averred that she had no part in the drilling of the well or in the construction of any tanks on the premises, and she denies

62 L. R. A.

that she had any power or control over the operation of said well or any of the devices or means used by her lessees in producing or caring for the oil or gas produced, and generally denies all the acts of negligence charged against her. For further defense she alleges that after the execution of the lease she moved away from the premises to a residence about 5 miles from Scio, and that her said lessees took possession of the lot so leased, and that whatever they did thereon was without any directions or suggestions from her.

The other defendants, the lessees, by answer admitted the execution of the lease, and the drilling of the well, which produced oil, and denied each and every other allegation in the amended petition. The new matter in the answers, if any, was denied by reply.

The evidence adduced on the trial tended to establish that the lot so leased by Mrs. Scott to her codefendants, as well as the lot of the plaintiff, Anderson, are part of land in said village, which slopes and declines rapidly towards a valley through which runs a creek or stream of water, and the lot of Mrs. Scott is above the lot of Anderson. The fire occurred about 10 o'clock at night on the 18th of March. The owners of the lease had constructed on the leased lot a large storage tank, having a capacity of about 250 barrels, and also a smaller tank for temporary storage, of about 60 barrels capacity, and this smaller tank was between the well and the larger tank, and placed on upright posts a few feet above the ground. A short time before discovery of the fire, this tank, by reason of defect in or the giving way of the upright posts, turned over, and part of the oil escaping therefrom ran under a portion of Anderson's house, and thence followed a slight ravine down to the creek, and there, or while flowing into the creek, came in contact with fire, ignited, and the fire traveled back up the track of the escaped oil until it reached the Anderson premises, and consumed the house, and perhaps other property. The record does not show the exact distance from the house to the creek, nor the location of the fire with which the oil came in contact, but it was away from, and some distance below, the premises of either of the parties. At the close of the plaintiff's testimony Mary Scott and her codefendants severally asked the court to direct a verdict in their favor, which was refused, and exceptions taken.

The court stated generally to the jury the claims of the parties, but did not state or explain the allegations of the amended petition, upon which the trial was had. After saying where the burden of proof rested, and

the necessity to a recovery of a preponderance of the evidence, the court charged the jury as follows: "The three questions of fact which I shall submit to you for your determination in this case are these: First. Is crude oil stored in tanks a highly explosive and dangerous substance, and a constant menace to property in its vicinity? Second. Did the defendants, or either of them, store crude oil in tanks on Mrs. Scott's property, adjoining plaintiff's property, and, if so, was the storing of such oil there the proximate cause of the burning of plaintiff's property? Third. If these two propositions or questions are answered in the negative by you, then your verdict should be for the defendants; but, if these two propositions or questions are answered by you in the affirmative, then the remaining question for your consideration is, What damage or loss did the plaintiff sustain by reason of the burning of his buildings? I submit only these three questions to you for your determination because of the many undisputed facts in this case." The jury was then instructed that an affirmative answer to each of these questions must be supported by a preponderance of the testimony. The defendant Mrs. Scott asked special instructions, which were refused, and these will be noticed in the opinion. The defendants excepted to the charge and to the refusal to charge as requested. The jury found against all the defendants in the sum of \$1,000, for which judgment was rendered, and this judgment was affirmed by the circuit court. This proceeding in error is to reverse the judgments of both courts.

Messrs. Harrison & Aston, A. O. Barnes, John C. Dickerson, Charles C. Bow, and John S. Pearce for plaintiffs in error.

Mr. D. A. Hollingsworth, for defendant in error:

It does not make any difference what the dangerous substance may be. If it is dangerous the owner must, at his peril, confine it so as not to injure his neighbor. And who but the jury shall determine as to the danger?

Defiance Water Co. v. Olinger, 54 Ohio St. 532, 32 L. R. A. 736, 44 N. E. 238; *Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.* 60 Ohio St. 560, 45 L. R. A. 658, 54 N. E. 528; *Cleveland Terminal & Valley R. Co. v. Marsh*, 63 Ohio St. 249, 52 L. R. A. 142, 58 N. E. 821; *Bryan, Petroleum*, tit. *Neg. Wood, Nuisances*, § 69, note 3; *Cooley, Torts*, pp. 142-145, 725; 16 *Am. & Eng. Enc. Law*, p. 981; *Kelley v. Ohio Oil Co.* 57 Ohio St. 317, 39 L. R. A. 765, 49 N. E. 399; *Ohio* 62 L. R. A.

Gas Fuel Co. v. Andrews, 50 Ohio St. 695, 29 L. R. A. 337, 35 N. E. 1059; *Columbus & H. Coal & I. Co. v. Tucker*, 48 Ohio St. 41, 12 L. R. A. 577, 26 N. E. 630; *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 *Am. Rep.* 408; *St. Mary's Woolen Mfg. Co. v. Bradford Glycerine Co.* 14 Ohio C. C. 522; *Brady v. Detroit Steel & Spring Co.* 102 Mich. 277, 26 L. R. A. 175, 60 N. E. 687; *Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 18, 9 L. R. A. 711, 25 N. E. 246; *Pottstown Gas Co. v. Murphy*, 39 Pa. 257; *Fish v. Dodge*, 4 Denio, 311, 47 *Am. Dec.* 254.

If the owner of a dangerous substance allows it to escape from his own premises upon the premises of another, he is liable for all proximate damages resulting therefrom.

Rylands v. Fletcher, L. R. 3 H. L. 330; *Cleveland Terminal & Valley R. Co. v. Marsh*, 63 Ohio St. 249, 52 L. R. A. 142, 58 N. E. 821.

Price, J., delivered the opinion of the court:

It may conduce to a clearer understanding of the questions involved in this proceeding if we notice the relation which the defendants below sustained to each other at the time of the loss by fire for which recovery was had in the lower court, and with this the location of the premises from which the oil escaped, and the regulations, if any, which the council of the village of Scio had prescribed with reference to the production and storage of oil within its boundaries. The plaintiff below, in his amended petition, avers that on the 26th day of January, 1890, the defendant Mary Scott entered into a contract with her codefendants, by the terms of which she leased to her codefendants, now her coplaintiffs in error, her lot in the village, which is above and adjoining the plaintiff's lot, for oil and gas purposes; and attaches to his amended petition, and as part thereof, a copy of the lease. By the terms of this instrument Mrs. Scott granted and demised to her lessees all the oil and gas in and under her tract of land in said village, with the exclusive right of operating thereon for oil and gas, to lay pipe lines on or over the same, with the further right to remove at any time any property placed thereon by the lessee. The term of the grant was sixty days, and, as long as oil and gas should be found in paying quantities, the lessees "yielding and paying to the lessor one eighth part of all the oil produced and sold from the premises, free of expense, in tanks or pipe lines, to the lessor's credit." For the use of half of the house on the premises the lessees agreed to pay \$15 per month.

Such are all the provisions of the lease that are important here. The record shows that Mrs. Scott gave possession of the premises to the lessees, and removed to the country, several miles from the village, and that the lessees entered upon the lot or lots, and took full possession, and proceeded to drill a well for oil or gas, and erected the tanks referred to in the statement of this case.

The plaintiff below also, by averments in his petition, brought upon the record a copy of an ordinance of said village entitled "An Ordinance to Protect the Property of Scio Corporation from Injury by Fire, Explosion, and Other Causes." This ordinance provided that "the oil produced shall, until transported out of the village, be securely confined and kept in suitable tanks so as to prevent the same from escaping upon the grounds or other property within the corporation; and that each tank, before being used, shall have dug surrounding it a ditch or excavation of sufficient size and dimensions . . . that the oil would be restrained by the ditch in case of accident to the tank." A party failing to comply with this regulation was amenable to a fine. Therefore, according to municipal law at that place, the production and storage of oil in tanks was lawful, but they must have about them a trench or ditch to receive escaping oil in case of accident to such tanks.

This production of oil has become an extensive and valuable business, and for several years has been recognized as a legitimate part of our domestic and interstate commerce, and our general assembly has conferred upon companies organized for the storage and transportation of oil the right to acquire right of way for pipe lines, erection of tanks, and other means of storage; and such companies are invested with the rights of common carriers, and subject to corresponding liabilities. See §§ 3878-3880, Ohio Rev. Stat. 1892. So, neither the production nor storage of crude oil is a public nuisance; nor is the storage of it on premises adjacent to or adjoining the premises of another a private nuisance *per se*, although the method of its use and the neglect to properly care for it may create a nuisance. The article (oil) itself has come into common use, and is handled in manifold forms, and by various methods, and one cannot fairly conclude that of itself it is a source of constant danger and menace to property on adjacent premises. If carefully stored in tanks, and the tanks maintained with care, destruction of or injury to neighboring buildings would not be the probable and reasonable result; and, if this be true, then the owner of the oil so stored cannot be properly charged with storing and maintaining an article which is a con-

stant menace to the property of others. Yet the court in the charge eliminated from the case all consideration of the issues joined by the parties on the allegations of negligence, and submitted to the jury an issue not tendered by the pleadings. The cause of action in the amended petition is founded upon acts of negligence and omissions of duty by the defendants, and the plaintiff specifically sets out the acts and omissions upon which he relies for recovery. These charges of negligence were traversed by answers, and so the case stood before the court and jury. Notwithstanding this attitude of the parties and the pleadings, the trial court plainly told the jury that but three questions were for their consideration, *viz.*: "First. Is crude oil stored in tanks a highly explosive and dangerous substance, and a constant menace to property in its vicinity? Second. Did the defendants, or either of them, store crude oil in tanks on Mrs. Scott's property adjoining plaintiff's property, and, if so, was the storing of such oil there the proximate cause of the burning of plaintiff's property?" The third question, in case the jury found affirmatively on the first and second, related to the measure of damages sustained.

In addition to what we have said as to the issues joined on the allegations of negligence, it is not improper for us to say that the evidence adduced by the parties is confined to the questions of negligence, save, perhaps, the testimony of one witness—Timmons—whom the plaintiff called as an expert upon the nature and character of crude oil, and his testimony is that "crude oil would be dangerous to a man who knows nothing about it. To my mind, the way we handle it, we have no more fear of danger with it than in any other business. We would not bring it anywhere in contact with fire. The facts are that when crude oil is warm enough to produce a vapor it would not be safe anywhere, but when cold is perfectly safe,—when it is not producing vapor." It was upon this evidence, or else without any evidence, that the court limited the investigations of the jury and withdrew the consideration of all the other facts in controversy. The charge was without sufficient foundation, unless it can justly be made to rest upon a mere tendency of the evidence. Therefore the simple points or questions submitted to the jury were to be answered practically without and independent of any testimony, and much time might have been saved by giving these brief and simple instructions without the examination of witnesses.

We think that the first two questions, involving, as they do, the liability of the defendants, should not have been left so large-

ly to the chance experience and knowledge of the jury. If it was common knowledge in that jurisdiction that crude oil stored in tanks was highly explosive, a dangerous substance, and a constant menace to property in its vicinity, then why did not the court take judicial notice of it, and pronounce such storage a nuisance *per se*?

But it is claimed by defendant in error that the charge is supported by sufficient legal authority, and the following Ohio cases are cited: *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Defiance Water Co. v. Olinger*, 54 Ohio St. 532, 32 L. R. A. 736, 44 N. E. 238, *Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co.* 60 Ohio St. 560, 45 L. R. A. 658, 54 N. E. 528; *Ohio Gas Fuel Co. v. Andrews*, 50 Ohio St. 695, 29 L. R. A. 337, 35 N. E. 1059; *Cleveland Terminal & Valley R. Co. v. Marsh*, 63 Ohio St. 236, 52 L. R. A. 142, 58 N. E. 821. We are of opinion that none of these cases supports the charge in review, as an examination of them will show.

In *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408, it appears that the city owned or had control of a piece of ground immediately west of plaintiff's lot, on which were a dwelling house, barn, and fruit trees. The city employed a party to quarry stone on its lot for city purposes. Powder was used by the employee to blast the stone, whereby fire was thrown upon the barn, and it and the hay and other feed therein contained were destroyed. The city denied negligence charged, and asserted that the blasting was done by an independent contractor. The city was held liable for damages caused by the fire. But would it have been proper in that case for the court to have submitted to the jury the question whether the stone in the quarry was dangerous, and a constant menace to property in its vicinity? It was the fire thrown by the blast upon the building which caused the injury. So in the case at bar, the presence or storage near by of crude petroleum did not burn the plaintiff's property. If the oil escaped by the negligence of defendants, and came in contact with fire beyond the premises, it was the burning oil which ignited the buildings.

In *Defiance Water Co. v. Olinger*, 54 Ohio St. 532, 32 L. R. A. 736, 44 N. E. 238, the first clause of the syllabus shows that negligence or want of care was relied on to recover, *viz.*: "One who collects on his own premises a substance liable to escape, and, if it should escape, likely to cause mischief, must at least use reasonable care to restrain it. If, for want of such care, it escapes, and injures persons or property rightfully on adjoining premises, he is answerable for the damages sustained on account thereof." That case was tried in the lower court on 62 L. R. A.

issues as to the negligence of the water company; and would it have been proper in that case for the court to submit to the jury the question whether water, when stored in the tower, was a dangerous fluid, and a constant menace to property in its vicinity? Certainly not. And the groundwork of the action in that case was a charge of negligent construction and maintenance of the water tower.

In *Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co.* 60 Ohio St. 560, 45 L. R. A. 658, 54 N. E. 528, there was a storage of nitroglycerin, a very high explosive, and, without proving negligence, it was held that the owner of the explosive was liable for damages caused by its explosion. The difference between the storage of water, stone, crude oil, and nitroglycerin is marked, and easily comprehended, and this point of difference applies in gunpowder cases and other cases arising out of injuries from explosives. The latter are at all times, in all places, and under all circumstances, dangerous. They are made for their dangerous qualities, and are bought, sold, and used as explosives, and hence the owner assumes at once the liability of their accomplishing natural and probable results. Not so as to crude petroleum.

In *Ohio Gas Fuel Co. v. Andrews*, 50 Ohio St. 695, 29 L. R. A. 337, 35 N. E. 1059, this court held that the provisions of § 3561a, Rev. Stat. 1892, imposes on the gas company the duty of keeping the natural gas under its control while transporting the same, and that, if damages resulted to others without their fault, by its explosion, the company would be liable, although not negligent in regard thereto. This holding is because of the statute, and the court did not go further in the case.

We are unable to perceive the reason for defendant in error citing *Cleveland Terminal & Valley R. Co. v. Marsh*, 63 Ohio St. 236, 52 L. R. A. 142, 58 N. E. 821, for there is nothing in it to support the doctrine of the charge of the court in this case.

The celebrated and much criticised case of *Rylands v. Fletcher*, L. R. 3 H. L. 330, is cited and relied on by defendant in error; and in *Defiance Water Co. v. Olinger*, 54 Ohio St. 532, 32 L. R. A. 736, 44 N. E. 238, the former case was quoted from, and one of its rules received the approval of the majority of the court, but in the opinion announced on page 540, 32 L. R. A. 738, 44 N. E. 240, Bradbury, J., says: "This doctrine would seem to be in exact accord with justice and sound reason, but in the case before us we are not required to apply it to its full extent, because the defendant in error, in her amended petition, expressly avers negligence

in the construction of the stand-pipe, as well as a knowledge that it had afterward cracked, and become weakened." As yet no decision of this court has adopted the entire scope of *Rylands v. Fletcher*, and while it holds, in general, a good and wholesome doctrine, resting on good morals and sound reason, its application should be made with suitable and necessary limitations.

In the case at bar the trial court, it seems, exceeded even the latter case, because the application of its doctrine primarily would make the owner and storer of the oil in the tank responsible for its escape onto adjoining premises and resulting damages from such oil. To this extent the authority is good, and may be so accepted. But in this case the action is not for damage by overflow of the oil, but that, after oil had run over and away from the plaintiff's premises some distance, it was intercepted by fire, which followed the oil trail back to his buildings, and that this resulted from negligence of defendants in not using proper means to prevent the escape of the oil, they knowing all the time that there were open fires in the valley below, which might fire oil that found its way thither. Moreover, we think the charge of the court transgresses the principles of *Ruffner v. Cincinnati, H. & D. R. Co.* 34 Ohio St. 96; and *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864. In the latter case F. & Co. sold to defendants a sawmill, and sent the plaintiff, an employee, with the mill, to aid in setting it up. While so at work, a steam boiler owned and used by defendants on their premises to run the sawmill exploded, and injured the plaintiff. It is held that the explosion did not raise a prima facie presumption of negligence on the part of the defendants. In the opinion the court says: "The defendants had a right to place the steam boiler on their premises. Used, as it was, to run the sawmill, it was in no sense a nuisance. As an agent in the various departments of industry, the steam engine has become a necessity in modern life. But, though placed on one's own premises, the owner of a steam engine and boiler will be held responsible for his negligence if he so operates the same as to injure one who comes lawfully upon the premises by invitation or permission. Though doing a lawful act upon his own premises, he will be liable for injurious consequences that may result from it to another if it was so done as to constitute actionable negligence. In such case there is a proper application of the rule that one should enjoy his own property in such manner as not to injure that of another."

In our judgment, the court erred in limiting the jury as was done, and that the case should have been submitted to it on the issue

joined upon the allegations of negligence contained in the amended petition.

Thus far we have considered the legal right of all the defendants to complain of the charge. There is more to be said as to the case against Mrs. Scott, the lessor of her codefendants. After some reluctance, she, like many other lot owners, residents in Scio, leased her lot to her codefendants, as already described, and removed several miles from the village. The village clerk testifies that from 250 to 275 wells had been drilled within its borders, which indicates that the oil fever had become epidemic. It was but reasonable for her to presume that her lessees would erect tanks and drill for oil on the leased premises; but she contributed nothing in any manner to the drilling of the well or placing of the tanks. She surrendered complete and absolute possession and control to her tenants. She had no interest in what might be done there, except that when the oil was produced she was entitled to one eighth of the same in the pipe line. It is true, as shown in the instrument of lease, there is a stipulation that, if her house should be destroyed by fire, the tenants would replace the same, or purchase the entire premises with \$4,000, if the fire was through any negligence of the lessees. This bound them for destruction by negligence, and not absolutely, and it was a contract between the parties to the instrument, and could in no manner inure to the benefit of third persons. However, the court charged, in substance, that if she knew, or might have known by the exercise of due care, that her lessees were liable to store oil upon her lot, and the oil escaped from the premises, and reached a fire, which ran back to and destroyed buildings on adjoining premises, she would be jointly liable with the lessees. From the tenor of the charge, such guilty knowledge or means of knowledge was sufficient to fix her liability, although she directed nothing and did nothing. We cannot believe that such is the law in her case.

If storing oil in tanks on her lot was dangerous, and the stored oil a constant menace, she was not a party to either. Merely permitting another to commit a nuisance does not render one liable for its consequences. Wood, Land. & T. 2d ed. in § 536, sums up a discussion of the liability of the landlord as follows: "The rule may be stated, as the result of the authorities, to be that, in order to charge the landlord, the nuisance must necessarily result from the ordinary use of the premises by the tenant, or for the purpose for which they were let; and where the ill results flow from the improper or negligent use of the premises by the tenant, or, in other words, where the

use of the premises may or may not become a nuisance, according as the tenant exercises reasonable care, or uses the premises negligently, the tenant alone is chargeable for the damages arising therefrom." We have observed that the storage of crude oil is not of itself a nuisance to adjacent or adjoining premises; and if the lessor even knew that oil would be produced by drilling, and stored on the leased premises, she would not be contemplating the creation or maintenance of a nuisance, unless she also knew that it would be negligently stored and cared for by the lessees; and it cannot be held as a matter of law that the lessor should presume that the lessees would be negligent in that behalf.

Some of the principles announced by this court in *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767, are applicable here. In that case it appears that Cheadle owned certain premises, which he fitted up for the sale of dry goods and groceries by his tenant, and he agreed with the tenant that he would construct the shelving and other fixtures, and fasten them to the wall so that they would be safe. These were put in the room by the landlord so carelessly and negligently that they fell upon and injured a customer of the tenant, who brought suit against Cheadle for damages. This court held the customer could not recover. On pages 396, 397, 26 Ohio St. 20 Am. Rep. 770, Mellvaine, J., says: "Indeed, the noxious fixtures complained of did not amount to a nuisance at all in the legal sense of the term. They were not . . . maintained in violation of any right of the public, or of any member of the public. They were made unsafe, it is true, but did not tend to endanger

the person or property of strangers to the premises. They were made unsafe to persons and things which might be for the time being in the storeroom, but no person or thing could rightfully be there except by the permission and upon the request of the lessees. . . . Whatever, therefore, may be the rights of the plaintiff as such customer of the tenant, it is quite clear that he has no remedy against the lessor as the erector or maintainer of either a public or private nuisance."

Mrs. Scott requested the court to charge: "If the jury find that Mary Scott leased the premises in question to the codefendants, and surrendered the possession and control of them to them, and had nothing to do with the building of tanks and other devices for producing, storing, and taking care of the gas and oil, then I charge you that she is not liable to the plaintiff, and the verdict as regards Mary Scott should be for her." The proposition is not very artistically worded, but it contains the law which should have been applied to the facts in her case, and it was error to refuse to so charge.

For error in the charge given and for error in refusing to charge as requested by Mrs. Scott, the judgments of the lower courts are reversed; and on the undisputed facts we find for Mary Scott, plaintiff in error. Judgment is rendered in her favor. As to her coplaintiffs in error, this cause is remanded for further proceedings according to law.

Judgment reversed.

Burket, Ch. J., and Spear, Davis, Shauck, and Crew, JJ., concur:

NEBRASKA SUPREME COURT.

W. C. LEMERT, *Plff. in Err.*,
v.

Robert GUTHRIE *et al.*

(.....Neb.....)

- *1. The failure of the holder of a negotiable note to notify the guarantor of the default of the makers within a reasonable time after default does not absolutely discharge the guarantor, but only to the extent that he is damaged by the delay.
2. The guarantor's contract is a guaranty of the maker's solvency,

*Headnotes by KIRKPATRICK, C.

NOTE.—As to necessity of notice of default to bind guarantor, see also, in this series, *Heyman v. Dooley*, 20 L. R. A. 257, and *note*, and *Welch v. Walsh*, 52 L. B. A. 782.
62 L. R. A.

and, unless there is a different intention expressed in the contract, he is entitled to reasonable notice of the default of the maker.

3. G. Bros. signed the following guaranty upon the back of a note: "For value received, we hereby guarantee payment of the within note, and waive demand and notice of protest on same when due." The makers failed to pay at maturity, although solvent, and demand was not made upon the guarantors until eighteen months after maturity, when the makers had become insolvent. *Held*, that the guarantors were discharged from liability.
4. *Held*, further, that they did not thereby waive notice of the nonpayment of the note by the makers.
5. Evidence examined, and *held* to justify a peremptory instruction for defendants.

(June 18, 1903.)

ERROR to the District Court for Nuckolls County to review a judgment in favor of defendants in an action brought to enforce an alleged guaranty of a promissory note. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Cole & Brown and G. W. Seev-ers, for plaintiff in error:

Having unqualifiedly and unconditionally guaranteed the payment of a note, waiving demand and notice, there can be no defense interposed by pleading insolvency, want of diligence, notice, or demand of payment.

Huff v. Slife, 25 Neb. 448, 41 N. W. 287; *Hungerford v. O'Brien*, 37 Minn. 306, 34 N. W. 161.

The mere neglect of the holder of a note to sue the maker does not discharge the guarantor, although the maker becomes insolvent.

Brown v. Curtiss, 2 N. Y. 225; *Roberts v. Hawkins*, 70 Mich. 566, 38 N. W. 575; *Flentham v. Steward*, 45 Neb. 640, 63 N. W. 924.

Where a contract of guaranty is placed upon a promissory note at the time of its execution, the consideration for the note is the consideration for the guaranty, and no further or other consideration need be proved.

Davis v. Wolff Mfg. Co. 84 Ill. App. 579; *Cahill Iron Works v. Pemberton*, 48 App. Div. 468, 62 N. Y. Supp. 944; *Faulkner v. Gilbert*, 57 Neb. 544, 77 N. W. 1072.

Guaranties of performance and of payment are placed on the same ground. They are absolute, not collateral, promises; and, therefore, no notice of the default of the original promisor is necessary to hold the guarantor.

Hoyt v. Quint, 105 Iowa, 443, 75 N. W. 342; *Hubbard v. Haley*, 96 Wis. 578, 71 N. W. 1036; *Davis v. Wolff Mfg. Co.* 84 Ill. App. 579.

The guaranty of a note and the note itself form but a single contract on the part of the guarantors, where both instruments are a part of the same transaction.

Bagley v. Cohen, 121 Cal. 604, 53 Pac. 1117; *Flentham v. Steward*, 45 Neb. 640, 63 N. W. 924; *Huff v. Slife*, 25 Neb. 448, 41 N. W. 289.

The questions "whether the makers were solvent at maturity, of the note" and "whether demand was made of makers at maturity," were not material and competent to establish any defense, when the payment of the note had been unqualifiedly and unconditionally guaranteed.

Bloom v. Warder, 13 Neb. 476, 14 N. W. 395; *Gibson v. Parlin*, 13 Neb. 292, 13 N. W. 405; *Huff v. Slife*, 25 Neb. 448, 41 N. W. 289; *Hungerford v. O'Brien*, 37 Minn. 306, 34 N. W. 161; *Hoyt v. Quint*, 105 Iowa, 443, 62 L. R. A.

75 N. W. 342; *Clay v. Edgerton*, 19 Ohio St. 549; *Roberts v. Riddle*, 79 Pa. 468; *Cobb v. Little*, 2 Me. 261, 11 Am. Dec. 72; *Davis v. Wolff Mfg. Co.* 84 Ill. App. 579; *Cahill Iron Works v. Pemberton*, 48 App. Div. 468, 62 N. Y. Supp. 944; *Hubbard v. Haley*, 96 Wis. 578, 71 N. W. 1036.

The terms of a written guaranty cannot be varied by parol testimony.

Mawcill v. Burr, 44 Neb. 31, 62 N. W. 236; *Kaserman v. Frics*, 33 Neb. 427, 50 N. W. 209; *Mattison v. Chicago, R. I. & P. R. Co.* 42 Neb. 545, 60 N. W. 925; *Commercial State Bank v. Antelope County*, 48 Neb. 496, 67 N. W. 465; *Miller v. Gunderson*, 48 Neb. 715, 67 N. W. 769.

An absolute guaranty that the debt of a third person shall be paid, or that he will pay it, imposes the same obligation upon the guarantor. In either case, it is an absolute guaranty of the sum stipulated; and the holder is not bound to use diligence, or to give notice of nonpayment, even though the maker of the note was solvent at its maturity, and thereafter became insolvent.

2 Dan. Neg. Inst. 808-810; *Bloom v. Warder*, 13 Neb. 476, 14 N. W. 395; *Huff v. Slife*, 25 Neb. 448, 41 N. W. 289; *Hungerford v. O'Brien*, 37 Minn. 306, 34 N. W. 161; *Brown v. Curtiss*, 2 N. Y. 225; *Roberts v. Hawkins*, 70 Mich. 566, 38 N. W. 575; *Clay v. Edgerton*, 19 Ohio St. 549, 2 Am. Rep. 422; *Roberts v. Riddle*, 79 Pa. 468; *Flentham v. Steward*, 45 Neb. 640, 63 N. W. 924; *Peck v. Frink*, 10 Iowa, 193, 74 Am. Dec. 384; *Gage v. Mechanics' Nat. Bank*, 79 Ill. 62; *Hoyt v. Quint*, 105 Iowa, 443, 75 N. W. 342; *Cobb v. Little*, 2 Me. 261, 11 Am. Dec. 72; *Davis v. Wolff Mfg. Co.* 84 Ill. App. 579; *Cahill Iron Works v. Pemberton*, 48 App. Div. 468, 62 N. Y. Supp. 944; *Hubbard v. Haley*, 96 Wis. 578, 71 N. W. 1036; *McNeal v. Gossard*, 6 Okla. 363, 50 Pac. 159; *Bagley v. Cohen*, 121 Cal. 604, 53 Pac. 1117; *Gibson v. Parlin*, 13 Neb. 292, 13 N. W. 405; *Faulkner v. Gilbert*, 57 Neb. 544, 77 N. W. 1072; *Carson v. Buckstaff*, 57 Neb. 262, 77 N. W. 670; *Bellows v. Lovell*, 5 Pick. 310; *Davis v. Huggins*, 3 N. H. 231; *Page v. Webster*, 15 Me. 249, 33 Am. Dec. 608; *Dennis v. Rider*, 2 McLean, 451, Fed. Cas. No. 3,797; *Train v. Jones*, 11 Vt. 446; *Noyes v. Nichols*, 28 Vt. 174; 2 Parsons, Contr. 520; 3 Addison, Contr. § 1111; 3 Kent, Com. 121; *Wright v. Simpson*, 6 Ves. Jr. 734; *Pain v. Packard*, 13 Johns. 174, 7 Am. Dec. 369; *King v. Baldwin*, 17 Johns. 384, 8 Am. Dec. 415; *Trimble v. Thorne*, 16 Johns. 152, 8 Am. Dec. 302; *Donley v. Camp*, 22 Ala. 659, 58 Am. Dec. 274; *Michigan State Ins. Co. v. Soule*, 51 Mich. 316, 16 N. W. 602; *Lee v. Dick*, 10 Pet. 490, 9 L. ed. 508; *Newbury Bank v. Sinclair*, 60 N. H. 106, 49 Am. Rep. 307.

Messrs. W. D. Oldham, F. H. Stubbs, and W. F. Buck for defendants in error.

Kirkpatrick, C., filed the following opinion:

This is an action brought in the district court of Nuckolls county by plaintiff in error against Guthrie Bros., a partnership, and Robert Guthrie and David Guthrie, the members of such partnership, upon the guaranty of a promissory note. The undisputed testimony shows that in the spring of 1893 A. J. Briggs, George F. Cotton, and J. G. Meek were engaged in the brick business, and purchased from the Frey-Sheckler Company, an Ohio corporation, some brick-making machinery for something more than \$8,000, and in payment therefor they executed to the Frey-Sheckler Company various promissory notes for \$1,074.90 each, coming due at different dates. It is further disclosed that the above-named parties, before delivering the notes, procured defendants in error to guarantee their payment. All of these notes were paid, except the one maturing last, which the Frey-Sheckler Company disposed of to plaintiff in error, W. C. Lemert, the president of the corporation, but who seems to have paid full value for the note. Shortly before the maturity thereof the makers, Briggs and others, desiring an extension, wrote to the Frey-Sheckler Company requesting such extension; the company informing them that they had sold the note to plaintiff in error, but would take the matter of extension up with him, and an extension was accordingly subsequently arranged for, plaintiff in error stipulating that he would grant the extension if Briggs and others would sign the notes individually as makers and procure the same guaranty on the note that appeared upon the old one. Accordingly the note in suit, dated June 1, 1894, payable in sixty days, was signed by Briggs, Cotton, and Meek, naming the Frey-Sheckler Company as payee. Before sending the note to the company the makers took it to defendants in error and requested them to guarantee the note.

It is disclosed that the guarantors had no knowledge that the note had been transferred by the Frey-Sheckler Company to plaintiff in error. When the machinery was purchased in the first instance, the company took a contract, by the terms of which the title to the property was to remain in them until the full payment of the purchase price. This was understood by defendants in error. They signed their name upon the renewal note under a guaranty in the words following: "For value received, we hereby guarantee payment of the within note, and waive demand and notice of protest on same when due. Guthrie Bros." The undisputed evi-

dence discloses that at the time of the execution and delivery of the note the makers were engaged in the brick-manufacturing business, were the owners of a valuable plant, and were also engaged in the banking business, and all of them were solvent. No notice was given to the guarantors of the dishonor of the note until about eighteen months after its maturity, and at that time the undisputed evidence discloses that the makers were each wholly insolvent. In the meantime they had disposed of all of the machinery purchased of the Frey-Sheckler Company to parties having no notice of the lien of that company thereon; the company having failed to place of record its contract reserving title in itself.

The petition filed in the case sets out a copy of the note, together with a copy of the guaranty, and charges the defendants in error as guarantors and indorsers. To this petition defendants in error interposed an answer, setting up four distinct defenses, as follows: (1) A denial of any consideration for the note and for the guaranty, and a denial that plaintiff in error ever purchased the note from the payee therein named, or that plaintiff in error ever paid any consideration for the note; (2) laches in not giving defendants in error notice of the non-payment of the note, and consequent damages, which released them from liability on their guaranty; (3) the wasting and disposing of security, which released defendants of all liability on the note; (4) a diversion of the guaranty, which absolutely released defendants as guarantors. There seems to have been practically no dispute in the evidence introduced at the trial, and at the close of the evidence the trial court, at the request of defendants in error, instructed the jury to find a verdict for them. From a judgment rendered on such verdict, and from the ruling denying the motion for a new trial, plaintiff in error brings the case to this court upon error.

If any one of the defenses pleaded is conclusively established by the evidence, and is in fact a complete defense, the peremptory direction was justified, and the judgment must be affirmed. In our view of the case, it will only be necessary to consider the second defense pleaded. Inasmuch as the evidence clearly establishes the solvency of the makers at the maturity of the note, and their insolvency at the time of notice to the guarantors, if the guarantors were entitled to notice, they were damaged in the amount due upon the note by reason of the failure to give notice. Some diversity in the decisions is found to exist upon the question whether, under an instrument like that in this case, the person signing is entitled to notice of the default of the maker. From an extended ex-

amination of the cases, we are lead to the conclusion that the diversity arises because of a failure to recognize the distinction between the liability of a guarantor and that of an indorser. This distinction is stated in apt language in 2 Daniel, Negotiable Instruments, 5th ed. § 1754: "The liability of a guarantor also differs materially from, and is more onerous than, that of an indorser. The indorser contracts to be liable only upon condition of due presentment of the bill or note on the exact day of maturity, and due notice to him of its dishonor; and he is absolutely discharged by failure in either particular, although he may suffer no actual damage whatever. The guarantor's contract is more rigid, and he is bound to pay the amount upon a presentment made and notice given to him of dishonor within a reasonable time; and in the event of a failure to make presentment and give notice within such reasonable time he is not absolutely discharged from all liability, but only to the extent that he may have sustained loss or injury by the delay." That a guarantor is entitled to such notice, and that a failure to give it within a reasonable time releases him from liability to the extent that he may be damaged, seems to be sustained by the better text-writers and by a very great weight of authority. 2 Parsons, Notes & Bills, §§ 137, 139; Tiedeman, Com. Paper, § 421; *Second Nat. Bank v. Gaylord*, 34 Iowa, 248; *Brandt, Suretyship & Guaranty*, 2d ed. § 197; *Oxford Bank v. Haynes*, 8 Pick. 423, 19 Am. Dec. 334; *Wildes v. Savage*, 1 Story, 22, Fed. Cas. No. 17,653.

This court, at a very early date, in *Newton Wagon Co. v. Diers*, 10 Neb. 284, 4 N. W. 995, speaking by a late judge, said: "When a guarantor is not notified of the default of his principal within a reasonable time, he is released from liability to the extent that he may be damaged by the omission; and if it appear that the principal was solvent at the maturity of the obligation, but became insolvent before the demand of payment was made or notice given, except upon special and peculiar circumstances, damages will be presumed." The case cited was where Herman Diers was acting as the agent of a wagon company in the sale of its wagons. He sold a wagon to certain persons, and took their note in payment, but before delivering the note to the wagon company he indorsed his name in blank on the back thereof. It was disclosed in that case that by the terms of his contract with the company he agreed to guarantee notes taken, and for that reason this court seems to have determined his liability as one of guaranty. This determination of the rights and liabilities of a guarantor seems never to have been overruled in this state. It seems based upon sound reason and supported by authority, 62 L. R. A.

and we are not inclined at this time to announce a different rule.

It is contended by plaintiff in error that this court in *Huff v. Slife*, 25 Neb. 448, 41 N. W. 289, has adopted a rule exactly contrary to that announced in the *Newton Wagon Company Case*. In the *Huff Case*, Zenus Farier executed a note to one I. L. Huff as payee. Huff, desiring to sell the note, wrote on the back thereof, and signed, the following guaranty: "I guarantee the payment of the within note. [Signed] I. L. Huff." It is thus disclosed that Huff, being the payee of the note, and transferring it as he did, became, not only an indorser, but a guarantor, of the note as well. As indorser he was absolutely bound to pay the note, if at maturity the note was protested for nonpayment and he duly notified. The holder need not have sued the maker, or might have joined Huff as indorser. In either case there could be no question of Huff's liability. By adding to his indorsement the words, "I guarantee the payment of the within note," he also made himself a guarantor, and thus waived his right to notice of protest and nonpayment. As indorser he was made liable by the terms of his contract, but protest and notice thereof would have been required to fix his liability. But as guarantor he waived this right, so that beyond question he was absolutely liable, and his liability in no way depended upon proper steps being taken to collect from the maker of the note. As stated in Daniel, Neg. Instruments, § 1754: "The same person may be guarantor and also indorser of a note; and in such case, while failure to give him due notice of demand and nonpayment will discharge him as indorser, he will still be bound as guarantor."

Huff v. Slife, 25 Neb. 448, 41 N. W. 289, seems to rest for authority upon *Bloom v. Warder*, 13 Neb. 476, 14 N. W. 395, and *Hungerford v. O'Brien*, 37 Minn. 306, 34 N. W. 161. In the *Bloom Case* the guaranty was as follows: "For value received, we guarantee the payment of the within note, and hereby waive protest, demand, and notice of nonpayment." It will thus be seen that the guarantor had waived the very defense upon which defendants in error were allowed to recover in this case. The guarantor in the last case cited, having expressly waived notice of nonpayment, of course, would not be heard to insist upon want of notice. It follows, therefore, that *Bloom v. Warder* is not an authority in the case at bar, is not in conflict with the conclusion we have reached, nor is it an authority in support of *Huff v. Slife*, because the questions involved are distinctly different. In the *Hungerford Case*, also cited in *Huff v. Slife*, the payee signed a guaranty as follows: "For value, I hereby guarantee the payment of the within note to

Casie Hungerford, or bearer." It thus appears that he was an indorser, as well as a guarantor, and, his liability being fixed by the double character of his contract, it was absolute. The case, accordingly, does not furnish an authority contrary to the rule announced herein.

It is contended, also, that *Gibson v. Parlin*, 13 Neb. 292, 13 N. W. 405, supports a different rule. There the payee indorsed the note, waiving demand upon the maker, protest, and notice of nonpayment; and it was held that a right of action accrued against him as soon as the note became due. As we have seen, the rule in this case has no application to the case at bar, where it is sought to charge a party as guarantor only upon the note.

Flenham v. Steward, 45 Neb. 640, 63 N. W. 924, is cited as announcing a view contrary to *Newton Wagon Co. v. Diers*, 10 Neb. 284, 4 N. W. 995. The *Flenham Case* arose in the following manner: Dawes & Foss, a copartnership, doing business at Crete, Nebraska, were engaged in the farm mortgage business, and made a loan to one Stewart. It seems they were paid a commission for negotiating this loan by appellant Flenham, and in addition took a second mortgage for a commission due them on the same land. Default having been made upon the mortgage, appellant began foreclosure, making Dawes & Foss, and Charles C. White, who in the meantime had been appointed receiver for the copartnership, defendants. A decree was entered upon the first and second mortgage, an order of sale issued, and the property sold for satisfaction of the decree; and, there remaining a deficiency due upon the first mortgage, appellant Flenham filed a motion for a deficiency judgment against Dawes & Foss and the receiver, upon the ground that Dawes & Foss had guaranteed the payment of the notes and coupons. Objection seems to have been interposed to this by Dawes & Foss and the receiver, and the motion was by the trial court denied. Appellant Flenham brought the case to this court upon appeal. Two principal questions seem to have been litigated in this court: The contention by Dawes & Foss that, inasmuch as a receiver had been appointed for the copartnership, a suit could not be maintained against them or the receiver without permission of the court, with reference to which it was held that objection was waived by taking a decree upon the second mortgage. The further contention that no notice had been given to Dawes & Foss of the application for a deficiency judgment, as to which it was held that due notice was given, and that they had appeared and asked time to answer. A further contention seems to have been made, namely, that no guaranty

had been made of the note and coupons, as to which defense this court said: "This contention is wholly without merit. The guaranty made by Dawes & Foss of the payment of the mortgage debt was in writing, and became and was a joint obligation of the members composing the copartnership." While the form of the guaranty is not disclosed in the opinion, it is disclosed by an examination of the record that it differed from the one in the case at bar, in that the guarantors waived "notice;" but it is readily apparent that no defense was tendered that Dawes & Foss had been in any way damaged by want of notice, and in fact it was disclosed in the entire record that they had notice all the way through, and appeared in the foreclosure proceedings, taking a decree upon their second mortgage. The case seems not in point, and not an authority in conflict with *Newton Wagon Co. v. Diers*, *supra*.

Again, it is contended that a recent unreported case of *McKibben v. Ripley* (decided September 18, 1901) 95 N. W. 1046, is contrary to the doctrine announced in the *Newton Wagon Company Case*. From an examination of the record in the case cited, it is disclosed that the guaranty in controversy was in the language following: "For value received, we guarantee the payment of the within note at maturity, and waive protest and notice of nonpayment." It will thus be seen that in the case just cited the guarantor waived notice of nonpayment, which defendants in error herein did not; and it follows that the case does not conflict with the *Newton Wagon Company Case*, or with the view announced herein. The cases cited by plaintiff in error from other states we do not find sufficiently in point to demand consideration.

It must be kept in mind that defendants in error are not indorsers of the note sued upon. They were strangers to the original contract. As guarantors, they had a right to fix the terms of their contract. Whether, in the absence of evidence to the contrary, had they simply signed their names on the back of the note in blank before its delivery, they would have been held as accommodation indorsers, guarantors, or sureties is not involved in this case, and need not be decided. As makers of an independent contract, they had a right to limit their liability to that of guarantors. This court has many times held the indorser on a note liable, who had, in addition to his liability as such, made himself liable as guarantor; but it has been said that he was simply an indorser with an enlarged liability. *Heard v. Dubuque County Bank*, 8 Neb. 10, 30 Am. Rep. 811; *Helmer v. Commercial Bank*, 23 Neb. 474, 44 N. W. 482; *Weitz v. Wolf*, 23 Neb. 500, 44 N. W. 485. The soundness of

the rule in *Newton Wagon Co. v. Diers* has been recognized in *Liningier & M. Co. v. Wheat*, 49 Neb. 567, 68 N. W. 941, where it was said: "The neglect to notify the guarantor of the default of his principal does not operate to discharge the guarantor, unless such neglect is on its face unreasonable, in view of all the circumstances of the case."

And in *Pollard v. Huff*, 44 Neb. 892, 63 N. W. 58, the rule is affirmed.

It is finally contended that by the use of the words in this guaranty, "and waive demand and notice of protest on same when due," defendants in error waived all notice of nonpayment by the makers. We are unable to see merit in this contention. The guaranty seems to have been placed on the back of the note with a stamp, and under it the name of Guthrie Bros. was written. It is very apparent from the language used that the words, "waive demand and notice of protest on same when due," have no application, and are not intended to waive the notice of nonpayment to which the guarantor is clearly entitled. The language used would be proper to fix the liability of an indorser, and is only a waiver of the protest and notice of protest of the law merchant necessary to charge an indorser as such.

Again it is contended that the following language on the face of the note: "The drawers and indorsers severally waive presentment for payment, protest, and notice of protest and nonpayment of this note,"—is a sufficient waiver. As we have seen, defendants in error are neither drawers nor indorsers. The settled rule is that the con-

tract of guaranty is a contract separate and apart from the note itself. This court has said that a guarantor and maker of a note cannot be joined in one action, while the maker and indorser can be joined, thus clearly recognizing the distinctive character of the two contracts. In the case at bar, the undisputed evidence shows that for six months after the maturity of the note the makers were solvent, and that during the succeeding twelve months before their failure to pay was brought to the attention of the guarantors they had become wholly insolvent. It is further disclosed by the record that this failure to give notice seems to have been occasioned by plaintiff in error having mislaid the note in his deposit vault, so that it was not found until about the time the notice was given and suit brought. For this delay, defendants in error were not responsible, and should not be prejudiced thereby. From what has been said, it clearly appears that defendants in error were damaged by failure to give the notice to the full amount of the note. It follows that the judgment of the trial court upon the verdict directed in their favor was right, and it is therefore recommended that the same be affirmed.

Hastings, C., concurs.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

PENNSYLVANIA SUPREME COURT.

Albert RACHMEL, by Next Friend, *Appt.*,
v.

Jefferson H. CLARK *et al.*

(205 Pa. 314.)

1. A manufacturer who uses the sidewalk in front of his building to store stone slabs which are used in his business is liable for injuries thereby occasioned to any person lawfully using the walk, and who is himself without fault.
2. If a space inside the building line is permitted by the abutting owner to remain open, and to be used as part of the sidewalk, he must exercise due care not to place there dangerous obstructions which

may result in injuries to persons lawfully on the walk, including children who may be attracted to, and enter upon, the premises.

3. Whether or not a child injured through another's negligence was in the exercise of ordinary care and caution for one of its age and discretion is a question for the jury.

(April 20, 1903.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 1, for Philadelphia County in favor of defendants in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Reversed.*

NOTE.—As to liability for dangerous conditions of private grounds lying open beside highway or frequented path, see also, in this series, *Lepnick v. Gaddis*, 26 L. R. A. 686, and *note*; *Pekin v. McMahon*, 27 L. R. A. 206; *Moran v. Pullman Palace Car Co.* 33 L. R. A. 755; *Dobbins v. Missouri, K. & T. R. Co.* 38 L. R. A. 62 L. R. A.

573; *Omaha v. Bowman*, 40 L. R. A. 531; *Stendal v. Boyd*, 42 L. R. A. 288; *Cooper v. Overton*, 45 L. R. A. 591; *Arnold v. St. Louis*, 48 L. R. A. 291; *Kopplekom v. Colorado Cement Pipe Co.* 54 L. R. A. 284; and *Savannah, F. & W. R. Co. v. Beavers*, 54 L. R. A. 314.

The facts are stated in the opinion.

Mr. A. S. L. Shields for appellant.

Messrs. E. Clinton Rhoads and Franklin L. Lyle, for appellees:

Defendants were entitled to a reasonable use of the sidewalk in conducting their business, and the use would be presumed to be reasonable until it was shown to be otherwise, or facts were proved from which an inference that its use was unreasonable could be inferred.

Com. v. Passmore, 1 Serg. & R. 217; *Vallo v. United States Exp. Co.* 147 Pa. 407, 14 L. R. A. 743, 23 Atl. 594.

A child of tender years may be a trespasser, and subject to the consequences of his own trespass.

Rodgers v. Lees, 140 Pa. 475, 12 L. R. A. 216, 21 Atl. 399; *Oil City & Petroleum Bridge Co. v. Jackson*, 114 Pa. 321, 6 Atl. 128; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258, 47 Am. Rep. 706; *Kay v. Pennsylvania R. Co.* 65 Pa. 276, 3 Am. Rep. 628; *Gaughan v. Philadelphia*, 119 Pa. 503, 13 Atl. 300; *Hestonville Pass. R. Co. v. Connell*, 88 Pa. 520, 32 Am. Rep. 472; *Moore v. Pennsylvania R. Co.* 99 Pa. 301, 44 Am. Rep. 106; *McLoughlin v. Philadelphia*, 142 Pa. 80, 21 Atl. 754.

Where facts have not been shown from which negligence may reasonably be inferred, they should not be submitted to a jury to infer arbitrarily, and without evidence, that there was negligence.

Philadelphia & R. R. Co. v. Hummell, 44 Pa. 375, 84 Am. Dec. 457; *King v. Thompson*, 87 Pa. 365, 30 Am. Rep. 364; *Goshorn v. Smith*, 92 Pa. 435; *Philadelphia & R. R. Co. v. Yerger*, 73 Pa. 121; *Philadelphia & R. R. Co. v. Heil*, 5 W. N. C. 91; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258, 47 Am. Rep. 706.

Mestrezat, J., delivered the opinion of the court:

The testimony as given in the paper book does not disclose the facts of the case as fully and clearly as it should. On the trial the witnesses were permitted to give distances, and to indicate the position of the child by reference to objects in the courtroom, and consequently we are not in possession of some important data necessary to a full understanding of the facts. This practice is not commendable, especially in cases of sufficient importance to be reviewed by an appellate court, as such testimony discloses no facts to those who read it. There is a total absence of any measurements before us showing the width of the pavement proper, or the pavement as enlarged by the space between the factory and the building line. This is an important feature of the case, and exact data should have been pro-

duced at the trial and printed with the record. From these suggestions and the indefinite character of some other parts of the testimony, it is not singular that the parties disagreed as to whether the accident occurred on the pavement proper or in the rear of the building line. On the facts as they were disclosed on the trial below, we think the learned trial judge erred in withdrawing the case from the jury.

The defendants were engaged in the business of manufacturing articles from slate, at their factory at 122 Eutaw street, in the city of Philadelphia. For several years they had been accustomed to stand large slabs of granite and slate in front of and against their factory building, on both sides of a door which leads into the cellar of the building. These slabs were from 3 to 5 feet in length, and, in the language of one of the witnesses, "were all piled up in front of the building, and pretty nearly half of the pavement was taken." The cellar door was partly in the pavement, from which it inclined upward to the wall of the building. About 4 o'clock in the afternoon of June 26, 1896, the plaintiff, a boy of about seven and one-half years, having returned from school to his home in that section of the city, was on the cellar door in front of the defendant's manufactory. While there, he placed his left foot on the frame of the door, steadied himself by his left hand on a slab of the slate, and was making figures on the slab with his right hand. In leaving this position he jumped to the ground, a distance of about 1 foot, in front of the slab, which fell on him and inflicted very serious injuries. The evidence does not directly disclose what caused the slab to fall, but the plaintiff claims that it was so negligently and insecurely placed that the slightest touch of the child's hand would cause it to fall.

The defendants had no right to use the pavement of the street as a storage ground for the material used in their factory. They could use it temporarily in conveying the material to the factory and in taking the manufactured articles from it. But even under those circumstances they were required to observe proper care and precaution so as not to endanger those who were using the pavement for transit. Notwithstanding the argument of the defendants to the contrary, the evidence would have justified the jury in finding that the place in front of their building, including a part of the pavement, had been occupied continuously for four or five years by the material used in the factory. Of course, the same slabs were not there for that length of time, but, when any slabs were removed, others replaced them. The slab that fell on the boy had stood in its place for at least one month. The act of

the defendants in obstructing the pavement was a nuisance, and hence was unlawful. They were therefore responsible for injuries occasioned by their conduct to any person lawfully using the street, and who was himself without fault. The streets of a city are for the purpose of transit, and, except for temporary use by abutting property owners, recognized as lawful, it is illegal to obstruct them.

If the plaintiff was within the building line at the time he fell, the defendants are not necessarily relieved of liability for his injuries. The evidence tended to show that the space between the building line and the factory had been paved, and was used as a part of the sidewalk of the street. If that be true, the defendants were required to exercise due care to keep it in a reasonably safe condition, and, if they placed and kept upon it a dangerous obstruction resulting in injury, an action would lie to the injured person. *Tomle v. Hampton*, 129 Ill. 379, 21 N. E. 800; *Holmes v. Drew*, 151 Mass. 578, 25 N. E. 22. In paving the space in front of the building, and permitting its use as a sidewalk, there was an implied invitation to the public to use it, and that imposed upon the defendants the duty of exercising reasonable care to protect those using it from danger. "This [paving and use by the public] would amount to an invitation to the public to enter upon and use as a public sidewalk the land so prepared," says Allen, J., in *Holmes v. Drew*, 151 Mass. 578, 25 N. E. 22, "and the plaintiff so using it would have gone upon the defendant's land by her implied invitation, and she would owe to him the duty not to expose him to a dangerous condition of the walk which reasonable care on her part would have prevented."

If it be conceded, however, that the ground between the factory and the building line was not paved, yet it was open, and practically a part of the footwalk of the street. The defendants, therefore, having regard to these circumstances, owed a duty to the public to exercise reasonable care to keep it safe, so that those using the adjacent highway would not be exposed to danger. As said by Chief Justice Agnew in *Hydraulic Works Co. v. Orr*, 83 Pa. 332: "Duties arise out of circumstances. Hence, where the owner has reason to apprehend danger, owing to the peculiar situation of his property and its openness to accident, the rule will vary. The question then becomes one for a jury, to be determined upon all its facts of the probability of danger and the grossness of the act of imputed negligence." The owners of the premises are required in such cases to anticipate that children as well as adults may use the highway, and thereby be exposed to any unsafe objects placed upon

the premises. In this case the person injured was a child of very tender years. His childish instincts led him to the place. He saw the slate, and, just from school, he had a desire to write on it. His conduct was perfectly natural, and what might have been expected of any schoolboy of his age, and especially of any child of the evident precocity of this boy. Pertinent and applicable to the facts of this case is the language of Cooley, Ch. J., in *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257: "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they, in their immature judgment, might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken." In throwing open, and permitting the use of, this space adjacent to a public street in a thickly populated community, the defendants, therefore, were required to make the place reasonably safe, not only for adults using the highway, but for children, recognizing their childish instincts, and the probability that they might be attracted to and enter upon the premises. Hence, if they disregard their duty in this respect, they are liable to any person, adult or infant, who, while exercising the care required of him, was injured by their default.

It is strenuously urged that the child was a trespasser, and that therefore, in the use of their premises, the defendants owed him no duty of protection against the injuries he sustained. Several cases decided by this court are cited in support of the proposition, and as sustaining the contention of the defendants, that by reason of the trespass there can be no recovery here. But those cases were ruled on a different state of facts, and do not control the present case. Similar or analogous facts alone make a case a precedent for subsequent decisions, and *dicta* in the opinion, not necessary to a decision on the facts presented, are not to be regarded as an authoritative enunciation of a principle. While in some of the cases it is said that a child may be a trespasser and subject to the consequences of his trespass, yet it will be found in many, if not all, of the cases, that under the facts disclosed the law imposed no duty upon the defendant, and that the injuries were not the result of his negligence. The mere fact that a child was injured without his fault is not sufficient to impose a liability on the defendant, unless he is convicted of negligence. The defendant's negligence and the child's lack

or want of it must both be found before there can be any liability on the part of the defendant. Here, as we have seen, the peculiar location of the ground where the accident occurred imposed the duty of reasonable care in the use of it on the defendants, and it is averred as the cause of action that the plaintiff's injuries were due to a negligent performance of that duty. This was a question for the jury. So, also, was the alleged negligence of the plaintiff if he were of sufficient age to appreciate and avoid danger. Where the extreme youth of a child forbids any imputation of negligence, it is not a question for consideration; but beyond that age, his conduct affects his right to recover damages for his injuries, and is for the jury. He is required to exercise ordinary care and caution reasonable for one of his age and discretion. Such prudence only is exacted of him, and, when he observes it, his duty is performed. The rule as to the responsibility of an infant for his acts is thus stated in *Kehler v. Schwenk*, 144 Pa. 348, 13 L. R. A. 374, 22 Atl. 910: "All the cases agree that the measure of a child's

responsibility is his capacity to see and appreciate danger, and the rule is that, in the absence of clear evidence of lack of it, he will be held to such measure of discretion as is usual in those of his age and experience. This measure varies, of course, with each additional year, and the increase of responsibility is gradual. It makes no sudden leap at the age of fourteen. That is simply the convenient point at which the law, founded upon experience, changes the presumption of capacity, and puts upon the infant the burden of showing his personal want of intelligence, prudence, foresight, or strength usual in those of such age. The standard remains the same, to wit, the average capacity of others in his condition."

The case as presented on the trial in the court below should have been submitted to the jury, with instructions as to the rights of the plaintiff, and the duty of the defendants, at the place of the accident. The nonsuit was therefore improperly granted.

The judgment is reversed, with a proce-dendo.

TEXAS SUPREME COURT.

J. H. RAYMOND, Jr., *Plff. in Err.*,
v.

A. H. YARRINGTON *et al.*

(.....Tex.....)

1. Parties are bound individually by a clause in an agreement selling a partnership business, that "we agree and bind ourselves not to enter into or conduct" a similar business in the territory covered by the business sold, which is signed by them in their individual names.
2. An action lies against parties who, through conspiracy, induce another to break his contract to the injury of the one by whom the action is brought.
3. One who is responsible for another's engaging in business in breach of his contract not to do so is liable for the damages thereby caused to the other contracting party, whether he induces the breach of the contract or not.
4. One violating his agreement not to engage in a business which he has sold to another is liable, at least, for nominal damages.

(April 23, 1903.)

NOTE.—As to effect of agreement by partnership, when making a sale of its business, not to re-engage in such business, on right of individual partners to engage therein, see also, in this series, *Steichen v. Fehleisen*, 51 L. R. A. 412, and *Love v. Stidham*, 53 L. R. A. 897.

62 L. R. A.

ERROR to the Court of Civil Appeals for the Third Supreme Judicial District to review a judgment affirming a judgment of the District Court for Travis County in favor of defendants in an action brought to recover damages for breach of a contract to refrain from engaging in business in competition with plaintiff. *Reversed.*

The facts are stated in the opinion.

Messrs. Fiset & Miller, with *Mr. James W. McCleendon*, for plaintiff in error:

The wrongful or malicious procurement of the breach of a contract, where such breach results in damage, is an actionable wrong.

Dels v. Winfree, 80 Tex. 400, 16 S. W. 111; *Olive v. Van Patten*, 7 Tex. Civ. App. 630, 25 S. W. 428; *Yoakum v. Dunn*, 1 Tex. Civ. App. 520, 21 S. W. 411; *International & G. N. R. Co. v. Greenwood*, 2 Tex. Civ. App. 79, 21 S. W. 559; *Doremus v. Hennessy*, 176 Ill. 608, 43 L. R. A. 797, 52 N. E. 924, 54 N. E. 524; *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333; *Ashby v. White*, 2 Ld. Raym. 938, 1

For other cases as to liability for inducing breach of contract, see *Boysen v. Thorn*, 21 L. R. A. 238, and *note*; *Raycroft v. Tayntor*, 33 L. R. A. 225; *Gore v. Condon*, 40 L. R. A. 382; *Doremus v. Hennessy*, 43 L. R. A. 797; and *West Virginia Transp. Co. v. Standard Oil Co.*, 50 L. R. A. 804.

Smith Lead. Cas. 8th ed. 264; *Jones v. Stanly*, 76 N. C. 350; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Gore v. Condon*, 87 Md. 368, 40 L. R. A. 382, 39 Atl. 1044; *Walker v. Cronin*, 107 Mass. 567; *Lumley v. Wagner*, 13 Eng. L. & Eq. 252; *Webster v. Dillon*, 3 Jur. N. S. 432; *Taunton C. M. Co. v. Cook*, 24 Austin Law Rep. 547; *Daly v. Smith*, 49 How. Pr. 150; *Moran v. Dunphy*, 177 Mass. 485, 52 L. R. A. 115, 59 N. E. 125; *Anson*, Contr. 2d ed. pp. 276-278; *Lucke v. Clothing Cutters' & T. Assembly*, No. 7507, K. of L. 77 Md. 396, 19 L. R. A. 408, 26 Atl. 505; *Chipley v. Atkinson*, 23 Fla. 206, 1 So. 934; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. 48; *Murray v. Chicago & N. W. R. Co.* 62 Fed. 45; *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. 811.

Malice is the intent to injure another without right or justifiable cause, and any unlawful act done wilfully and purposely to the injury of another is, as against that person, malicious.

Lumley v. Gye, 2 El. & Bl. 216; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Birby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; 2 Greenl. Ev. § 453.

The fact that a contract is terminable at the will of either of the parties thereto does not justify a third party in wilfully and maliciously causing the breach of the same.

Delz v. Winfree, 80 Tex. 460, 16 S. W. 111; *Olive v. Van Patten*, 7 Tex. Civ. App. 630, 25 S. W. 428; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 23, 38 L. ed. 66, 14 Sup. Ct. Rep. 240; *Benton v. Pratt*, 2 Wend. 385, 20 Am. Dec. 623; *Lucke v. Clothing Cutters' & T. Assembly* No. 7507, K. of L. 77 Md. 396, 19 L. R. A. 408, 26 Atl. 505; *Allen v. Flood* [1898] A. C. 1; *Chipley v. Atkinson*, 23 Fla. 206, 1 So. 934; *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30; *Johnston Harvester Co. v. Meinhardt*, 60 How. Pr. 172; *Gunter v. Astor*, 4 J. B. Moore, 12; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. 48.

Where a number of persons conspire to injure another, and, in pursuance of their joint arrangement and understanding, some of said persons do actually commit a legal wrong, resulting in damage, against such other person, all the conspirators are liable therefor.

Olive v. Van Patten, 7 Tex. Civ. App. 630, 25 S. W. 428; *Delz v. Winfree*, 80 Tex. 460, 16 S. W. 111.

Damages for a wrong will be allowed if they be such as would ensue in the usual and natural course of events from the wrong done, or if they be such as may be reasonably supposed to have been contemplated by 62 L. R. A.

the parties from facts within their knowledge.

Pacific Exp. Co. v. Darnell, 62 Tex. 641; *Jones v. George*, 61 Tex. 349; 48 Am. Rep. 280; *Hadley v. Bazendale*, 9 Exch. 353.

In a suit for damages occasioned by the total destruction of plaintiff's business the measure of damages should be the total value to plaintiff of the business destroyed.

International & G. N. R. Co. v. Greenwood, 2 Tex. Civ. App. 79, 21 S. W. 559; *Doremus v. Hennessy*, 176 Ill. 608, 43 L. R. A. 797, 52 N. E. 924, 54 N. E. 524; 2 Sedgw. Damages, § 470; *Welsh v. Morris*, 81 Tex. 159, 16 S. W. 744.

In determining the total value of a business, and in assessing damages for the destruction thereof by the wrongful acts of defendants, the probable expectation of the continuance and of profits of said business should be considered.

Halcomb v. Stubblefield, 76 Tex. 311, 13 S. W. 231; *Pacific Exp. Co. v. Darnell Bros.* 62 Tex. 641; *Galveston City R. Co. v. Miller* (Tex. Civ. App.) 38 S. W. 1132; *Houston & T. C. R. Co. v. Hill*, 70 Tex. 51, 7 S. W. 659; *Western U. Teleg. Co. v. Bowen*, 84 Tex. 477, 19 S. W. 554; *Swasey v. Gay*, 3 Tex. App. Civ. Cas. (Willson) § 226, p. 272; *Equitable Mortg. Co. v. Weddington*, 2 Tex. Civ. App. 373, 21 S. W. 576.

Where a wrong resulting in actual damage is wanton, wilful, malicious, fraudulent, or oppressive, exemplary damages in addition to actual damages may be recovered.

San Antonio & A. P. R. Co. v. Kniffen, 4 Tex. Civ. App. 484, 23 S. W. 457; 2 Greenl. Ev. § 453; *Addison*, Torts, p. 621.

All the defendants were shown to be liable in the petition, because it was alleged (1) that they all confederated and conspired to do an unlawful thing, and (2) that the milling company, Kaufman and McDowell maliciously induced and procured Harwood to do an illegal act, viz., to break his contract not to compete with plaintiff, and (3) that Harwood, on his part, did break said contract.

Allen v. Flood [1898] A. C. 1; *Moran v. Dunphy*, 177 Mass. 485, 52 L. R. A. 115, 59 N. E. 125; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; *Gunter v. Astor*, 4 J. B. Moore, 12; 2 Greenl. Ev. § 453; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Birby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Delz v. Winfree*, 80 Tex. 460, 16 S. W. 111; *Olive v. Van Patten*, 7 Tex. Civ. App. 630, 25 S. W. 428; *Benton v. Pratt*, 2 Wend. 385, 20 Am. Dec. 623; *Lucke v. Clothing Cutters' & T. Assembly* No. 7507, K. of L. 77 Md. 396, 19 L. R. A. 408, 26

Atl. 505; *McDonald v. Edwards*, 20 Misc. 523, 46 N. Y. Supp. 673; *Johnston Harvester Co. v. Meinhardt*, 60 How. Pr. 172; *Jones v. Stanly*, 76 N. C. 356; *Gore v. Condon*, 87 Md. 368, 40 L. R. A. 382, 39 Atl. 1044; *Doremus v. Hennessy*, 62 Ill. App. 391; *Walker v. Cronin*, 107 Mass. 567; *Anson*, Contr. 2d ed. pp. 276-278.

It is illegal for persons to combine to prevent others from dealing with a person or carrying out their contracts with him;—that is by boycotting him.

35 Alb. L. J. 224; *Lucke v. Clothing Outlets' & T. Assembly No. 7507*, K. of L. 77 Md. 396, 19 L. R. A. 408, 26 Atl. 505; *Chipley v. Atkinson*, 23 Fla. 206, 1 So. 934; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. 48; *Murray v. Chicago & N. W. R. Co.* 62 Fed. 45; *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. 811; *Dela v. Winfree*, 80 Tex. 400, 16 S. W. 111.

Messrs. D. W. Doom, D. H. Doom, and West & Cochran, for defendants in error:

The petition fails to state a cause of action as against the milling company, because it affirmatively appears therefrom that the only contractual relation existing between the milling company and plaintiff was one terminable at the will of either party.

1 Am. & Eng. Enc. Law, 2d ed. pp. 12-15, note, 4; Story, Agency, §§ 462-467; *Baker v. Metropolitan L. Ins. Co.* 23 Ky. L. Rep. 1174, 55 L. R. A. 271, 64 S. W. 913.

The allegations as to conspiracy are too general, and the acts upon which the damages are alleged are not the acts of all the parties, nor are they set forth specifically enough in detail to make any of the defendants as such liable therefor.

Security Mortg. & T. Co. v. Haney (Tex. Civ. App.) 27 S. W. 217; 4 Enc. Pl. & Pr. p. 737.

The anticipated profits of a commercial business are too remote, uncertain, and speculative to warrant their recovery; and particularly is this the case in a brokerage business terminable at any time simply upon notice.

Elmendorf v. Classen, 92 Tex. 472, 49 S. W. 1043; *Voorheis v. Fry* (Tex. Civ. App.) 52 S. W. 580; *San Antonio v. Smith*, 94 Tex. 266, 59 S. W. 1109; *Central Coal & Coke Co. v. Hartman*, 49 C. C. A. 244, 111 Fed. 96; *Sutherland, Damages*, 2d ed. § 67; *Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 206, 35 L. ed. 150, 11 Sup. Ct. Rep. 500; *Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.* 152 U. S. 200, 38 L. ed. 411, 14 Sup. Ct. Rep. 523; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718.
62 L. R. A.

Gaines, Ch. J., delivered the opinion of the court:

This suit was brought by plaintiff in error against defendants in error. General and special demurrers to the petition were interposed by all the defendants, and all were sustained except those of defendant Harwood. His exceptions were overruled, but upon the trial a verdict was instructed in his favor. A judgment was accordingly entered for all the defendants, and it was affirmed on appeal to the court of civil appeals.

We shall set out in substance, and as briefly as practicable, the facts alleged in the petition. In the first paragraph Yarrington, Harwood, McDowell, Kaufman, and the E. O. Standard Milling Company, a corporation, are made defendants in the suit, and their respective residences are stated. In the second paragraph it is alleged that Yarrington and Harwood were partners engaged in a brokerage or agency business, and had built up a profitable trade selling flour, meal, bran, and other milling products for the defendant corporation and others engaged in a like business; that the firm had contracts with such corporations and others, which gave them an exclusive right to sell the products of their employers in a certain designated territory, of which the city of Austin was a part, but that the contracts were for no definite period of time, and were terminable at the pleasure of either party upon notice to the other. It was further alleged that for the consideration of \$1,000 the defendants Yarrington and Harwood sold to the plaintiff and to his brother, one Frank Raymond, as partners, such agency business in such territory, and bound themselves not to conduct at any time thereafter, either individually or as partners, a milling agency business therein, and that the defendant milling company knew of said contract, and agreed that the plaintiff and his brother should take the place of Yarrington and Harwood as their agents in the designated territory, and should there represent them exclusively in the sale of their products. It was also averred in such paragraph that in the agreement it was stipulated in behalf of the defendant milling company that the plaintiff and his brother should retain defendant Yarrington to assist them in their business for the period of ninety days, and that thereby the defendant milling company impliedly agreed to retain the plaintiff and his brother as their agents in the designated territory for a reasonable time, provided they should prove to be satisfactory agents; and that, but for the conduct of the defendants as thereafter alleged, the agency would have continued for a

period of five years. In the third paragraph it is further averred that, in order to deprive the plaintiff and his brother of the advantages to accrue to them under their contract with Yarrington and Harwood, the defendants conspired to break up the agency business of plaintiff and his brother in the following manner: That, to obtain the \$1,000 paid for the business, Harwood entered into the contract with the intention of not carrying out his obligation, and with the purpose of again entering upon the business of an agency for the sale of mill products in the territory named in the agreement; that "in pursuance of said conspiracy" he began, in August, 1898, to sell the products of other mills in such territory, and that about December of that year the defendant milling company limited the territory of Raymond & Bro., as their agents, to the city of Austin; that prior to February 1, 1899, defendants McDowell and Kaufman, acting in their own behalf and as agents of the defendant milling company, took part in the original illegal purpose of Harwood to violate said contract, and with full knowledge of the rights of the Raymonds conspired and agreed with him that McDowell and Harwood should take the place of the Raymonds as the agents of the defendant milling company in the territory designated in the original contract between the Raymonds on the one part and Yarrington and Harwood on the other; and that thereupon the defendant milling company did employ McDowell and Harwood as their agents for such territory, and did discontinue the employment of the Raymonds. It is also alleged in this paragraph that about December 1, 1898, the defendant milling company limited the agency of the plaintiff and his brother to the city of Austin, and that they continued to act as agents for such restricted territory until February 1, 1899. Then follow allegations of a loss of profits from the conduct of defendants in the sum of \$10,000, and that their acts were done knowingly and over the protests of the Raymonds, with a claim for exemplary damages. In the fourth paragraph are found similar allegations as to the destruction of the business of the plaintiff and his brother, and the damages which resulted therefrom, all of which are alleged to have accrued from a conspiracy on part of defendants, McDowell, Kaufman, the milling company, and Harwood, to cause Harwood to break his contract with the Raymonds. The fifth paragraph repeats the allegations as to the damages. The sixth alleges an assignment for value by Frank Raymond of his interest in the cause of action to the plaintiff.

Were the demurrers of the defendants 62 L. R. A.

other than Harwood properly sustained? A copy of the written contract between the plaintiff and Yarrington and Harwood is made an exhibit to the amended petition, and contains this provision: "We specially agree and bind ourselves not to enter into or conduct a milling agency business in the city of Austin or the territory above designated without the written permission of J. H. Raymond, Jr., or his assigns." It appears from the averments in the petition that Harwood only engaged in a milling agency business in the prohibited territory after the contract was executed. Therefore, unless the contract properly construed bound each of them not to conduct such business, no cause of action is shown against either of the defendants. Do Yarrington and Harwood, by the contract, bind themselves that neither of them shall sell mill products in the prohibited territory, or merely that both shall not? This question we referred back to the counsel for written arguments, and the arguments have been filed. From the cases there cited we feel constrained to hold that it was a breach of the contract for either Yarrington or Harwood to again engage in the business in question in the designated territory. In the case of *Welsh v. Morris*, 81 Tex. 159, 16 S. W. 744, a partnership known as "Welsh Bros." sold out a business as undertakers to the plaintiff, Morris, and bound themselves "not to start the undertaking business in Denison City, Texas, so long as said S. B. Morris is in the business." Subsequent to the execution of the contract one of the partners only engaged in the prohibited business, and it was contended that this was no breach of the stipulation. It was held, however, that the action of the one was a breach of the contract. The contract was signed "Welsh Brothers;" and counsel for defendants in error frankly concede that, unless this case can be distinguished by the fact that the contract of Yarrington and Harwood is signed by each of them in their individual names only, it is conclusive of the question against them. We do not think the cases can be distinguished. The contract of Yarrington and Harwood, though signed by them individually, is as much a contract as partners as if it had been signed in the partnership name. The decision in *Welsh v. Morris* is in accordance, as we think, with the weight of authority. See opinion of Alvey, Ch. J., in *Love v. Stidham*, 18 App. D. C. 306, 53 L. R. A. 397, and cases there cited. *Contra*, *Streichen v. Fehleisen*, 112 Iowa, 612, 51 L. R. A. 412, 84 N. W. 715. The case, then, made by the petition is that the defendants, other than Harwood, conspired to induce, and did induce, the latter to break his con-

tract to the damage of the plaintiff. The important question is, Does this show a cause of action? The point has never been decided in this court, and the authorities upon it elsewhere are in conflict. We think, however, the great weight of authority is in favor of an affirmative answer to the question.

We will first review briefly the cases in the English courts in which the point has come up for consideration. The first is the leading case of *Lumley v. Gye*, 2 El. & Bl. 216, which was decided in 1853. In that case the plaintiff, the lessee of a theater, sued the defendant, alleging that a certain singer had been engaged by the plaintiff to sing at his theater, and none other, and that while she was under such contract the defendant maliciously induced and enticed her not to perform for him, as she had agreed to do. Upon demurrer to the declaration it was held by three of the judges that it showed a good cause of action. Justice Coleridge, one of the four judges who sat in the case, dissented. Practically the same question came before the court in the case of *Bowen v. Hall*, L. R. 6 Q. B. Div. 333. It was again held that an action would lie for inducing one under contract of service to another to leave the service. Lord Coleridge, then the chief justice of the common pleas, dissented from the opinion of the majority. Again, in 1893, the case of *Temperton v. Russell* [1893] 1 Q. B. 715, came up for decision. There the plaintiff was a contractor and builder, and had made contracts with third persons to supply him with material to be used in his business. The defendants were a committee of certain trade unions, and for the reason that plaintiff would not comply with certain rules laid down by the unions they induced those who had contracted to deliver him material to break their contracts, and also conspired to prevent others from entering into contracts with him. It was held that they were liable, both for inducing a breach of the existing contracts, and also for conspiring to prevent others from entering into contracts with the plaintiff. A similar case came before the House of Lords in 1897. *Allen v. Flood* [1898] A. C. 1. In that case the plaintiffs were employed by the job at work upon a ship, but were subject to be discharged at the will of their employer. Allen, the defendant, representing a boiler makers' society, called upon the agents of their employer, and stated to them that, unless the plaintiffs were discharged, the members of the boiler makers' society, about 40 in number, then at work on the ship, would be "called out" or "knock off" work on that day. Thereupon their employer discharged the plaintiffs, and they brought suit against 62 L. R. A.

the defendant, alleging, in effect, that he had unlawfully and maliciously caused their discharge. It was held by the court—four of the nine law lords dissenting—that, since the employer had a right to discharge the plaintiffs, and since the discharge was lawful the defendant was not liable for having procured it, although, as found by the jury, he acted from a malicious motive. In the numerous opinions which were given in the case, the previous cases of *Lumley v. Gye* and *Bowen v. Hall* were discussed. After that decision it became a question whether their authority had not been shaken, if not overruled, thereby. But in 1901 the important case of *Quinn v. Leatham* [1901] A. C. 495, arose, and it was there held that "a combination of two or more without justification or excuse to injure a man in his trade by inducing his customers or servants to break their contracts with him, or not to deal with him or continue in his employment, is, if it results in damage to him, actionable." All the judges concurred in the judgment, and the effect of the decision is to distinguish *Allen v. Flood*, and to hold the cases of *Lumley v. Gye*, *Bowen v. Hall*, and *Temperton v. Russell* were correctly decided. In *Lumley v. Gye* the contract was one for personal services, and the insistence of Mr. Justice Coleridge was that it was not actionable to induce the breach of such a contract except where it created the relation of master and servant in the technical and restricted sense of those terms. The majority, however, held that the rule applied to any contract for service. The decision, therefore, goes no further than to hold that a cause of action lies for procuring the breach of any such contract. It may be doubted whether the contract the breach of which was induced in *Bowen v. Hall* should be classed as a contract for service. However that may be, the contract in *Temperton v. Russell* was for the delivery of material, and it does not come under that class. It seems to us, therefore, that the law is now settled in England that it is an actionable wrong knowingly to induce one to break his contract with another to the damage of the latter, and that it is also wrongful and actionable for two or more to accomplish such end by conspiring with each other.

Numerous decisions affirming the same rule may be found in the courts of this country. We will briefly refer to some of the more prominent cases. In *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240, the contract under consideration was for the construction of a railroad, and it was held that, "if one maliciously interferes in a contract between two parties, and induces one of them

to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer." The opinion of Mr. Justice Brewer reviews *Lumley v. Gye* and other English cases, which had been decided at that time, and was concurred in by all the judges save one, who dissented upon grounds not in conflict with the decision upon that point. The case of *Walker v. Cronin*, 107 Mass. 555, holds that an action lies against one who procures the violation of his contract of service by the servant, and that the rule is not confined to contracts for menial services. It was argued by the dissenting judge in *Lumley v. Gye* that the rule applied only in case of servants in the strict sense of that term, and that the action in such a case was given by the statute of 23 Edw. III., and was "limited by it." Since the Massachusetts court holds that the action is not confined to contracts such as are referred to in that statute, and since we see no sufficient reason for making a distinction in such a case between contracts of service and other contracts, it seems to us that that court would hold that it would be actionable knowingly to procure the violation of any contract to the damage of one of the contracting parties. In *Jones v. Stanly*, 76 N. C. 355, it is distinctly held that the rule applies to any contract. On the other hand, it is decided by the supreme court of California that maliciously inducing another to break a contract with a third person will not create a liability to the latter when it is done without threats, violence, falsehood, deception, or benefit to the person inducing the breach. *Boyson v. Thorn*, 98 Cal. 578, 21 L. R. A. 233, 33 Pac. 492. The same principle was applied in *Bourlier Bros. v. Maccauley*, 91 Ky. 135, 11 L. R. A. 550, 15 S. W. 60. That was a case strikingly like *Lumley v. Gye*. The plaintiffs had entered into a contract with the manager of the distinguished actress Mary Anderson to perform on certain nights at their theater, and afterwards the defendant procured a breach of the contract with plaintiffs, and procured the actress to appear at his, a rival, house. It was held that these facts constituted no cause of action.

There are many other cases of a somewhat similar nature, but in most of them there was some element of fraud, threats, intimidation, or conspiracy, and for that reason are probably not direct authority upon the question before us. We are of opinion that the rule that, where one knowingly induces another to break his contract with a third person, such third person has a right of action against the one so causing the breach for any damages resulting to him by such breach, is supported by a decided preponder-

ance of authority and by the better principle. The principle is well stated by Lord Justice Lopes in his opinion in the case of *Temperton v. Russell* in the following extract: "The case which I think must govern our decision as to the first head of claim is *Bowen v. Hall*, which I understand to lay down the broad principle that a person who induces a party to a contract to break it, intending thereby to injure another person, or to get a benefit for himself, commits an actionable wrong. That appears to me to be the effect of the decision in that case, which was decided in 1881, and never appears to have been since questioned. I presume that the principle is this, viz., that the contract confers certain rights on the person with whom it is made, and not only binds the parties to it by the obligation entered into, but also imposes on all the world the duty of respecting that contractual obligation." It seems to us that, where a party has entered into a contract with another to do or not to do a particular act or acts, he has as clear a right to its performance as he has to his property, either real or personal; and that knowingly to induce the other party to violate it is as distinct a wrong as it is to injure or destroy his property. It is not a sufficient answer to say that he has a remedy against the party who has broken the contract. In the first place, such remedy is ineffectual unless he who has made the breach has property or credits which may be applied by process of law to the satisfaction of a judgment that may be obtained against him. In the second it sometimes occurs that in case of joint tortfeasors the liability of the one may be secondary to that of the other, and that, in the event of a recovery against one, he may have a claim for indemnity against the party jointly liable. For example, a master may be sued for the wrong of his servant while acting in performance of the master's business and within the scope of his employment, although the wrongful act may have been done, not only without any participation on part of the master, but even against his express orders. We understand the rule in such a case to be that, though either or both may be held liable to the injured party, as between the master and servant the latter is primarily responsible. We have said that the point has never been decided in this court. But in *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111, the plaintiff, a butcher, alleged in his petition that the defendants, a firm dealing in live stock, had not only refused to sell to him, but had combined with other such dealers, and had induced them also to refuse to deal with him. It was held that the defendants had the absolute

right to deal or not with the plaintiff, as they saw fit, but that it was an actionable wrong to induce others to do so. Clearly, the substance of the wrong in that case was the inducements of third parties not to deal with plaintiff, which was a mere obstruction of his right to buy from dealers, without officious interference on part of others. If it be actionable for one to intermeddle in another's affairs, and thereby prevent him from making contracts, to the damage of his business, for a stronger reason it is actionable to induce the breach of a contract already made.

Our conclusion upon this branch of the case is that the court erred in sustaining the demurrer to the petition. Just here we will add, however, that it is not quite clear to us whether the allegations in the petition should be construed as charging defendant Yarrington as being a party to the agreement to induce Harwood to break his contract. But this is unimportant, since, as we have seen, he was responsible for Harwood's engaging again in the milling agency business, whether he induced him to do so or not.

We are also of the opinion that the court erred in instructing a verdict for the defendant Harwood. The charge is as follows: "In this case there is no evidence tending to show what part of the decrease in the business of Raymond & Bro. below that done by Harwood & Yarrington was caused by the competition of Harwood, if any, in violation of his contract, what part was due to competition of Harwood under his written permission, what part was due to lack of experience in the business on the part of Raymond & Bro. as compared with Harwood & Yarrington. . . . The jury will therefore return a verdict for the defendant." In view of the fact that the case will be remanded for a new trial, we must refrain from discussing the testimony. We may say, however, that the evidence does not show how much, if any, the plaintiff was damaged, and it may be that if, under the testimony and a proper instruction, the jury had given only nominal damages, the court should not have disturbed the verdict. From the nature of the case it is impossible to show the damages with accuracy, and to require accuracy in such a case would be to deny a remedy for a wrong. In *Welsh v. Morris*, previously cited, a judgment for substantial damages was sustained upon testimony quite as unsatisfactory, to say the least of it, as that introduced in the present case. If Harwood violated his contract, the plaintiff was entitled to recover, at all events, nominal damages. *Davis v. Texas & P. R. Co.* 91 Tex. 505, 44 S. W. 822.

62 L. R. A.

The judgments of the District Court and that of the Court of Civil Appeals are reversed, and the cause remanded for a new trial.

S. BLAISDELL, JR., COMPANY, Appt.,
v.
CITIZENS' NATIONAL BANK of Tyler et al.

(.....Tex.....)

1. A bank does not, by purchasing a draft with bill of lading attached, become a party to the sale, so as to be responsible to the consignee in case, after he has paid the draft, the bill of lading proves to be fraudulent so that the consideration fails.
2. A conclusion in a pleading setting forth that drafts with bill of lading attached were transferred to a bank, that thereby the bank "became and was the owner of said draft and bill of lading" and of the property represented, does not enlarge the legal effect of the facts stated so as to charge that the bank purchased, not only the draft, but the bill of lading.

(June 22, 1903.)

QUESTIONS certified by the court of Civil Appeals for the First Supreme Judicial District which arose upon an appeal by plaintiff from an order of the District Court for Smith County sustaining a demurrer to the petition in an action to recover money alleged to have been wrongfully paid upon certain drafts. *Judgment of affirmance advised.*

The facts are stated in the opinion.

Messrs. W. S. Thomas and J. Q. Mahaffey for appellant.

Messrs. Gregory & Batts, Marsh & McIlwaine, and Fiset & Miller, for appellees:

The transfer of a draft with bill of lading attached gives to the transferee a limited and qualified interest in the property covered by the bill of lading, this property being to secure the indorsee of the draft in its payment.

Colebrooke, Collateral Securities, §§ 382, 383; *Lee v. Bowen*, 5 Biss. 154, Fed. Cas. No. 8,183; *Halsey v. Warden*, 25 Kan. 136; *First Nat. Bank v. Crocker*, 111 Mass. 163; *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *DeWolf v. Gardner*, 12 Cush. 19, 59 Am. Dec. 165; *First Nat. Bank v. Dearborn*, 115 Mass. 223, 15 Am. Rep. 92; *Hathaway v. Haynes*, 124 Mass. 313; *Daven-*

NOTE.—For other cases in this series as to rights and liabilities of assignee of bill of lading with draft attached, see *Finch v. Gregg*, 49 L. R. A. 679, and note; *Tolerton & S. Co. v. Anglo-California Bank*, 50 L. R. A. 777; and *Hall v. Keiler*, 62 L. R. A. 758.

port Nat. Bank v. Homeyer, 45 Mo. 149, 100 Am. Dec. 363; *Minnesota Security Bank v. Luitgen*, 29 Minn. 363, 13 N. W. 151; *Holmes v. Bailey*, 92 Pa. 57; *Emery v. Irving Nat. Bank*, 25 Ohio St. 360, 18 Am. Rep. 299; *Hoffman v. National City Bank*, 12 Wall. 181, 20 L. ed. 366.

The purchase or discount of a draft with bill of lading attached, by the indorsee of the contract between the drawer and drawee, does not make the indorser the guarantor of the drawer upon the contract between the consignor and consignee.

Tolerton & S. Co. v. Anglo-California Bank, 112 Iowa, 706, 50 L. R. A. 777, 84 N. W. 930; *Goetz v. Bank of Kansas City*, 119 U. S. 551, 30 L. ed. 515, 7 Sup. Ct. Rep. 318; *Hoffman v. National City Bank*, 12 Wall. 181, 20 L. ed. 366; *Atlanta Bridge & Aale Co. v. Merchants' Nat. Bank*, 89 Ga. 225, 15 S. E. 303.

The indorsee of the draft with bill of lading attached can enforce against the drawee, prior to acceptance, the contract between the drawer and drawee only so far as it might have been enforced by the drawer; upon acceptance, however, of the draft, the acceptor becomes the obligor upon a new contract with the indorsee, and the obligation may be enforced notwithstanding the partial or complete failure of the original consideration; and, if the draft be paid, the drawee cannot recover from the indorsee for value to whom the payment was made.

Jarvis v. Wilson, 46 Conn. 92, 33 Am. Rep. 18; *Fisher v. Beckwith*, 19 Vt. 31, 46 Am. Dec. 174; *Arnold v. Sprague*, 34 Vt. 402; *United States v. Bank of Metropolis*, 15 Pet. 377, 10 L. ed. 774; *Grant v. Ellicott*, 7 Wend. 227; *First Nat. Bank v. Ricker*, 71 Ill. 439, 22 Am. Rep. 104; *Johnston v. Commercial Bank*, 27 W. Va. 343, 55 Am. Rep. 315; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77, 7 Am. Rep. 310; *Godard v. Merchants' Bank*, 4 N. Y. 149; *Bernheimer v. Marshall*, 2 Minn. 78, 72 Am. Dec. 79, Gil. 61; *Hoffman v. National City Bank*, 12 Wall. 181, 20 L. ed. 366; *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, 6 L. ed. 334; *Craig v. Sibbett*, 15 Pa. 238.

Williams, J., delivered the opinion of the court:

The court of civil appeals for the first district have certified for decision the case stated as follows:

"In this cause now pending before this court on motion for rehearing, the trial court sustained a general demurrer to the plaintiff's petition, and the latter, refusing to amend, has appealed. The petition is as follows:

"Now comes the S. Blaisdell, Jr., Com- 62 L. R. A.

pany, complaining of Newell W. White and A. Hicks, who compose the firm of Newell W. White & Company, both as individuals and as a firm, and the Citizens' National Bank of Tyler, defendants, and, leave of the court first had and obtained, files this its first amended original petition, in lieu of and amending its original petition filed herein on the 6th day of May, 1901, and, so amending, respectfully shows and represents to the court as follows, to wit:

"1st. That the plaintiff is a private corporation duly incorporated under the laws of the state of Massachusetts, and having its place of business in the city of Chicopee, in the county of Hampden, in the said state. And the defendants Newell W. White and A. Hicks are resident citizens of Smith county, Texas, and are and have been since prior to the 1st day of October, 1900, partners in trade under the firm name of Newell W. White & Company, and that the defendant, the Citizens' National Bank of Tyler, is a private corporation, duly incorporated under the laws of the United States of America, with its place of business in the city of Tyler, Smith county, Texas, of which J. W. Wright, whose residence is said Smith county, Texas, is president, and upon whom service can be had.

"2d. That heretofore, to wit, on or about the 26th and 29th days of October, 1900, and the 13th day of November, 1900, plaintiff, then doing business in the said city of Chicopee, offered and proposed to the defendants, Newell W. White and A. Hicks, who were then doing business in the city of Tyler, as partners under the said firm name of Newell W. White & Company, to purchase from them certain bales of cotton at the prices hereinafter stated, to be delivered by the said defendants to plaintiff as follows, to wit: [Here follow number of bales and place of delivery, which it is not necessary to set out.]

"Which said offer and proposal so made by the plaintiff was on or about said above-mentioned dates accepted by the defendants, and they then and there entered into a contract with the plaintiff whereby it was agreed that the said defendants should in the due course of trade, and at as early date as possible, deliver to the plaintiff at the above-mentioned points said bales of cotton as above set out, and that the plaintiff was to pay the said defendants therefor, upon the presentation to it of drafts, with bills of lading attached thereto, showing that said cotton had been delivered to a carrier for transmission to plaintiff at said points, the amounts above stated for each and every pound of cotton so delivered.

"3d. That said defendants, Newell W. White & Company, under said agreement,

and to the end of fulfilling the same, did, on divers and sundry dates hereinafter shown, deliver to the International & Great Northern Railroad Company, a common carrier, for transmission to plaintiff at said points of delivery, certain bales of cotton, to wit: [Here follows detailed statement of the several shipments.]'

"And took and received from said carrier bills of lading in the name of Newell W. White & Company for each and all of said shipments, and said defendants, having so received said bills of lading, drew sight drafts on plaintiff, purporting to be for the amount of the purchase prices of said cotton, calculated upon the true weights thereof, less the freight charges and brokerage, which under the said contract were to be paid by the defendants, and which for that reason were deducted from the purchase prices, the said drafts being payable to the order of Newell W. White & Company, and being in amounts as follows, to wit: [Here follows detailed statement of the amounts of the various drafts.]'

"Which said drafts, the said drafts being negotiable instruments, and said bills of lading, were by said defendants indorsed in blank in the name of Newell W. White & Company, and were transferred to and purchased by the defendants herein, the Citizens' National Bank of Tyler, whereby the said bank became and was the owner of said drafts and bills of lading and of the cotton represented by said bills of lading, and whereby said bank undertook, promised, and agreed and became bound unto the plaintiff to carry out and fulfil the defendants Newell W. White & Company's said contract with plaintiff above set out.

"4th. The said bank, having by the means aforesaid become the owner and holder and proper payee of said drafts and bills of lading and cotton aforesaid, forwarded the said drafts, along with said bills of lading, to its agents and correspondents for collection from the plaintiff, which said drafts, and bills of lading accompanying the same, reached plaintiff and were accepted and paid by plaintiff long prior to the time when said cotton which had been shipped by freight did or could have reached its destination, by reason of which plaintiff was forced to and did rely solely on defendants to deliver to it the amount of cotton represented by said drafts, with freight and brokerage added, at the purchase price herein shown, and for which the plaintiff had paid them as aforesaid. And plaintiff, believing that said drafts, less said freight charges and brokerage, represented the true amount of the purchase prices of said cotton, calculated upon the true and correct

weight thereof, paid said drafts, freight charges, and brokerage before it could have examined or weighed said cotton, all of which the defendants well knew the plaintiff would be forced to do when they shipped said cotton and drew and discounted said drafts, and which was also known to the said bank when it purchased said drafts and bills of lading, and it undertook to carry out said contract as aforesaid.

"5th. That the defendants, Newell W. White and A. Hicks, contriving and fraudulently intending to deceive and defraud plaintiff in this behalf, did not deliver to it the amount of cotton in weight represented by the amount of said drafts, freight charges, and brokerage, at said purchase prices, and which plaintiff had paid them for, but falsely made out said drafts for an amount grossly in excess of the amount they were entitled to receive from plaintiff calculated upon the true weight of said cotton, for the purpose of defrauding plaintiff as aforesaid, for all of which the defendant bank, by reason of its having purchased said drafts and bills of lading and become the owner of said cotton and undertaken to carry out said contract, is liable to plaintiff, while in truth and in fact the true weight of said cotton so shipped was only as follows, to wit: [Here follows statement of weights.]'

"That had the said cotton been of a weight sufficient at said purchase prices to have made the amount of said drafts, including all freight and brokerage, the same would have been as follows, to wit: [Here follows statement of weights showing the shortage.]'

"Which said difference in weight between the cotton actually delivered and the amount for which the plaintiff had paid said defendants as aforesaid at said purchase prices, amounting to the sum of \$3,727.34, as is more particularly shown by the itemized statement which is hereto attached, marked "Exhibit A" for identification, and made a part of this petition, which sum is \$3,727.30, the said Citizens' National Bank of Tyler, by the manner and means herein alleged, has collected, had, and received from plaintiff over and above the amount it was justly entitled to receive, and which it now still wrongfully withholds from the plaintiff, and which amount the defendants, although often requested, have failed and refused and still fail and refuse to pay, to plaintiff's great damage.

"6th. And plaintiff further alleges that, if it be mistaken in its allegations that said Newell W. White and A. Hicks were partners, and that said contract of sale was made and said drafts drawn on said cotton shipped, and said drafts and bills of lading

were transferred, sold, and indorsed by them to defendant bank as partners, plaintiff alleges that all of said things were done and performed by one or both of them as individuals, and that the said Newell W. White was, in and about said transaction, doing business under the said name of Newell W. White & Company, and plaintiff alleges that it is unable here to state whether or not in said transaction the said Newell W. White and A. Hicks were partners, or whether said acts and things herein alleged to have been done by them were done as individuals or done by them jointly or severally, for the reason that the knowledge of the true nature and manner of said transaction is unknown to plaintiff and cannot be ascertained by it, and is peculiarly within the knowledge of the said defendants, Newell W. White and A. Hicks.

"Wherefore, the premises considered, plaintiff sues and prays that defendants having been duly cited, that upon final hearing it have judgment against all of the aforesaid defendants for the amount of its said damages, for costs of suit, and for all such other and further orders, judgments, and decrees as it may be entitled to under the law and the facts, both generally and specially, both in law and equity, and in duty bound will ever pray."

"We respectfully propound for your decision the question: Did the trial court err in sustaining the general demurrer?"

The action appears to be founded on the idea that, by the transactions alleged, the bank became a party to the contract of sale between plaintiff and White & Co., bound to perform the undertakings of the latter, and therefore liable for the violation of their agreement. It is not averred that the bank was a party to or had notice of the fraud charged against White & Co., or was guilty of any negligence or misrepresentation, or in any way deceived plaintiff, and hence the action cannot be maintained as for deceit, fraud, or negligence on part of the bank.

The theory of the plaintiff is supported by the decision of the court of civil appeals for the third district in the case of *Landa v. Lattin Bros.* 19 Tex. Civ. App. 246, 46 S. W. 48, which was followed by the supreme court of North Carolina in the case of *Finch v. Gregg*, 126 N. C. 176, 49 L. R. A. 679, 35 S. E. 251. We understand the courts to hold in those cases that a purchaser of such drafts and bills of lading is substituted, by the mere purchase, in the place of the vendor in the contract of sale, and becomes bound to perform that contract as a condition precedent to his right to the price of the goods represented by the bill of lading; and that, therefore, although the drafts be actually accepted and paid by the drawee, if 62 L. R. A.

the consideration which he was to receive from the drawer fails, the price may be recovered from the holder to whom the payment has been made. It is undoubtedly true that the purchaser acquires by his purchase no greater rights than the drawer has against the drawee. The attitude of the latter is, so far, unchanged, and he is no further bound to the purchaser than he would be bound to the drawer to accept or pay; but we do not agree that the purchaser becomes bound to perform the contract of the vendor, nor that, when the bill of exchange is subsequently accepted or paid, he acquires no additional right against the acceptor or payor. Transactions of this kind have often come before the courts, and we understand the rule of the commercial law to be thoroughly established that one who has accepted or paid a bill of exchange drawn upon him cannot defeat his acceptance or recover the money paid because there was no consideration, or the consideration has failed, as between him and the drawer, when the payee bought from the latter for value without notice of the defense. The leading cases on the subject have arisen where bills of lading for goods were forged and attached to drafts drawn for the prices of the goods, negotiated with banks and forwarded to and accepted or paid by the drawees, without knowledge on the part of either holder or drawee of the forgery. Efforts of the acceptors to avoid liability on acceptances, and of payors to recover the money so paid, have been defeated both in courts of law and of equity. *Hoffman v. National City Bank*, 12 Wall. 181, 20 L. ed. 366; *Goetz v. Bank of Kansas City*, 119 U. S. 551, 30 L. ed. 515, 7 Sup. Ct. Rep. 318; *Robinson v. Reynolds*, 2 Q. B. 196; *Thiedemann v. Goldschmidt*, 1 De G. F. & J. 4; 1 Dan. Neg. Inst. §§ 174, 175, and notes; *Marsh v. Low*, 55 Ind. 271. Other authorities are cited in those referred to.

In *Thiedemann v. Goldschmidt*, Lord Campbell said: "I think that dangerous consequences would follow, and the credit of bills of exchange be very much shaken, if the title of the indorsees of bills of exchange as against the acceptor under such circumstances could be called in question. It is allowed that the case of *Robinson v. Reynolds* was well decided, that its authority has never been questioned, and that it is a part of the commercial law of England." After further discussing the cases, he says: "It must be considered that the bills were accepted by Thiedemann [the drawee] on the credit of Homeyer [the drawer and forger], and for that reason it would be alarming if the title of the indorsees (they holding the bills bona fide for value) could be thus impeached."

In the case of *Hoffman v. National City Bank*, 12 Wall. 181, 20 L. ed. 366, the Supreme Court of the United States thus states the doctrine: "Money paid under a mistake of facts, it is said, may be recovered back as having been paid without consideration, but the decisive answer to that suggestion, as applied to the case before the court, is that money paid, as in this case, by the acceptor of a bill of exchange to the payee of the same, or to a subsequent indorsee, in discharge of his legal obligation as such, is not a payment by mistake nor without consideration, unless it be shown that the instrument was fraudulent in its inception, or that the consideration was illegal, or that the facts and circumstances which impeach the transaction, as between the acceptor and the drawer, were known to the payee or subsequent indorsee at the time he became the holder of the instrument. . . . Different rules apply between the immediate parties to a bill of exchange—as between the drawer and the acceptor, or between the payee and the drawer—as the only consideration as between those parties is that which moves from the plaintiff to the defendant; and the rule is, if that consideration fails, proof of that fact is a good defense to the action. But the rule is otherwise between the remote parties to the bill, as, for example, between the payee and the acceptor, or between the indorsee and the acceptor, as two distinct considerations come in question in every such case where the payee or indorsee became the holder of the bill before it was overdue, and without any knowledge of the facts and circumstances which impeach the title as between the immediate parties to the instrument. Those two considerations are as follows: First, that which the defendant received for its liability, and, secondly, that which the plaintiff gave for his title; and the rule is well settled that the action between the remote parties to the bill will not be defeated unless there be an absence or failure of both these considerations. Unless both considerations fail in a suit by the payee against the acceptor, it is clear that the action may be maintained, and many decided cases affirm the rule, where the suit is in the name of a remote indorsee against the acceptor, that, if any intermediate holder between the defendant and the plaintiff gave value for the bill, such an intervening consideration will sustain the title of the plaintiff."

It is claimed that the allegation in this case that not only the drafts, but the bills of lading, were purchased by the bank, distinguishes it from those cited, where the bills merely accompanied the drafts as security. The facts alleged in the petition do not show this to have been other than 62 L. R. A.

the common transaction in which money is paid for drafts, accompanied by bills of lading representing the goods consigned as security. The allegation is that the drafts and bills of lading were indorsed in blank, and were transferred to and purchased by the bank. The conclusion from these facts is then stated: "Whereby said bank became and was the owner of said drafts and bills of lading and of the cotton represented." This is only a conclusion from the facts previously stated, and cannot be held to enlarge the legal effect of those facts. The drafts were for the price of cotton which the drawer was under obligation to deliver to the drawee on payment. The bank's right was therefore only to receive the amount called for by the drafts, and on payment thereof it was bound to deliver to the payor the bills of lading representing the cotton. The bank became the owner, only as the facts alleged made it the owner of the cotton; and this was only in the limited sense that it could hold and control the cotton until the drafts were paid, and as a means of insuring payment or recovering loss. No contract or agreement of the bank, either with the drawer or drawee, is alleged to make its relation to the contract of sale other than that which resulted from the simple fact that the drafts for the price of the cotton and the bills of lading were purchased by it from the vendors of the cotton. The concluding language in the fourth and fifth paragraphs of the petition, referring to the undertaking of the bank to carry out the contract, does not charge, nor, as we construe the pleading, intend to charge, that the bank affirmatively agreed to carry out the contract, but states, as the pleader's construction of the facts alleged, that such an undertaking arose from the purchase, as held in *Landa v. Lattin Bros.* Necessarily, the legal effect of the transaction stated between the bank and White & Co. was only to entitle the former to collect, either from the drawee, or, in case of its refusal to pay, from the drawers, the money called for by the drafts, and, to secure this right, a limited ownership and control of the cotton was conferred by the indorsement and delivery of the bills of lading. Such is the legal effect of the facts alleged, and such was the legal effect of the transactions passed upon in the authorities cited; and those decisions clearly control this case. It was as true in those cases as in this that the purchasers of the bills of exchange, secured by the bills of lading, originally acquired only such rights against the drawees as the drawers had against them, and that, in order to put the holders in a position to require acceptance or payment of the bills of exchange, performance of the

contract of sale by the drawers was essential; and it is equally true in this case, as it was in those, that, in paying the drafts, the drawees, acting on the credit of the drawers and not of the holder, became bound to the latter, and that a failure of the consideration moving from the drawers to the drawees cannot affect the rights of the payee thus acquired in good faith upon a consideration moving from itself to the drawers.

The latest decision called to our attention is that of the supreme court of Iowa in the case of *Tolerton & S. Co. v. Anglo-California Bank*, 112 Iowa, 706, 50 L. R. A. 777, 84 N. W. 930, in which the court, after discussing *Landa v. Lattin Bros.* and *Finch v. Gregg*, enunciates what we regard as the correct rule.

The decisions referred to are wholly inconsistent with the theory that in such a transaction the purchaser of the draft and

bill of lading becomes substituted for the vendor to such extent that he assumes the obligations of his contract with the vendee. This is not true of assignees generally. While an assignee may not by his assignment acquire any right against the party against whom the claim is asserted, he does not, by taking the assignment merely, assume the obligations of the assignor. The true question in such cases is whether or not money so paid upon bills of exchange can be recovered as having been paid by mistake, which is negatived by the rules of the law-merchant; and not whether or not there has been a breach of contract by the holder, who never has a contract with the drawee of the bill of exchange until the latter honors it.

We answer that *the court did not err in sustaining the general demurrer.*

TEXAS COURT OF CRIMINAL APPEALS.

Hugh HIPPI, *Appt.*,

v.

STATE of Texas.

(.....Tex. Crim. App.)

1. A tent occupied by a divorced man and his child as their only place of residence is a private residence occupied by a family, within the meaning of a statute punishing gaming, except when it occurs at such residence.

2. That a game was played outside of a residence does not take it out of an exception in a statute punishing gaming "at any place, except a private residence occupied by a family," if it occurred within an inclosure containing the residence, and only a few feet from it.

(June 3, 1903.)

A PPEAL by defendant from a judgment of the Coleman County Court convicting him of gaming. *Reversed.*

The facts are stated in the opinion.

Messrs. Woodward & Baker for appellant.

Mr. Howard Martin for the State.

Davidson, P. J., delivered the opinion of the court:

Appellant was charged with playing cards in a certain named pasture, and on his trial was convicted and fined \$10. The indictment is sufficient. *Russell v. State* (Tex. Crim.

App.) 72 S. W. 190; *Hankins v. State* (Tex. Crim. App.) 72 S. W. 191.

Articles 379 and 381, Acts 1901, p. 26, punish all character of gaming "at any place, except a private residence occupied by a family." Article 381 provides that it is not necessary to prove betting occurred upon any of these games where the card playing occurred at a house for retailing spirituous liquors, etc., or in any street, highway, or other public place, or in any out-house where people resort, or at any place except a private residence occupied by a family; "Provided, that nothing in this title shall be so construed as to prevent the playing of any game for amusement at a private residence occupied by a family." Card playing at a private residence would not be a violation of the law, unless such residence is commonly resorted to for the purpose of gaming. Article 379, *supra*. It is contended the place where the card playing occurred, and which forms the basis of this conviction, was a private residence of a family within the meaning of the statutes above cited. On this phase of the case *Scoggins*, at whose camp the card playing occurred, testified: That he lived in the tent or under the wagon sheet, and this residence was thus constructed: "I put up a pole and stretched my wagon sheet across it. I then piled brush up at the back end and on each

NOTE.—For a case in this series holding that a private room in a hotel may be a "place" or "house" within the meaning of ordinance as to gambling, see *Greenville v. Kemmis*, 50 L. R. A. 725.

62 L. R. A.

For a case holding that a covered wagon traveling from place to place, in which prostitution is carried on, may constitute a "house of ill fame" within meaning of statute, see *State v. Chauvet*, 51 L. R. A. 630.

side to keep out the wind, and from this brush I made a brush fence in front to keep out the stock. My wagon constituted a part of this fence, and some cord wood constituted part of it. From the front of the wagon sheet to the fence was about 30 feet. The place where I made the fence was in front of the wagon sheet, and about 10 or 15 feet from the wagon sheet. My bedding and bedclothes were under the wagon sheet, and we slept under the wagon sheet. We cooked out at the fire. I have all my household and kitchen furniture at this camp. The cooking utensils were kept near the fire. I was camped in the pasture doing some grubbing. This camp was the only home I have at this time, and I do not own any house now. My boy, aged about sixteen years, lived with me, and stayed with me at this camp, and was there the night spoken of. I have no other family with me. A few years ago my wife got a divorce from me, and she has one child with her. . . . I established this camp in November, 1901, a month or so before the playings. This camp was in what is known as the "John Roberts' pasture," near Glen cove, in Coleman county. Sam Scoggins, son of former witness, testified: "I lived with my father, in our camp near Glen cove, in December, 1901. This camp was all the home we had of any kind at the time of the playing; and all of our bedding and cooking utensils were at the camp." The state's contention is that this was not the residence of a private family within contemplation of the statute of 1901. The word "residence," as used in this article, is used in the sense of domicile; a place where the family resides; the domicile

occupied as a habitation. And in our opinion, under the testimony, the camp occupied by Scoggins and his son was their private residence. It was all they had, as they testified; it was their home for the time being; and, under this evidence, we are of opinion this was sufficiently the private residence of Scoggins and his son to bring it within the term of "private residence" set out in the statute. We are further of the opinion that the evidence was sufficient to show that this was a private residence of a family. Scoggins and his son comprise the membership of his family under the facts stated. It seems that he and his wife had been divorced; he took one child and she the other; and of course since that divorce they had not lived together. This would have been a sufficient designation of the family under the homestead law, and this evidence sufficiently meets the definition of a family, as we understand it, under the laws of this state. The facts in regard to the playing are that it occurred just outside this tent or domicile, and not immediately under it, but within a very short distance, perhaps within 10 feet. The statute uses the expressions "at the residence of a private family" and "in the residence of a private family" interchangeably; and the fact that it was just outside the domicile, instead of on the inside, in our judgment would make no difference. It was at the residence, and, within contemplation of our statute, parties playing at that point were protected from punishment under this statute.

The judgment is reversed, and the cause remanded.

WASHINGTON SUPREME COURT.

STATE of Washington *ex rel.* Mary E. BROWN, *Respt.*,

v.

Charles R. BROWN, *Appt.*

(31 Wash. 397.)

1. The court may recall an inadvertent order which has been handed to the clerk for entry, at any time before it is actually filed or

entered on the records, under a statute providing that all judgments shall be entered by the clerk under the direction of the court.

2. One cannot relieve himself from the payment of alimony according to the provisions of a divorce decree by the obligations imposed upon him by a second marriage.

(Fullerton, Ch. J., and Anders, J., dissent.)

(March 26, 1903.)

NOTE.—Effect of second marriage upon obligation to pay alimony.

- I. Scope of note, 974.
- II. Remarriage of husband, 975.
- III. Remarriage of wife, 975.

I. Scope of note.

Alimony or allowance made to the wife out of the income or property of the husband is, in the United States, purely a creature of statute, and the decisions in the several states are variously swayed by the wording of their respective statutes. L. R. A.

ute or Code enactments on the subject. And this difference extends to the character or nature of the wife's interest in the income or property of the husband thus allotted to her, and, as a consequence, as to the effect of any subsequent act or change of relation on her part on such interest. The effect of a subsequent marriage of either husband or wife upon the obligation of the husband to pay or provide to the wife what was ordered by the decree will be considered, and the cases on the subject given and discussed in this note.

A PPEAL by defendant from a judgment of the Superior Court for Spokane County convicting him of contempt. *Affirmed.*

The facts are stated in the opinion.

Mr. P. F. Quinn for appellant.

Messrs. Graves & Graves, for respondent:

The declaration of the general conclusion of law from the facts found is the rendition of the judgment in so far as that, when entered, the judgment may relate to such rendition for certain purposes. But this does not make the conclusions of law first announced final and beyond the reach of the court. There is no judgment which is final until a judgment is recorded.

Condee v. Barton, 62 Cal. 1; *Broder v.*

Conklin, 98 Cal. 360, 33 Pac. 211; *Brown v. Scott*, 2 G. Greene, 454; *Re Weber*, 4 N. D. 119, 28 L. R. A. 621, 59 N. W. 523.

The announcement of the court's decision does not constitute a judgment.

Newbould v. Stewart, 15 Mich. 155; *Harper v. Roberts*, 22 Pa. 194; *Thompson v. Howe*, 21 Minn. 1, 98; *Bowman v. Tallman*, 28 How. Pr. 482.

A decision cannot technically be a judgment, and therefore final, until it is entered of record.

Gunn v. Plant, 94 U. S. 664, 24 L. ed. 304; *Green v. Van Buskerk*, 3 Wall. 448, 18 L. ed. 245; *Oase v. Plato*, 54 Iowa, 64, 6 N. W. 128; *Raymond v. Smith*, 1 Met. (Ky.) 65, 71 Am. Dec. 458; *Hall v. Hudson*, 20 Ala. 284; *Gilpatrick v. Glidden*, 82 Me. 201,

II. Remarriage of husband.

In *STATE ex rel. BROWN v. BROWN* the relator sought to be relieved from the payment of alimony by the obligations imposed on him by a second marriage. The same thing has been attempted before, the results of which appear in the following cases:

The final decree in an action for divorce determines conclusively the right of the parties in regard to alimony; and, where a certain sum per year has been awarded to the wife in a judgment dissolving the marriage, and the husband, in violation of the judgment, assumes to contract another marriage, and the proofs do not show that he is unable to pay the alimony, such a state of facts will not prevent the court from making an order to punish him for contempt in not paying it. *Park v. Park*, 18 Hun, 466, *Affirmed* in 80 N. Y. 156.

Where a husband is in prison, and committed thereto by an order adjudging him in contempt for not paying alimony awarded to a wife in a decree granted in an action by her against him for a divorce, an application on his part to be discharged from such imprisonment on account of his inability to pay such alimony will be denied, where it appears that such inability was occasioned by his subsequent marriage in defiance of the judgment, and his consequent liability to support the wife of the second marriage. *Ryer v. Ryer*, 33 Hun, 116, 67 How. Pr. 369.

This case is in every respect exactly on all fours with *STATE ex rel. BROWN v. BROWN*.

In *Buckminster v. Buckminster*, 38 Vt. 248, 88 Am. Dec. 652, the court, in refusing additional alimony on the application of the wife therefor where a divorce had been decreed in her favor, said that there were many considerations which induced it to refuse to alter the former decree as to alimony to the wife:

"1. The decree was made according to the agreement of the parties. There was no fraud or concealment. The wife knew as much then about the husband's property as she does now.

2. If we look into the decree itself, we find it to have been a very liberal one to the wife,—giving her a third at least (indeed, we think very nearly one half) of the husband's property. It is true she took the heavier burden as to the children; taking the four younger ones, while the husband took the two sons whose age would 62 L. R. A.

make them rather a source of profit than of expense to him.

3. The husband has since married, and has children by this marriage; his property (which now amounts to about \$3,000) has been chiefly acquired since the divorce. He is getting old, his wife is infirm, his children by the new wife are quite young.

4. As a matter of sound public policy, where husband and wife are divorced the wife should not be encouraged to think she has a continuing lien upon the old husband for her support. On the contrary, the divorce and the decree of alimony should be understood, as between them, to end their relations and obligations to each other.

A suit for divorce is one both *in rem* and *in personam*, and a judgment in such a suit, recovered upon substituted service of the original process and without personal service thereof in favor of the wife, is good as against the husband so far as the same dissolves the marriage status, but not to charge the husband with alimony, as for that purpose jurisdiction *in personam* is essential. But where such a judgment had been obtained in one state, and the husband, with full knowledge of the decree, holds himself forth as single and unmarried, and as such marries again and in every way treats himself as having been by the decree freed from the obligation to maintain his former wife, all this will be considered as an affirmation by him of the validity of the decree, which he must have known to have been obtained on the theory that he had been personally served with process; and he will be estopped, in an action upon the decree to recover the alimony, from questioning the validity of the judgment, as, having received the benefits of the decree, he ought not to be permitted to escape the burden which it imposes, as to the payment of alimony. *Hamill v. Talbott*, 81 Mo. App. 210.

III. Remarriage of wife.

But the question has naturally been more frequently discussed on the occasion of the attempt of the man to be relieved of the payment of alimony for the reason that his former wife has married a second time.

In Indiana the common-law divorce *a mensa et thoro*, or a mere separation of the parties from bed and board, in which alimony was allowed at common law, has been abolished by statute, and a total dissolution of the marriage

19 Atl. 166; *Balm v. Nunn*, 63 Iowa, 641, 19 N. W. 810; *Winter v. Coulthard*, 94 Iowa, 312, 62 N. W. 732; *Callanan v. Votruba*, 104 Iowa, 672, 40 L. R. A. 375, 74 N. W. 13.

At common law, the courts had unlimited power over their judgments during the term at which they were rendered; after the term, they were final.

Freeman, Judgm. 3d ed. §§ 90, 96.

Even after the term, it was considered that there was power to vacate judgments rendered much as was the order of June 2.

United States v. McKnight, 1 Cranch C. C. 84, Fed. Cas. No. 15,895; *Com. use of Port Kennedy Slag Works v. Krause*, 198 Pa. 391, 48 Atl. 256; *Sivyer v. Lawyer*, 25 Wash. 360, 65 Pac. 529.

When findings and a judgment are inad-

vertently signed by the judge, they are void, and he may, without regarding them, sign other findings and a judgment based thereon.

Gough v. McFall, 31 App. Div. 578, 52 N. Y. Supp. 221; *Re Buffalo*, 78 N. Y. 362; *Cooper v. Cooper*, 51 App. Div. 595, 64 N. Y. Supp. 901.

When a person refuses to comply with a court's order, he must clearly establish his inability to comply with it, and that his incapacity was not occasioned by any fault of his own.

4 Enc. Pl. & Pr. pp. 790, 791; *Wise v. Chaney*, 67 Iowa, 73, 24 N. W. 599; *Huckins v. State*, 61 Neb. 871, 86 N. W. 485.

The courts will not entertain an application to reduce alimony when it appears that

contract has been substituted therefor for any of the grounds therein stated, among which is "any other cause for which the court shall deem it proper that a divorce should be granted;" and it is further provided that "the divorce of one party shall wholly dissolve the marriage contract as to both." Under this statute, in *Miller v. Clark*, 23 Ind. 370, which was an action by the personal representative of the wife after her death to collect the balance of a gross amount allowed to her as alimony on the procurement by her of the divorce from her husband, it was held that this statute had abrogated and stricken down that policy from which the common law "deems so highly and with such mysterious reverence of the nuptial tie that it will not allow it to be unloosed for any cause whatever that arises after the union is made," and established a contrary policy, and allowed a total dissolution of the marriage contract in almost every case where the union has failed to be productive of mutual affection and happiness. The statute in reference to alimony provides that the decree for alimony to the wife shall be for a sum in gross, and not for annual payments; but the court, in its discretion, may give a reasonable time for the payment thereof by instalments, on sufficient security being given. That the amount so given to the wife by the court under the authority of this statute as a just and equitable settlement between the parties of their marital relations thereupon becomes her absolute property, and that, while the allowance so authorized is named alimony in the statute, it is not the alimony of the common law resulting from the fact that the marriage relation continued to exist until the death of the wife; and that practically they in all respects become to each other as they were before marriage.

From this it would seem pretty plain that the subsequent marriage of the wife or the husband would have no effect upon the decree as to alimony,—so termed,—which this case would seem to adjudge as final between the parties in the matter.

In *Shepherd v. Shepherd*, 1 Hun, 240, Affirmed in 58 N. Y. 644, it was held that the statute empowers the court, upon making a decree in favor of the wife, dissolving the marriage for the misconduct of the husband, to require him to provide such suitable allowance for her support as it shall deem just, having regard to the circumstances of the respective parties. And that the continuance of that allowance is in no way

rendered dependent upon the fact that she shall not afterwards marry again. That it is liable to no such contingency. That, beyond that, the statute expressly secures to the wife the right to marry again where she is the innocent party to the decree. And that it neither expressly, nor by any reasonable implication, deprives her of her allowance by way of alimony for so doing. That the remedy is entirely statutory in its nature, and must be governed by the import and spirit of the legislation enacted upon the subject; and that, as it has not been provided that the wife shall forfeit her alimony by afterwards marrying, the court has no right to attach that as a penalty to the act.

And in *Stevenson v. Stevenson*, 34 Hun, 157, the supreme court, in holding that alimony decreed to be paid in instalments by the husband to the wife by a decree in a divorce action in favor of the wife was liable for the wife's debts, and that the payment thereof by the husband to a receiver appointed for the wife in supplementary proceedings upon a judgment against her would discharge him from his liability to pay the same to her,—said, citing and approving *Shepherd v. Shepherd*, 1 Hun, 240, Affirmed in 58 N. Y. 644, and *Park v. Park*, 18 Hun, 466, Affirmed in 80 N. Y. 156, that, after judgment awarding alimony to the wife, she acquired a vested right to the same which was not divested by her remarriage.

But after a decree for an absolute divorce had been granted to a wife with monthly allowance of alimony, and it appeared, on the application of the husband to reduce the amount of the alimony, that the wife had remarried and was living with and being supported by her second husband, and that the children of the marriage, with one exception, were of age and able to support themselves, and it appeared that the husband was unable to comply with the directions of the court as to alimony, the court, while acknowledging the rule laid down in *Shepherd v. Shepherd*, 1 Hun, 240, Affirmed in 58 N. Y. 644, and *Park v. Park*, 18 Hun, 466, Affirmed in 80 N. Y. 156, *supra*, held that on account of the fact of the husband's inability to pay the alimony, coupled with the fact that the wife had married another man who was able to and was supporting her, and that all the children of the original marriage were capable and were supporting themselves, save one, the payments should be reduced to a sum sufficient to

the changed circumstances which are relied upon as cause for the reduction were brought about by the applicant's own acts.

2 Bishop, Marr. & Div. 6th ed. § 430; *Fisher v. Fisher*, 32 Iowa, 20; *Barrett v. Barrett*, 41 N. J. Eq. 139, 3 Atl. 689.

Nor may a wife have her alimony increased because of her increased expenses, when such increase is occasioned by her undertaking the support of a person whom the husband was under no legal obligation to maintain.

2 Bishop, Marr. & Div. 6th ed. § 431; *Halsted v. Halsted*, 5 Duer, 659.

Where a husband's inability to pay alimony is occasioned by his second marriage, his disability is no excuse, and he will be

punished for contempt if he does not comply with the order.

Ryer v. Ryer, 67 How. Pr. 369.

An order to pay alimony is an adjudication of ability to pay it. It can only be modified for causes arising subsequent to the making of the order; and he who claims that circumstances have arisen which require a modification should make application for it, and will not be heard in defense of a contempt proceeding to say that the order has become so onerous he is unable to obey it.

2 Nelson, Div. & Sep. § 939, p. 906; *Strobridge v. Strobridge*, 21 Hun, 288; *State ex rel. Nixon v. Second Judicial Dist. Ct. (Mont.)* 36 Pac. 757; *Ronan v. Ronan*, 32

support that child. *Kiralfy v. Kiralfy*, 30 Misc. 407, 73 N. Y. Supp. 708.

These cases show that the rule in New York is based upon the theory that alimony is awarded on the basis of the necessity of the wife, and the ability of the husband to pay, and that in no sense is it awarded as a punishment to the husband. Neither is it, when once awarded, taken away from the wife as a punishment to her. That her subsequent conduct or remarriage will make no difference, unless it produces a state of facts showing that she thereby has obtained a support equivalent to the alimony originally awarded her, and that by the condition whereby she gains that support she has practically waived her claim on her husband to the alimony; and that especially is this so where it is coupled with the fact that the financial condition of the husband is so changed that he cannot, without depriving himself of the means of support, continue to pay the alimony originally adjudged.

By a decree in a divorce suit brought by a wife against her husband on the ground of extreme cruelty, \$2,000 was decreed to her as permanent alimony, and a further sum of \$1,500 on condition that she should release dower in his lands. The husband appealed to the district court from the decree for alimony, and, pending appeal, temporary alimony was allowed her at two different times in different sums; and, after the granting of the divorce, and pending the appeal, the wife removed to another state and married another man, with whom she continued to live, and in the district court, on the hearing of the appeal, this marriage was shown and claimed as a bar to the allowance of alimony; but the court awarded her the sum of \$1,000 in gross in addition to the temporary alimony. The court said that a decree for alimony is not affected by the subsequent marriage of the woman to whom it is granted, in the absence of a provision in the decree that it shall have such effect, although such marriage may, in some cases, afford sufficient ground for reducing the amount. That, in determining the amount, the change effected by the marriage of the wife was evidently considered, and properly considered, by the district court; and hence, the amount awarded in the common pleas was materially reduced; and the action of the district court was affirmed. *King v. King*, 38 Ohio St. 370.

A petition by a husband alleged his marriage to the defendant, the birth of children, the fil-

ing of a petition by him, praying for a divorce by reason of her wilful absence without cause, that a decree of divorce was granted in his favor on that petition on the ground of such wilful absence, but ordering him to pay certain amounts of alimony, part of which was paid. The petition in this case further alleged that, since the granting of such decree of divorce, the wife had intermarried with another man, and was living and cohabiting with him within the state, and that such second husband had means and property to afford and give her such support and maintenance as she, in her condition of life, had been heretofore enjoying, either as the wife of the plaintiff or otherwise, and to a fuller, and, in fact, greater extent than was provided for her in and by the decree. The court recognized its decision in *King v. King*, 38 Ohio St. 370, *supra*, in which it determined that a decree for alimony is not necessarily affected by the subsequent marriage of the wife, although such a marriage may in some cases have the effect of reducing the amount, but said that, upon all the authorities, as well as upon principle, a cause of action for the review and modification of the decree as to alimony was set forth, and reversed the judgment of the court below, which sustained a demurrer to the petition. *Olney v. Watts*, 43 Ohio St. 499, 3 N. E. 354.

After a wife has obtained a divorce from her husband in the decree for which an award of permanent alimony was made to her, while a subsequent marriage by her will not *ipso facto* dissolve the obligation of the former husband to continue the payment of the allowance, it affords a cogent and convincing reason for the court to modify or cut off the allowance altogether; and the fact that after her second marriage the husband of that marriage procured a divorce from her, and she was thereafter obliged to earn her own living, and it appeared that she was without property or means, will not serve to reinstate her to her former condition, but her husband will only be compelled to pay the alimony originally awarded down to the time of her second marriage; it appearing that her second husband was able to, and did, support her adequately, and that that support had been cut off by no fault of her first husband, but of herself. *Brandt v. Brandt*, 40 Or. 477, 67 Pac. 508.

Where it appears that, under the decree of divorce in a suit therefor brought by the wife

Misc. 467, 66 N. Y. Supp. 799; *Young v. Young*, 35 Misc. 335, 71 N. Y. Supp. 944.

A motion for modification will not be considered unless circumstances occurring subsequent to the rendition of the decree and requiring such relief are clearly shown.

2 Nelson, Div. & Sep. § 939, p. 906; 2 Bishop, Marr. & Div. 6th ed. § 429; *Semrow v. Semrow*, 23 Minn. 214; *Perkins v. Perkins*, 12 Mich. 456; *Blythe v. Blythe*, 25 Iowa, 266; *Cole v. Cole*, 142 Ill. 19, 19 L. R. A. 811, 31 N. E. 109; *Petersine v. Thomas*, 28 Ohio St. 596; *Simonds v. Simonds*, 57 Hun, 290, 10 N. Y. Supp. 606.

Mount, J., delivered the opinion of the court:

On May 3, 1902, relator filed an affidavit in the superior court of Spokane county, alleging, substantially, that on the 18th day of November, 1897, relator and appellant were divorced by a decree of the superior court of said county; that by the decree the

relator was awarded the care and custody of their minor child, and also awarded \$50 per month alimony for the support of herself and child; that the appellant has failed to comply with the terms of said decree in that he has not paid relator the sum of \$90 due in accordance with the terms thereof, and has refused so to do, and informed relator that he does not intend to comply therewith; that relator has no other means of support, and that appellant is able to comply with the terms of said decree. On the filing of this affidavit the appellant appeared and filed an answer to the affidavit of relator, by which answer he in substance denied that he had disobeyed the order and decree of November 18, 1897, and alleged that he had endeavored to the best and utmost of his ability to comply therewith; denied that he had informed relator that he intended to disregard the terms of said decree, and denied that relator has no other means of support; alleged that relator has

against the husband, the wife received much the greater part of the husband's property, and afterward married again, and that he was insolvent at the time of the divorce, and had since that time acquired a small amount of property, it would not be equitable to charge upon him a large amount of money as alimony; and a bill filed by the wife to charge the husband with alimony under such circumstances should be dismissed. *Bankston v. Bankston*, 27 Miss. 692.

In *Stillman v. Stillman*, 7 Ill. App. 524, the court stated the true rule to be that, while the remarriage of the wife might be prima facie or presumptive evidence that she had acquired other means of support, yet it was not conclusive; and, when it was made to appear that she actually had not, then such marriage afforded no ground for relieving the former delinquent husband from paying the alimony provided in the decree, or for reducing it to a mere nominal sum.

But upon appeal the supreme court reversed this judgment, holding that the reasoning of the supreme court of New York in *Shepherd v. Shepherd*, 1 Hun, 240, on the question involved was neither conclusive nor satisfactory, and distinguishing *Forrest v. Forrest*, 3 Bosw. 661, on the ground that the case was upon a question that did not come within the range of the decision in this case, and that the effect of a subsequent marriage of the wife upon her alimony was not discussed when that case was before the court of appeals (25 N. Y. 501). The court said there was no force in the argument that a holding that a subsequent marriage of the wife will suspend the further payment of alimony is in restraint of marriage, and cited the pension laws as being analogous, and which had never been held to be in restraint of marriage because providing that the pension shall cease on the remarriage of the wife. That in the case of the pension the wife of the subsequent marriage simply abandons the provision which the law humanely made for her for a support which she has a right to expect to receive from her second husband; and that was precisely the case as to alimony; and that, whether she acts wisely in her election, or whether in every instance

she obtains as good or as adequate a support by her marriage as that which she abandoned, are questions about which the courts can have no concern. 99 Ill. 196, 39 Am. Rep. 21.

In *Albee v. Wyman*, 10 Gray, 222, the wife had commenced an action for divorce, which had been compromised upon the agreement between her and her husband by which he was to pay her a sum yearly during her life. Thereafter the wife commenced another action for the same purpose, and secured a decree of divorce and for alimony, which, by agreement between the parties, was fixed at the same sum mentioned in the contract of separation. The wife having thereafter married, the court, upon the application of the husband, reduced that alimony to a nominal sum, and thereafter an action was brought by the trustee named in the separation contract to enforce an unpaid amount thereon, and it was held that the action could not be maintained; that all the facts and circumstances above recited relieved the husband from his obligation to pay.

A divorce having been decreed to the wife on the ground of desertion, with an allowance of \$150 a month as alimony, she thereafter married another, and thereupon the husband applied to the court to have the order as to alimony revoked, or the alimony reduced. The counsel for the wife requested the judge to rule that the alimony was a vested right which the court had no power to disturb, and that, in order to maintain the petition, the husband was bound to show that by her remarriage, the wife's financial condition was so changed that she did not need the alimony allowed to her. This was declined, and, at the request of the counsel for the husband, the judge ruled that the remarriage of the respondent was prima facie cause for the reduction of alimony to a nominal sum, and this decree was affirmed by the supreme court. *Southworth v. Treadwell*, 168 Mass. 511, 47 N. E. 93.

In *Bowman v. Worthington*, 24 Ark. 522, which was an action by the wife to recover dower after she had been divorced from her husband by an act of legislature, and had married another man, who had died before the action

invested, in interest-bearing securities, which interest is paid promptly, the sum of \$1,800, given and transferred to her by appellant prior to the commencement of her action for divorce, and also that relator has a comfortable home in the state of Illinois; that he is entirely unable to perform the conditions of said decree; that since the said decree he has intermarried, and, by his changed relation, is required to support his present family, at an expense of \$95 a month; that he is working at a salary of \$112.50 per month, and has no other source of income. Upon the issues thus made the cause came on for trial on the 16th day of May, 1902. The relator offered in evidence a copy of the decree, and rested. The appellant thereupon testified in his own behalf, and rested. Thereupon the cause was continued until the next day, when the court heard the argument of counsel for appellant. Counsel for relator did not argue

the case, but requested permission of the court for an opportunity to submit a brief of argument and authorities upon the issues involved. The court granted this request. Thereupon the court took the case under advisement and for argument. Upon June 2, 1902, before briefs were submitted to the court, and without notice to relator, the court announced a decision from the bench, finding the defendant unable to pay the alimony, and dismissed the contempt proceedings, at the same time requesting the attorney for appellant to prepare an order to that effect, which was done. The judge signed the order as follows, omitting the title of the cause: "On this second day of June, 1902, this cause came regularly on for hearing by the court on the petition of relator for the punishment of the defendant as for contempt, or the payment of the amount provided for in the decree heretofore entered, and, after hearing said petition

was brought, the court, after holding that a separate action for alimony could not be maintained, said further, that, even if it should be mistaken in that view of the case, the fact that she had, after the granting of the divorce, married another husband whose duty it was to support her, was sufficient to bar an action on her part for alimony against the husband from whom she had been divorced. The court cited and approved *Albee v. Wyman*, 10 Gray, 222; *Fisher v. Fisher*, 2 Swabey & T. 411, 31 L. J. Prob. N. S. 1, 8 Jur. N. S. 103, 5 L. T. N. S. 364, 10 Week. Rep. 122; and *Sidney v. Sidney*, 4 Swabey & T. 178, 34 L. J. Prob. N. S. 122, 11 Jur. N. S. 815, 12 L. T. N. S. 826.

In an action by a husband for a dissolution of the marriage, the wife having filed a petition for alimony, the husband in his answer, after setting out the amount of his income, alleged that the wife was living with the correspondent as his wife, and was supported by him, and, this having been proved, the judge ordinarily held that the husband ought not to be called upon to pay alimony for the time during which the wife had other means of support, and said that it was immaterial, as far as this question was concerned, whether she was living in adultery; that the ground upon which the court proceeded was that she was living in such a manner that she had means of support independent of her husband. *Holt v. Holt*, L. R. 1 Prob. & Div. 610, 38 L. J. Prob. N. S. 33, 19 L. T. N. S. 662.

In England prior to 1857 there had been no divorce by the court for a cause occurring subsequent to the marriage, other than from bed and board; the marriage relation was continued, and so there could be no legal second marriage. In that year the matrimonial causes act (20 & 21 Vict. chap. 85) was enacted authorizing the absolute dissolution of the marriage for the causes stated in the act, and giving a most liberal discretion to the court making the decree to make a provision for the wife therein, having regard, in doing so,—among other things,—“to the conduct of the parties.” Acting under this wide discretion, the English divorce court has in some cases, in ordering an allowance to be secured to the wife, directed that the clause “*dum sola et casta viverit*” be inserted; in

others “*dum sola*” only; and in still others have refused to place any condition whatever in the decree. A reference to these cases is all that is deemed necessary. *Lister v. Lister*, L. R. 14 Prob. Div. 175, Affirmed in L. R. 15 Prob. Div. 4, 38 Week. Rep. 81; *Gladstone v. Gladstone*, L. R. 1 Prob. Div. 442, 45 L. J. Prob. N. S. 82, 35 L. T. N. S. 380, 24 Week. Rep. 739; *Latham v. Latham*, 30 L. J. Prob. N. S. 43, 7 Jur. N. S. 218; *Narracott v. Narracott*, 3 Swabey & T. 408, 33 L. J. Prob. N. S. 132, 10 Jur. N. S. 640, 10 L. T. N. S. 389, 12 Week. Rep. 1064, 4 Swabey & T. 776, 34 L. J. Prob. N. S. 54, 11 L. T. N. S. 750, 13 Week. Rep. 506; *Sidney v. Sidney*, 4 Swabey & T. 178, 34 L. J. Prob. N. S. 122, 11 Jur. N. S. 815, 12 L. T. N. S. 826; *Watkyns v. Watkyns*, 2 Atk. 96; *Chetwynd v. Chetwynd*, L. R. 1 Prob. & Div. 39, 35 L. J. Prob. N. S. 21, 11 Jur. N. S. 958, 13 L. T. N. S. 474, 14 Week. Rep. 184; *Fisher v. Fisher*, 2 Swabey & T. 410, 31 L. J. Prob. N. S. 1, 8 Jur. N. S. 103, 5 L. T. N. S. 364, 10 Week. Rep. 122; *Noel v. Noel*, L. R. 10 Prob. Div. 179, 54 L. J. Prob. N. S. 73, 33 Week. Rep. 552; *Branton Day v. Branton Day*, 78 L. T. N. S. 358; *Harrison v. Harrison*, L. R. 12 Prob. Div. 130, 56 L. J. Prob. N. S. 76, 57 L. T. N. S. 119, 35 Week. Rep. 703; *Lander v. Lander* [1891] P. 161, 60 L. J. Prob. N. S. 65, 64 L. T. N. S. 120, 39 Week. Rep. 416, 55 J. P. 152; *Wood v. Wood* [1891] P. 272, 60 L. J. Prob. N. S. 66, 64 L. T. N. S. 586; *Smith v. Smith* [1898] P. 29, 78 L. T. N. S. 28, 67 L. J. Prob. N. S. 54; *Kettlewell v. Kettlewell* [1898] P. 138, 67 L. J. Prob. N. S. 16, 77 L. T. N. S. 631; *Whitton v. Whitton* [1901] P. 348, 71 L. J. Prob. N. S. 10, 85 L. T. N. S. 648; *Ashcroft v. Ashcroft* [1902] P. 270, 71 L. J. Prob. N. S. 125, 37 L. T. N. S. 229.

There is, however, one case which shows, or at least tends strongly to show, what effect a second marriage by the wife would have to relieve her former husband from the obligation to secure her the allowance and support provided by the decree. See *Holt v. Holt*, L. R. 1 Prob. & Div. 610, 38 L. J. Prob. N. S. 33, 19 L. T. N. S. 662, *supra*, the reasoning in which would indicate that the New York rule will be apt to prevail in England.

P. H. V.

and the argument of counsel, and the court being fully advised in the premises, it is by the court ordered that said petition be and the same is hereby denied, and said proceeding be and the same is hereby dismissed, at relator's cost. Leander H. Prather, Judge." On the next morning counsel for relator appeared in court, and stated that he had been informed that the court had rendered a decision in the cause, and, being informed by the court that he had announced the decision in said cause, counsel for relator made the following statement: "Your honor will recollect that this matter was taken under advisement subject to the right of counsel to submit briefs of argument and authorities upon the issues involved. We prepared our brief, served the same upon counsel for defendant on May 29th, and have not received his copy in reply as yet, and therefore had no reason to believe that your honor would decide this matter until both briefs were filed. We were not present in court yesterday when the decision was announced, and had no notice of such contemplated action. We have here our briefs, and desire an opportunity to submit the same to your honor before this matter is decided." Whereupon the court made the following statement and ruling: "I had forgotten that this matter was to be submitted on briefs, but I now recollect that such order was made. The order that I made yesterday was therefore made through a mistake of that fact. Mr. Clerk, has that order been entered?" To which the clerk replied, "No, sir." The court then said: "Very well, you will not enter that order. That order will be withdrawn. The court will withhold its decision until the briefs have been examined." Thereafter, on the 12th day of June, the court made findings that appellant had neglected and refused to pay the sum of \$90 due under the decree, adjudged him in contempt, and ordered him into custody until the said sum shall be paid according to the terms of said decree. This appeal is prosecuted from this order.

The appellant maintains: (1) That the order signed by the judge on June 2d was a finality, and that the court thereafter had no jurisdiction to make any findings or render a different judgment in the case; and (2) that, if the order of June 2d was not final, the court erred in making finding No. 7 requested by relator, and in refusing to find Nos. 6 and 7 requested by appellant.

In *Quareles v. Seattle*, 26 Wash. 226, 66 Pac. 389, this court said: "There is a clear distinction between the making or rendering of a judgment and its entry. The judgment is made or rendered when the court announces it or signs the judgment, as is the common practice, and returns the signed

judgment to counsel. It is entered when it is placed of record by the clerk." And we held in that case that the judgment became effective as a judgment when it was rendered and filed with the clerk; that the filing by the clerk was the entry.

In *Barthrop v. Tucker*, 29 Wash. 666, 70 Pac. 120, we said: "In *Sears v. Kilbourne*, 28 Wash. 194, 68 Pac. 451, which is probably the last expression of opinion by this court on the subject, where the judgment was affirmed as against an appellant and the sureties on the appeal bond, and an order was afterwards made by this court setting aside the former judgment and entering another judgment to reduce the judgment against the sureties to the amount for which they were liable on their bond, we held that judgment was rendered on the first date, within the meaning of the Code, and we quoted approvingly from 18 Enc. Pl. & Pr. 430, where it is said: 'The rendition and the entry of a judgment are entirely different things. The first is a purely judicial act of the court alone, and must be first in the order of time; while the entry is merely evidence that a judgment has been rendered, and it is purely a ministerial act.' So, in this case, the essential thing sought by the plaintiff in the action was the judicial act of announcing or rendering the judgment. Everything that followed, including the preparation by the attorney of the journal entry, its signing by the judge, and the spreading of the same upon the journal by the clerk, was purely ministerial—evidence simply of the judicial act of the announcement or rendition of the judgment."

In none of these cases was there any question as to when the court lost control of the judgment. The statute, at § 5119, 2 Ballinger's Anno. Codes & Stat., provides: "All judgments shall be entered by the clerk, subject to the direction of the court, in the journal, and shall specify clearly the amount to be recovered, the relief granted, or other determination of the action."

In this case, at the time of the trial, the court reserved the cause for further argument, and no definite time was fixed therefor. Subsequently, on June 2d, before the written briefs had been submitted to the judge, and when he had forgotten that he had the case under advisement to be argued on briefs, he made an order dismissing the cause, and the order was handed to the clerk. Before the clerk filed the order or entered the same upon the journal, the court, upon discovering his inadvertence, recalled it, and directed the clerk not to enter it. We think the court clearly had the right to do this at any time before the order was filed or actually entered upon the records. In *Condee v. Barton*, 62 Cal. 1, it is said: "There is

no judgment which is final until a judgment is recorded." And in *Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211, the court said: "The judgment which was prepared and signed by Judge Rooney could not be effective as a judgment until it was filed with the clerk. Until then it was but a purpose in the breast of the judge, which could be changed as he might determine. Whether he deposited it in the postoffice to be transmitted to the clerk, or himself carried it in person to the office of the clerk, is immaterial. Until it was actually filed it did not become part of the records in the case, and consequently was not a judgment." It is probable that, if the clerk had either filed or entered the order in his journal, the order would then have passed beyond the control of the court, except to vacate or modify the same under the statute with reference thereto. But where the same had only been delivered to the clerk, who had not filed it, and no entry thereof was made by him, the court had authority, under the statute above quoted, to direct when it should be entered, or to direct that it should not be entered at all. We therefore think the court did not lose jurisdiction of the proceedings on June 2d, but was authorized thereafter to enter a final judgment upon the merits.

Appellant requested the court to make findings as follows: "The court finds that the defendant, Charles R. Brown, prior to the entry of the decree, turned over to the relator herein all of the property he then possessed, of every kind and nature whatever, except only a certain life insurance policy upon his own life, which he subsequently disposed of for the sum of \$1,300, which money [*together with that which was possible to spare out of his said salary*] was paid over to said relator in compliance with and performance of said decree, and that he has now no property of any kind or nature out of which he can obtain any money, and the only income he is now receiving is \$112.50 salary as aforesaid; that his family expenses now and for a long time have been \$95 per month, as follows, to wit: House rent, \$20; light and fuel, \$5; provisions, \$45; clothing, \$20; incidental expenses, \$5 [*all of which is necessarily required for the maintenance and support of his present family*]."

The court made this finding, except the words italicized and included in brackets, which were found not true. The court also refused to find "that the defendant has made an honest effort to comply with and perform the decree aforesaid, but is unable to do so," but found as follows: "That Charles R. Brown is able to comply with said decree, and is able to pay relator, for her maintenance and support and the support of her

minor child, the sum of \$50 for each and every month, and that said defendant has wilfully disobeyed the order of said court by failing and refusing to pay relator the sum of \$50 per month as required and provided by said decree."

The appellant was the only witness in his own behalf, and he testified, substantially, that he was employed as paying teller in a bank at Spokane at a monthly salary of \$112.50; that he is a married man, was married about three and a half years prior to the trial, and has no other income than his salary, and no property; that at the time of the decree of divorce he cashed an insurance policy on his life, on which he realized the sum of \$1,300; that with this money, and what he could spare from his salary, he had paid the alimony since the decree; that he has no money now except his salary; that the expenses of himself and wife actually necessary were \$95 per month, itemizing these expenses; that his salary and position now are the same as when the decree of divorce was rendered. He also admitted that the sum of \$90 was then due according to the terms of the decree, and that he had refused to pay more than \$35 per month because he was unable to do so. This evidence went only to the ability of the appellant to pay the \$50 per month. He admitted that he was earning \$112.50 per month, and that his income had not changed since the decree of divorce was rendered. The only change in his financial condition is that the \$1,300 which he received about the time of the decree has been consumed, and the further change that he has since remarried. He testifies that the necessary expenses of himself and present wife are \$95 per month. The decree of divorce fixed the amount which appellant must pay to respondent. That decree is final until it is modified, and must be complied with by the appellant so long as he is able to do so. It cannot be collaterally attacked or modified in this proceeding. A failure to comply with the terms of the decree subjects the appellant to the penalty for contempt unless he shows his inability to perform the terms thereof. When it is shown that he receives a monthly salary of \$112.50, his ability to pay \$50 is certainly shown, unless prior claims thereon are shown. None are shown here. While the appellant, under the law of this state, may after the decree of divorce legally remarry, the fact of a subsequent remarriage cannot relieve him of the obligation fixed by the decree. If his monthly income after divorce was sufficient to support himself alone and to pay his divorced wife the alimony allowed, he could not by his subsequent marriage set aside the

decree, or be heard to say that the additional burdens which he himself thereby assumed made him unable to comply with the decree. The divorced wife and minor child have a fixed and prior claim upon the earnings of appellant, which appellant for his

own comfort may not take away. We think the findings made were correct.

The judgment is therefore affirmed.

Dunbar and Hadley, JJ., concur. Fullerton, Ch. J., and Anders, J., dissent.

WISCONSIN SUPREME COURT.

Adelhaid OPITZ, *Resp.*,
v.

John C. KAREL, Admr., etc., of William Enos, Deceased, *Appt.*

(.....Wis.....)

1. One who takes a policy of insurance upon his own life, payable to his personal representative, may make a valid gift of the proceeds to another by a delivery of the policy, although the policy itself provides that an assignment of it must be in writing and filed in the office of the insurer, if the insurer does not seek to enforce the provision against the assignee.
2. A woman has an insurable interest in the life of a man whom she is engaged to marry.
3. The beneficiary named in a policy of life insurance cannot take advantage of provisions in the policy as to methods of its assignment, which were inserted for the benefit of the insurer.
4. The interest, costs, and disbursements accruing in an action to determine the right to the proceeds of a life insurance policy, payable to the personal representative of the insured, are not chargeable against the executor personally, but should be paid out of the estate, in the absence of any misconduct or bad faith on his part in defending the action, although his defense proves unavailing.

(July 3, 1903.)

APPEAL by defendant from a judgment of the Circuit Court for Milwaukee County in plaintiff's favor in an action brought to recover the proceeds of a life insurance policy. *Modified and affirmed.*

Statement by **Siebeker, J.:**

Plaintiff brings this action to recover the proceeds of a life insurance policy issued by the Prudential Life Insurance Company of America on the life of William Enos, payable to his executors, administrators, or as-

signs. She claims to be owner of this policy as a gift by the insured. The action was instituted against the company. It appeared, paid the amount due thereon into court, subject to its order, and prayed that Oscar Opitz, as administrator of the estate of William Enos, deceased, be substituted as defendant, which prayer was granted. The county court of Milwaukee county removed Oscar Opitz as administrator of said estate, and substituted the appellant, who was thereafter substituted as defendant. It appeared upon the trial that on May 24, 1894, William Enos, then twenty years of age, made application to the Prudential Life Insurance Company of America for insurance upon his life. The company issued him a policy for \$1,000, conditioned upon the payment of the stipulated quarterly premium, and to be paid upon satisfactory proof of his death. One of the conditions of said policy was: "If this policy shall be assigned the assignment must be in writing and the company shall not be required to notice such assignment until the original or a duplicate thereof is filed in the home office. The company will not assume any responsibility for the validity of any assignment." William Enos died September 28, 1900. At the time the policy was delivered to him by the company, on June 1, 1894, plaintiff and the insured were engaged to be married. This promise and engagement of marriage continued until his death. On the day the policy was received by him, he delivered it to the plaintiff, making her a parol gift thereof. She accepted the policy, and held it up to the time of his death. The court found that the deceased ratified the gift after he became of age, that he gave her the money to pay the quarterly premiums, and that she applied the same upon the policy. Upon this state of facts, the court awarded plaintiff judgment for the amount due on the

NOTE.—As to insurable interest of woman in life of man to whom she is engaged to be married, see also cases in *note* to *Metropolitan L. Ins. Co. v. Smith*, 53 L. R. A. 825.

As to assignability of life insurance policy generally, see *note* to *Johnson v. Alexander*, 9 L. R. A. 680; also *Hoffman v. Hoke*, 1 L. R. A. 229; *Rittler v. Smith*, 2 L. R. A. 844; *Milner v. Bowman*, 5 L. R. A. 95; *Roller v. Beam*, 6 L. R. A.

R. A. 136; *Hewlett v. Home for Incurables*, 17 L. R. A. 447; *Mutual Reserve Fund Life Assn. v. Hurst*, 20 L. R. A. 761; *Hays v. Lapeyre*, 35 L. R. A. 647; *Clement v. New York L. Ins. Co.* 42 L. R. A. 247; *Steinback v. Diepenbrock*, 44 L. R. A. 417; *Tate v. Commercial Bldg. Assn.* 45 L. R. A. 243; *Chamberlain v. Butler*, 54 L. R. A. 338; and *Steele v. Gatlin*, 59 L. R. A. 129.

policy, and for interest from the date the company paid the same into court to the date of the judgment, and for costs and disbursements incurred upon the trial.

Messrs. Cummings, Hays, & Thiel for appellant.

Mr. James H. Stover, for respondent:

A valid gift *inter vivos* may be made by delivery without writing.

Wing v. Merchant, 57 Me. 383; *Camp's Appeal*, 36 Conn. 88, 4 Am. Rep. 39; *Grover v. Grover*, 24 Pick. 261, 35 Am. Dec. 319; *Crook v. First Nat. Bank*, 83 Wis. 37, 52 N. W. 1131; *Bedell v. Carll*, 33 N. Y. 581; *Hewins v. Baker*, 161 Mass. 325, 37 N. E. 441; *Madeira's Appeal*, 17 W. N. C. 202, 4 Atl. 908; *O'Brien v. Prescott Ins. Co.* 32 N. Y. S. R. 579, 11 N. Y. Supp. 125; *State ex rel. Wright v. Tomlinson*, 16 Ind. App. 675, 45 N. E. 1116.

A valid gift of an insurance policy may be made *inter vivos* without writing and by simple delivery.

Hallstead's Estate, 2 Kulp, 508; *Pomeroy v. Manhattan L. Ins. Co.* 40 Ill. 398; *Hani v. Germania L. Ins. Co.* 197 Pa. 276, 47 Atl. 200; *Bliss, Life Ins.* 547; *Crittenden v. Phenix Mut. L. Ins. Co.* 41 Mich. 442, 2 N. W. 657; *Chapman v. McIlhorrath*, 77 Mo. 38, 46 Am. Rep. 1; 14 Am. & Eng. Enc. Law, p. 1022.

The clause in a life insurance policy prohibiting assignment cannot be set up by the assignor, where the insurer does not object to the assignment, but impliedly assents thereto by paying the proceeds of the policy into court.

New York L. Ins. Co. v. Rosenheim, 56 Mo. App. 27; *Merrill v. New England Mut. L. Ins. Co.* 103 Mass. 251, 4 Am. Rep. 548; *Embry v. Harris*, 107 Ky. 61, 52 S. W. 958; 19 Am. & Eng. Enc. Law, pp. 93, 94, 96; *Hewins v. Baker*, 161 Mass. 320, 37 N. E. 441; *Richardson v. White*, 167 Mass. 58, 44 N. E. 1072; *Hogue v. Minnesota Packing & Provision Co.* 59 Minn. 39, 60 N. W. 812; *St. John v. American Mut. L. Ins. Co.* 13 N. Y. 31, 64 Am. Dec. 529; *Burges v. New York L. Ins. Co.* (Tex. Civ. App.) 53 S. W. 602; *Dickey v. Pocomoke City Nat. Bank*, 89 Md. 280, 43 Atl. 33; *Brown v. Equitable Life Assur. Soc.* 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968, 1126; *Travelers' Ins. Co. v. Grant*, 54 N. J. Eq. 208, 33 Atl. 1060; *Brown v. Manour*, 64 N. H. 39, 5 Atl. 768; *Marcus v. St. Louis Mut. L. Ins. Co.* 68 N. Y. 625; *Baillie v. Stephenson*, 95 Wis. 500, 70 N. W. 660.

Siebecke, J., delivered the opinion of the court:

The facts in this case present the question, Could the proceeds of this policy be made the subject of a gift, as claimed by 62 L. R. A.

the plaintiff? To consummate a gift *inter vivos*, there must be an absolute delivery of the subject of the gift by the donor, with an intention to part with his interest in and dominion over the property sought to be transferred. The rule seems well settled that bonds and other negotiable instruments for the payment of money can be transferred by delivery to the intended donee as a gift without a written assignment. The essential requirement in cases of gifts is that such a delivery shall be made as the nature of the subject sought to be bestowed reasonably admits of. Many of the strict requirements to the transfer of property by gift, indicated by the earlier cases, have been removed or relaxed to give a freer exercise to such a disposition of property. This modification of the law applies to what may be the subject of a gift, as well as the manner of executing it. In the case of *Crook v. First Nat. Bank*, 83 Wis. 31, 52 N. W. 1131, the court adopts the language of Shaw, Ch. J., in *Chase v. Redding*, 13 Gray, 418, expressing the rule on the subject of gifts, as follows: "Originally it was limited, with some exactness, to chattels—to some object of value deliverable by the hand; then extended to securities transferable solely by delivery, as bank notes, lottery tickets, notes payable to bearer or to order, and indorsed in blank. Subsequently it has been extended to bonds and other choses in action in writing or represented by a certificate, where the entire equitable interest is assigned." The court further states that "these cases all go on the assumption that a bond, note, or other security is a valid, subsisting obligation for the payment of a sum of money, and the gift is in effect a gift of the money by a gift and delivery of the instrument that shows its existence, and affords the means of reducing it to possession." *Basket v. Hassell*, 107 U. S. 602, 27 L. ed. 500, 2 Sup. Ct. Rep. 415; *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663; *Schollmeyer v. Schoendelen*, 78 Iowa, 426, 43 N. W. 282. In some jurisdictions, it has been held that certificates of stock in a corporation can be the subject of a valid gift by delivery thereof, though the rules of the corporation prescribing the manner of executing an assignment have not been complied with. The basis of these decisions is that the law recognizes the binding effect of such transfers, as between the parties thereto, though it does not alter the relations which exist between the shareholder and the persons related to him by reason of being members of the same company. *Com. v. Crompton*, 137 Pa. 138, 20 Atl. 417; *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663. The suggestion that such an agreement cannot be relied upon, because it rests entirely in parole

is in conflict with the established rules controlling a transfer of property of this nature, where the delivery of the instrument which is the evidence of a subsisting obligation is a symbolical delivery of the property, and operates as a completed transfer of the title as between the parties to the transaction. No particular form of words or written instrument is required by the law to constitute an assignment of this class of property. "Any order, writing, or act which makes an appropriation of the fund amounts to an equitable assignment, and an oral or written declaration may be as effectual as the most formal instrument. . . . The same is true as to gifts of choses in action, if a delivery, or what in judgment of law amounts to such, takes place." *Crook v. First Nat. Bank*, 83 Wis. 31, 52 N. W. 1131; *Wilson v. Carpenter*, 17 Wis. 516; *Skobis v. Ferge*, 102 Wis. 122, 78 N. W. 426. The delivery of the instrument is a symbolical delivery of the fund, and the contract or gift becomes executed and completed, vesting title in the person receiving it.

It is strenuously contended that the rule is firmly established in this state, permitting no transfer of a policy in cases like this, except it be with the consent of the insurance company, and in the manner prescribed by the contract. Some of the recent cases relied upon in support of this proposition refer to change of beneficiaries. In *McGowan v. Supreme Court, I. O. of F.* 104 Wis. 173, 80 N. W. 603, the subject of changing beneficiaries by the certificate holder in a mutual benefit association was fully considered. It is there held that, if the holder of such certificate "wishes to change the beneficiary, [he] must make the change in the manner required by his policy, and the rules of the association, and that any material deviation from this course will render the attempted change ineffective. It is equally well settled that there are cases where literal and exact conformity with the requirements of the policy may be excused." The exceptions are considered and stated in the opinion upon a full review of the case of *Supreme Conclave, R. A. v. Cappella*, 41 Fed. 1, and other cases. In the later case of *Berg v. Damkoehler*, 112 Wis. 587, 88 N. W. 606, the question of changing beneficiaries by the insured in an ordinary life policy was considered, and the court states: "The general rule is that the change in beneficiaries must be made in the manner required by the policy. . . . This rule, however, in this state, is subject to several exceptions, one of which is that the insured may dispose of the policy by will to the exclusion of the beneficiary, when he has paid the premiums and kept control of the policy." Citing *Breitung's Estate*, 78 Wis. 33, 62 L. R. A.

46 N. W. 891, 47 N. W. 17; *Clark v. Durand*, 12 Wis. 223; *Kerman v. Howard*, 23 Wis. 108; *Strike v. Wisconsin Odd Fellows Mut. L. Ins. Co.* 95 Wis. 583, 70 N. W. 819; *Alvord v. Luckenbach*, 106 Wis. 537, 82 N. W. 535. The right to select a beneficiary, secured either by the contract, or under some provision of the charter or by-laws of the insurer, is in the nature of a power, and must therefore be exercised in compliance with the terms of the contract granting the power, while the right of a holder to transfer a policy on his own life, and in his possession and control, if not prohibited by its terms, has been upheld as a legal right attached to the contract. This distinction between the right to transfer a policy and to change beneficiaries has at times not been carefully observed in the construction of such contracts. The cases of *McGowan v. Supreme Court, I. O. of F.* and *Berg v. Damkoehler* present questions of a change of beneficiaries, and the principle applied as ruling those and like cases is in no way limited, modified, or affected by this right to transfer. The facts involved in those cases were in legal effect so unlike those involved in this case that the opinion in neither of those cases can properly be regarded as controlling this case, nor in conflict with the conclusion we have reached. The recent case of *Racoon v. Milwaukee Mut. L. Ins. Co.* 115 Wis. 641, 92 N. W. 378, is a pertinent authority on this question. This court in that case states: "In Wisconsin, however, there has existed from early times a principle of the law of life insurance which is unique and at variance with the law in most of the states. This principle is that a person who insures his own life for the benefit of another, and pays the premiums thereon, may . . . [except as limited by statute as to married women] dispose of the policy by will, or in other manner not inconsistent with the terms of the policy, to the exclusion of the beneficiary named therein." Though the beneficiary in such a policy has a vested interest, he can do nothing to prevent the insured, as equitable owner, from revoking such beneficial interest, retain it himself, or vest it elsewhere, when not prevented by the terms of the contract.

Appellant contends that under the contract in question the insured was prohibited from transferring this policy by will or otherwise, except by assignment in writing, and filing the original or a duplicate thereof in the home office of the company. The stipulation is: "If this policy shall be assigned the assignment must be in writing and the company shall not be required to notice the assignment until the original or a duplicate thereof is filed in the home office. The company will not assume any re-

sponsibility for the validity of any assignment." This condition contains no agreement declaring the policy void in case of a transfer not in writing, nor any terms imposing restrictions on the insured to deal with third parties concerning it as his property. The provision, at most, is for the benefit and protection of the company, which it may assert as against any claimant of the proceeds of the policy, other than the beneficiary named therein. It does not, however, prevent the insured from transferring it as a chose in action. We are unable to find anything in the contract or the condition attached which takes from the insured the right and power to dispose of the policy by any of the methods approved in the law, to the exclusion of the beneficiaries named in the policy. Such a policy is not to be distinguished from ordinary choses in action, and comes within the operation of the legal rules applicable to agreements involving pecuniary obligations. To deprive the policy owner of the right given him by the law to dispose of it, we must find clear and binding provisions to that effect. In addition to cases cited from this court, others supporting this doctrine are *Hewins v. Baker*, 161 Mass. 320, 37 N. E. 441; *Ireland v. Ireland*, 42 Hun, 212; *Olmsted v. Keyes*, 85 N. Y. 593; *Marcus v. St. Louis Mut. L. Ins. Co.* 68 N. Y. 625; *Bacon, Ben. Soc.* § 298, and cases cited.

The case, then, presents this situation: The deceased procured a policy on his own life for the benefit of his executors, administrators, or assigns; agreeing to pay the premiums; retaining possession and control of it up to the time of the alleged gift to the plaintiff. Under the law of this state, he had the right and power to transfer it in any of the ways provided by the law. It is difficult to perceive why his interest in the policy could not, in law, be held as properly subject to gift as notes, bonds, and certificates. It represents a subsisting obligation while in force, as do these written instruments. It is the evidence of an amount to be paid at a time fixed by the contract, though it may lapse by failure to comply with its terms. This contingency, however, cannot destroy its character as a transferable chose in action while it subsists as a valid obligation. The doctrine is supported by reason and authority. It has been held that the insured, having the power to transfer the policy under the law and the terms of the contract may dispose of it by gift, and, when such transfer meets the requirements of the law constituting a gift, the title to the fund at its maturity is vested in the donee. *Travelers' Ins. Co. v. Grant*, 54 N. J. Eq. 208, 33 Atl. 1060; *Hogue v. Minnesota Packing & Provision Co.* 59 Minn. 62 L. R. A.

39, 60 N. W. 812; *Ireland v. Ireland*, 42 Hun, 212; *Chapman v. Mellicrath*, 77 Mo. 38, 46 Am. Rep. 1; *Marcus v. St. Louis Mut. L. Ins. Co.* 68 N. Y. 625; *Madeira's Appeal*, 17 W. N. C. 202, 4 Atl. 908; *Crittenden v. Phoenix Mut. L. Ins. Co.* 41 Mich. 442, 2 N. W. 657; *Williams v. Guilde*, 117 N. Y. 343, 6 L. R. A. 366, 22 N. E. 1071; *Thornton, Gifts*, p. 150, note 1.

The contention that it is not established in the case that the insured made a complete delivery of the policy, and surrendered dominion over it, is not borne out by the facts. It appears he gave plaintiff this policy on the day he received it from the company. She retained possession of it, except that deceased procured it shortly before his death, to have it assigned to her in writing. At the suggestion of the company's local agent, he postponed such assignment, with intention to do this after his marriage to plaintiff, which was then expected to take place in the near future. On the same day he returned the policy to the plaintiff, who retained and held it up to the time of his death. These facts, coupled with the other circumstances of the case, can leave no doubt that he completely surrendered his dominion over the policy at the time he first delivered it to the plaintiff. We must hold that deceased had the legal right to, and did, make a gift of the policy to the plaintiff, vesting title to the fund in her, and therefore the contingency which would give the personal representatives of the donor any interest in the fund did not arise. When the gift was perfected and consummated, donee's rights and interests became absolute, and all possibility of a devolution of benefits of the policy upon the personal representatives of the insured ceased.

It was argued that nothing appeared, showing that an insurable interest existed between the insured and plaintiff, and therefore all intendments should be presumed against the gift. The following cases sustain the position that an insurable interest exists where one party "has a reasonable right to expect some pecuniary advantage from the continuance of the life of the other, or to fear a loss from his death, . . . as in case of a man and woman between whom a contract of marriage exists." *Chisholm v. National Capital L. Ins. Co.* 52 Mo. 213, 14 Am. Rep. 414; *Taylor v. Travelers' Ins. Co.* 15 Tex. Civ. App. 254, 39 S. W. 185, cited in 53 L. R. A. 825, note.

The company has paid the proceeds of the policy into court for the lawful owner. By this act it has waived any objection it might have made to any transfer of the policy by the insured during his lifetime. Any objections to a transfer of this policy which this company might have made under this con-

dition are not available to the defendant, as the personal representative of the deceased, nor any other person interested in his estate. The gift of the policy to the plaintiff made her the owner of the proceeds. We must hold that the judgment properly awarded her the amount due on the policy.

The court awarded judgment for interest on the fund for the time the fund was in court, and for costs and disbursements incurred by the plaintiff in the action against the defendant personally. Nothing appears in the record to show that he was guilty of any misconduct or bad faith in defending this action. Under such circumstances, the judgment should have directed such interest and costs and disbursements to be paid out of the estate. *Ladd v. Anderson*, 58 Wis. 591, 17 N. W. 320; *Wiesmann v. Brighton*, 83 Wis. 550, 53 N. W. 911. The judgment of the circuit court is erroneous in this respect.

The judgment of the Circuit Court is modified so as to render judgment for the interest and the costs and disbursements against appellant as administrator of the estate of William Enos, deceased; and, as so modified, the judgment is affirmed. The appellant is awarded costs on this appeal.

Mary HOLMES, Appt.,

v.

George WALTER et al., Respts.

(.....Wis.....)

1. The rule that judicial construction is neither required nor permissible unless uncertainty of sense is clearly apparent applies to wills the same as to other instruments.
2. Where the field of construction is entered upon respecting a will, the rule that a meaning is to be preferred which will support, instead of defeat, it applies as strongly to testamentary trusts as to any other testamentary disposition of property.
3. When the title to property is conveyed to one for the benefit of another, with active duties to be performed by the grantee with reference to the subject of the conveyance, evidencing an intention that the primary use of the property shall be in the grantee, an active trust is created whether any technical words to that effect are used or not.
4. In the circumstances above instanced, waiving that of the primary use being in the grantee, his duties in respect to the title not requiring the right to the posses-

sion and profits to any extent, a passive trust is created as to the title, and a power in trust in respect thereto is vested in the grantee if the duty to be performed may legitimately be the subject of such a power under the statutes.

5. A trust created for the purpose mentioned in subdivision 5, § 2081, Rev. Stat. 1898, is valid if fully expressed and clearly defined upon the face of the instrument creating it, unless the same violates the prohibition against suspending the absolute power of alienation.
6. A purely passive trust is annihilated as soon as created, by the operation of the statute (§ 2075, Rev. Stat. 1898), causing the legal title to vest with the beneficial right.
7. The statute operating upon passive trusts in the manner above indicated does not affect active trusts whether they be valid or invalid. If the former, they are to be executed according to the scheme of the creator thereof; and if invalid the property is entirely unaffected by the instrument and goes under the residuary clause of the will in the absence of any other direction contained therein, and, if there be no such residuary clause or direction, it goes as intestate estate.
8. A trust is fully expressed and clearly defined, within the meaning of the statute, when the general purpose thereof is clearly within the statute, the general scheme of the trust is made evident, and the subject of the trust and persons to be benefited are made sufficiently clear that a court of equity can judicially determine the same and superintend the execution of the trust.
9. Where a trust has no express provision for its termination it is not void on that account if it does not offend against the statute as to suspending the absolute power of alienation.
10. The law prohibiting the suspension of the absolute power of alienation does not apply to personal property in any case, and it does not apply to realty where the trustee has the absolute power to sell the same, or where the beneficiaries are all *in esse*, and can, by uniting, convey the whole title.
11. When an instrument creating a trust does not in terms or by necessary implication prohibit the termination thereof, if all parties who are or may be interested are in existence and are *qui juris*, they may, by uniting, terminate the trust subject to such restraints as are contained in §§ 2089, 2091, Rev. Stat. 1898.
12. The mere fact that no time is stated in the creation of a trust for its termination, does not render it void for uncertainty.

(June 18, 1903.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Wood County construing the will of George Walter, deceased. *Reversed.*

Statement by Marshall, J.:

Action to construe the will of George Walter, deceased, which, so far as material to

*Headnotes by MARSHALL, J.

NOTE.—As to uncertainty of trust, see also, in this series, *Cowley v. Twombly*, 46 L. E. A. 164. 62 L. R. A.

the questions raised, is in the following language:

"First. After the payment of my just debts and funeral expenses I give, devise, and bequeath to my beloved wife Mary, in trust for herself and my children, all of my estates, both real and personal, with full power to continue my business if for the best interest of my estate.

"Second. I hereby nominate and appoint my friend John J. Sherman the executor of this my last will and testament," etc.

The testator left surviving the plaintiff, who was his widow, and the following children: George Walter, Laura L. Roemer, Martin T. Walter, Lena C. Walter, Anna M. Walter, Chas. W. Walter, Henry F. Walter, Rose T. Walter, and Edgar B. Walter, all being minors except one, and properly made defendants. Such proceedings were duly had in the settlement of the estate that the property was assigned in due form to Mary Walter in trust, according to the language of the will. She accepted the trust. Subsequently she resigned, and the county court appointed defendant Christian Walter in her place. He accepted the trust and took possession of the property. He thereafter managed the same without question of his right in the matter till this action was commenced. Such property consisted mainly of a brewery in operation, and the personal property in and for use in connection therewith. The value thereof was about \$100,000. It was vital to its preservation that the brewery should be kept in continuous operation. It was not susceptible of division by conversion into money. The claim of plaintiff was that no valid trust was created by the will; that by a proper construction of the instrument she took the whole title and beneficial interest in the property. The claim on behalf of the defendants was also that the will did not create a valid trust, though there was an attempt to do so, and that the legal result was to vest the full title to the estate in the mother and children in equal portions.

The court decided as follows, in effect: The testator had no intention of vesting the whole beneficial interest in his estate in his wife. He expected that the harmonious relations theretofore existing in his family would continue. He knew the character of his property was such that the best results for his family could be obtained by operating the same without any divided management. He could not foresee whether it would be for their best interests to keep the property *in specie* or convert it into money and invest the same, or divide the proceeds at some time in the future. He thought best to leave a choice of courses to

his wife and children. He did not leave the matter, however, exclusively to his wife. He directed the business to be continued if thought best. His purpose was that the business should be continued if all agreed to that and such course should seem to be for the best, and that, if a decision should be at any time arrived at not to continue the business, the property should be sold and the proceeds reinvested or divided, as might seem best. His idea was that, so long as the property should be kept together it would be best to have one of the members dominant in the management thereof. He left the precise details of the trust to be determined by circumstances as they might arise. The purposes of the testator are not set forth with sufficient particularity to satisfy the statute. The will created a mere passive or dry trust. Therefore it must be considered as if there were no trust at all and the property was given direct to the beneficiaries. Judgment was ordered and rendered accordingly, and the plaintiff appealed.

Messrs. Wigman, Martin, & Martin,
for appellant:

The testator did not use the word "trust" in its technical and legal sense.

Davies v. Davies, 109 Wis. 129, 85 N. W. 201; *Davis v. Boggs*, 20 Ohio St. 563; *Forbes v. Darling*, 94 Mich. 621, 54 N. W. 385; *Elliott v. Elliott*, 117 Ind. 380, 20 N. E. 264; *Seamonds v. Hodge*, 36 W. Va. 304, 15 S. E. 156; *Wilmoth v. Wilmoth*, 34 W. Va. 426, 12 S. E. 731; *Clarke v. Leupp*, 88 N. Y. 228; *Small v. Field*, 102 Mo. 104, 14 S. W. 815; 1 Perry, Tr. 3d ed. §§ 116, 119, 5th ed. § 116; 1 Redf. Wills, 1st ed. 412, 413; 2 Devlin, Deeds, § 858; *Mackett v. Mackett*, L. R. 14 Eq. 49; *Landon v. Moore*, 45 Conn. 422; *Whitridge v. Williams*, 71 Md. 105, 17 Atl. 938; *Blue v. Peneston*, 24 Mo. 240; *English v. Beehle*, 32 Mo. 186, 82 Am. Dec. 126; *Pell v. Folger*, 68 Hun. 443, 23 N. Y. Supp. 42; *Cressler's Estate*, 161 Pa. 427, 29 Atl. 90, 95; *Bain v. Buff*, 70 Va. 371; *Schouler, Wills*, § 596; *Zimmer v. Sennott*, 134 Ill. 505, 25 N. E. 774.

The intent to create a trust must be established with a reasonable degree of certainty. The use of precatory words, vague terms, and doubtful phrases is not sufficient.

Bryan v. Milby, 6 Del. Ch. 208, 13 L. R. A. 563, 24 Atl. 333; *Mitchell v. Mitchell*, 143 Ind. 113, 42 N. E. 467; 27 Am. & Eng. Enc. Law, p. 40; 1 Redf. Wills, p. 713.

A gift of the income, interest, or produce of a fund, or of lands, indefinitely, will be held to pass the funds or lands.

Zimmer v. Sennott, 134 Ill. 505, 25 N. E. 774; *Bishop v. McClelland*, 44 N. J. Eq. 450,

1 L. R. A. 551, 16 Atl. 1; Wms. Exrs. § 1194; 29 Am. & Eng. Enc. Law, p. 441.

Messrs. Humphry Pierce and Thomas H. Ryan for respondents.

Marshall, J., delivered the opinion of the court:

The claim is made by appellant's counsel that no trust was attempted to be created by the will; that the purpose of the testator was to bestow all of his estate upon his wife with full power to do therewith as she might see fit. That idea is urged upon us with much earnestness, and rules for judicial construction are invoked to support it. As we view the will we cannot reach the point where judicial construction is permissible. There is a tendency to commence dealing with testamentary instruments at once and almost as a matter of course upon their coming within the reach of judicial administration, as if construction thereof were necessary, or at least permissible, while the true rule is that construction never begins until uncertainty of sense is pretty clearly apparent. In this case there is no such uncertainty. Any attempt to construe the instrument would involve an effort to put meaning into the words contrary to their plain import, and to create uncertainty instead of the opposite. "I give, devise, and bequeath to my beloved wife Mary, in trust for herself and my children, all of my estates," etc., "with full power to continue my business if for the best interest of my estate." What can be plainer than those words as regards the mere intention to create a trust, leaving out of view the question of the validity of the trust for the time being. The devise and bequeath of property was not made absolutely to the trustee, but "for herself and my children." The property was not merely conveyed to the trustee to the use of herself and the children, all to immediately possess and enjoy as primary takers; but it was conveyed to the widow for herself and the children, with full power vested in her to operate the property, or to convert the same and invest the fund in other property in her discretion, she taking, primarily, the use thereof. Every word used in the will is in harmony with the one theory that the testator intended to vest the legal title to the property in the trustee with the fullest discretionary authority over the same, as regards how best to devote it to the purpose of the trust. It was limited only by the words "for herself and my children," plainly indicating that all were to share equally in the benefits of the trust.

Counsel refer to *Davies v. Davies*, 109 Wis. 129, 85 N. W. 201, as if that were an authority for holding that, when property

is plainly given to one in trust for that one and others, with absolute power of control over the same as regards the manner in which the same shall be managed for the beneficiaries, the element of trust, though technical words in respect thereto be used to express it, may by construction be eliminated. That case is very far from supporting such idea. The *Davies* will was uncertain to the highest degree susceptible of being made certain by construction. There was no question about that. The difficulty was in reading out of the ambiguous instrument the idea which the testator had in mind when he signed it. The court did not reach the final result by discarding the element of trust. That was retained, and amplified, so to speak, by construction, so as to disclose some reasonable meaning within the scope of the testator's language. No one, it seems, can read the decision there rendered and gather, legitimately, the impression that, if Dr. Davies had left his property to his wife in trust for herself as well as the other objects of his solicitude mentioned in his will, there would have been any difficulty calling for construction as regards the element of trust itself. The court did not say that the doctor failed to create a trust, or did not intend to create one. It held that he did create a trust, but that he intended to make his wife one of the beneficiaries thereof as well as the other persons named as such, though failed to express the purpose so that it could be discovered without the aid of judicial construction. We have no such difficulty here. There is not a circumstance, that we can discover, sufficient to furnish a well-grounded suspicion that the testator did not intend to create a trust. Whereas, in the *Davies Case* the literal sense of the trust clause was broadened, letting in Mrs. Davies as a beneficiary, it appearing to be manifest, under the circumstances, that the testator did not intend to leave her entirely unprovided for and destitute and at the same time impose upon her the duty of administering his estate, which was small, for the benefit of others, here the idea is that we should eliminate altogether the element of trust, though it is clearly expressed, by taking the language of the will literally, to accomplish the disinheritance of all the testator's children, though he had ample property to provide for the wife and his children as well. There construction was successfully invoked to avoid an unnatural meaning. Here it is invoked to create one, as we look at the matter.

Our views so far are in harmony with those of the learned circuit judge as regards

whether the testator intended to create an active trust. In an elaborate opinion he pointed out in a general way what the testator purposed doing, all indicating such a trust, winding up with these expressions: "In any event the business could be conducted, the estate managed, disposed of, its proceeds invested and divided, — transactions likely to run through a series of years,—with greater convenience and economy, in the name of a single person acting as trustee, than by the ten heirs acting individually, some of them for some years by guardians. Such were very probably some of the considerations which moved the testator to invest his widow with the entire estate, 'in trust for herself and my children,' leaving the conditions of the trust to be determined afterwards, in the manner already indicated, as future circumstances should seem to require." The last clause of the quoted language, looking at the opinion as a whole, must be construed as holding that the testator left to the trustee broad discretionary authority as to how best to execute the trust in order that her administration might be adapted to changing circumstances, a very common feature in a trust created by will for the benefit of the testator's family,—a feature almost necessary to such a trust.

Enough has been said, without going further into a detailed consideration of the learned judge's opinion and decision, to show that he held that the will created a trust of an unmistakably active character. The legal title to the property was, by appropriate terms, vested in the trustee, and she was empowered to control and manage it, as the circuit judge suggests, for the reason, among others, that it was of such a character that the interests of all concerned could be best subserved by avoiding a divided management. The statement of the learned court that the testator intended to vest in his wife the title to the property with power to manage it is, of course, a distinct decision that he intended to create a trust. It negatives any purpose that the beneficiaries should take the title as tenants in common. Notwithstanding the very active character of the trust thus indicated, the learned circuit judge said that the trust was passive in character. It would not seem necessary to stop to more than suggest that a trust cannot be at the same time both active and passive. If it has presently the essentials of one, that excludes the possibility of its having presently the essentials of the other. The prime requisite of a passive trust is that the trustee is made in form a mere holder of the legal title, the right to the possession and the profits being in another.

If there are any active duties for the testator to perform with respect to administering the property, and the primary use be expressly or impliedly, by reason of such active duty, vested in the trustee, the trust is necessarily active and not affected by the statute which would otherwise execute the use and thus vest the legal title in the equitable owner. That rule is elementary. *Strong v. Gordon*, 96 Wis. 476, 71 N. W. 886; *Goodrich v. Milwaukee*, 24 Wis. 422, *Riehl v. Bingenheimer*, 28 Wis. 84; *Sullivan v. Bruhling*, 66 Wis. 472, 29 N. W. 211; 2 *Underhill, Wills*, § 773; *Bean v. Bowen*, 47 How. Pr. 306; *Thomson v. Thomson*, 55 How. Pr. 494; *Scofield v. St. John*, 65 How. Pr. 292; *Ward v. Ward*, 105 N. Y. 68, 11 N. E. 373; *Bennett v. Garlock*, 79 N. Y. 302, 35 Am. Rep. 517. The law in that regard is stated in *Perry, Tr.* § 305, thus: "If any agency, duty, or power be imposed on the trustee, as by a limitation to a trustee and his heirs to pay the rents, or to convey the estate; or if any control is to be exercised, or duty performed by the trustee in applying the rents to a person's maintenance, or in making repairs, or to preserve contingent remainders, or to raise a sum of money, or to dispose of the estate by sale,—in all these, and in other and like cases, the operation of the statute is excluded, and the trusts or uses remain mere equitable estates."

The learned circuit judge reached the conclusion that the trust in question was a simple or passive trust, after deciding that it was an active trust, because, as one of the latter, it was void for uncertainty, using this language: "The words employed to express such trust fail to do so with such certainty and particularity as are necessary under the statutes which govern the subject," referring, of course, to subdivision 5, § 2081, Rev. Stat. 1898, which provides that express trusts may be created "for the beneficial interests of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it," etc. It is needless to say that if a person, in attempting to create an active trust, fails by reason of the trust not being expressed with sufficient fullness and definiteness, that offers no opportunity for the statute of uses to operate and vest the title to the property involved in the intended beneficiary discharged of the trust. The statute which in a proper case so operates, § 2075, Rev. Stat. 1898, never concerns active trusts, whether they are valid or invalid. If an attempt is made by will to create such a trust, which fails for want of certainty, the property, instead of vesting in the beneficiary as if the trust were

passive in character, will fall into the residuum of the estate and go under the residuary clause of the will, if there be one, otherwise it will go as intestate property. Redf. Wills, 410, note; Tiffany & B. Trusts & Trustees, 57, 58. The condition which will render an express trust inoperative and carry the legal with the equitable title direct to the intended beneficiary, is possession and enjoyment by him of the primary use. If there is vested in the trustee, however, some duty to perform, merely as regards the title, which may be performed consistent with that being in the beneficiary subject to performance of such duty, the statute executes the use just the same, merging the legal with the equitable title in the beneficiary, the trust, as a mere power, remaining effective under the statute on the subject of powers. That, however, does not affect this case because it is evident that the trust here concerns more than the mere title, and that the immediate use and possession was not intended to go to the beneficiaries. The primary use of the property was evidently designed to go to the trustee, as the circuit judge held in his opinion and decision. The trust cannot, therefore, be sustained solely as a power, nor can it be held annihilated by the statute of uses. It is good because it is expressed with sufficient fullness and definiteness to satisfy the statute, or it is void for infirmity in that regard. In the latter case the title must be held to have passed, not to the beneficiaries under the will discharged of the trust, but as before indicated, to the heirs of the testator as intestate estate, there being no residuary clause in the will.

The remaining question to be considered is whether the trust is void for uncertainty. The suggestion, in effect contained in the opinion of the learned circuit judge, that the particular manner of executing the trust is not pointed out, and that such feature constitutes a fatal infirmity, cannot be sustained. Such matters are commonly left to the discretion of the trustee. The statute (subdivision 5, § 2081, Rev. Stat. 1898), is substantially an enactment of the common law as regards when equity will enforce a trust. It requires that the trust shall be fully expressed and clearly defined upon the face of the instrument creating it, in order that the court may deal with it if necessary. If the trust is so fully expressed and defined, all else may be left to the discretion of the trustee. Failure to fully comprehend and give effect to that has led to many adjudications seemingly controlled by the idea that trusts are things to be avoided if some reasonable ground can be found to do so, instead of being enforced if that can be done consistently with rules of law. The rule that

prefers a construction of a will rendering effective an attempt to create a trust to one that will defeat it, and also prefers a construction that will sustain testacy to one that will create intestacy, applies just as strongly to testamentary trusts as to any other testamentary disposition of property. Modern decisions indicate a growing appreciation of the judicial duty to uphold testamentary dispositions of property, made through the medium of trusts, instead of searching for reasons for avoiding them, or dealing with them with any degree of disfavor. Judge Redfield, in his work on Wills, vol. 2, § 385, noted, at the time he treated the subject that "the chief reason why courts, in the later cases, have felt reluctant to admit uncertainty as a ground of avoiding the formal disposition of property, will be found in the very general feeling in all judicial tribunals, whether in this country or in England, that the earlier decisions upon this point were, many of them, unreasonable and indefensible, and not a few of them verging very closely upon the ludicrous and the absurd."

Courts, as a rule, hold that, where there is no indefiniteness of beneficiaries to enforce the trust, and no indefiniteness of subject or object of the trust, the statute is satisfied, because in such circumstances, through its equity powers, the court can effectively deal with the matter. That idea can be found most frequently advanced and applied in respect to public trusts, where the rule of certainty governing private trusts was applied at least as to certainty of beneficiaries. *Webster v. Morris*, 66 Wis. 366, 371, 57 Am. Rep. 278, 28 N. W. 353; *McHugh v. McCole*, 97 Wis. 166, 40 L. R. A. 724, 72 N. W. 631. The rule of the English cases as regards when a trust is stated with sufficient definiteness that a court of equity will enforce it, is substantially the rule laid down in the cases cited. It is when the object or purpose and the person are pointed out with fullness and definiteness. All else may properly be left to administrative discretion. *Pierson v. Garnet*, 2 Bro. Ch. 226; *Robinson v. Waddelow*, 8 Sim. 134; *Gloucester v. Wood*, 3 Hare, 131. In *Roe v. Vining*, 117 N. Y. 204, 22 N. E. 933, it was in effect held that certainty of general scheme, and of the person or persons to be benefited, satisfies the statute. That will be easily recognized as the rule laid down by this court in the cases above cited. Peckham, J., said: "Upon such perusal [of the will], if a general scheme can be found to have been intended and provided for in the instrument, and such general scheme is consistent with the rules of law, and so may be declared valid, it is the duty of courts to effectuate the main purpose of the testatrix." In that case the court rested from

searching for essentials of certainty upon discovering a clear and fully expressed purpose to create a trust, the subject of the trust, the object thereof, and the persons to be benefited. In *Vernon v. Vernon*, 53 N. Y. 351, it was held that, as regards the object of a trust, it is sufficient if language is used clearly indicating that it is one within the terms of the statute. In *Fosdick v. Hempstead*, 125 N. Y. 581, 11 L. R. A. 715, 26 N. E. 801, a bequest to the town for the benefit of the poor of the town was inferentially held free from uncertainty except as regards the beneficiaries, though the language used to create the trust left the manner of administering the subject thereof wholly to the discretion of the trustee. In *Goodrich v. Milwaukee*, 24 Wis. 422, the trustee was empowered to hold the property for the sole use and benefit of certain persons named, with general powers of administration, somewhat under the direction of one of the beneficiaries. The subject of the trust, the purpose or object, specifying those to be benefited, were stated with fullness and definiteness, but as to many matters of administration the instrument was silent.

Testing the trust in question by what has been said, what is there about it that is not fully expressed and clearly defined? All the essentials of fullness and definiteness are easily discovered. The subject of the trust, the property, is described as a $\frac{1}{2}$ of the estate of the testator, both real and personal. The purpose or object of the trust is likewise clear. It is to enable one person, the trustee, to control, care for, and in all things administer the property, and devote the same to the benefit of others. The persons to be benefited are unmistakable, being the widow and all the children of the testator.

It is suggested that the trust is indefinite in that the time when it is to be terminated is not mentioned. The mere fact that no limitation to the existence of the trust is stated is not an element of indefiniteness under the statute since the power of alienation is not unduly suspended. The trustee is empowered to sell the property at any time, so there is no infirmity as regards suspending the absolute power of alienation. If the trust were necessarily perpetual as to the converted fund, that would not offend against any law. *Becker v. Chester*, 115 Wis. 90, 91 N. W. 87, 650. Again, since the will contains no prohibition, express or implied, against terminating the trust, and all parties that can be interested are *in esse*, when all are *sui juris* they can by uniting cause its termination, subject to the restraints contained in §§ 2089 and 2091, Rev. Stat. 1898. Perry, Tr. 920; Lewin, Tr. 578; *Ruggles v. Tyson*, 104 Wis. 500, 521, 48 L. R. A. 809, 62 L. R. A.

79 N. W. 766, 81 N. W. 367, 1 Hilliard, Real Prop. 461; *McWilliams v. Gough*, 116 Wis. 576, 93 N. W. 550. The mere fact that the trust is in terms perpetual does not affect it. That feature is not objectionable so long as it does not offend against the prohibition against suspending the absolute power of alienation. Perry, Tr. § 23. The books furnish many examples of trusts having the feature under discussion, without a suggestion of the invalidity of the trust on the ground of uncertainty. In *Crockett v. Crockett*, 2 Phill. Ch. 553, the property was given to the wife "for herself and children." In *Raikes v. Ward*, 1 Hare, 445, the gift was to the testator's wife "to the intent she may dispose of the same for herself and our children in such manner as she may deem most advantageous." In both cases the claim was made by the children that the will created a joint tenancy, but it was held otherwise, and that their interests were only equitable, the primary taker being a trustee. In *Fosdick v. Hempstead*, 125 N. Y. 581, 11 L. R. A. 715, 26 N. E. 801, as we have before seen, the bequest was general for the benefit of a class. In *Goodrich v. Milwaukee*, 24 Wis. 422, the same feature characterized the instrument. In *Barnard v. Crossman*, 54 Hun, 53, 7 N. Y. Supp. 275, the terms of the devise were to one to hold for the benefit of his children. The instrument was held to create an active trust. No doubt was suggested as regards the trust being expressed with sufficient fullness and certainty.

Thus it will be seen that, when we put aside as immaterial the suggestion that no time is mentioned in the instrument under consideration for the termination of the trust, and the suggestion that the manner of administering the trust is not therein definitely prescribed but is left to the discretion of the trustee, and appreciate that all that is necessary to a valid active trust under the statute in respect to fullness and definiteness is that it shall clearly appear to have been created for one of the authorized objects, that the general scheme thereof shall fully appear, that the subject of the trust and the persons to be benefited shall be definitely pointed out, all difficulty in regard to whether the trust in question satisfies the statute vanishes.

The learned counsel for appellant claims that if the trust is to be sustained, as we have indicated that it must be, the appellant is entitled to administer it. That matter does not appear to be before us. The record shows that appellant resigned her position as trustee to the proper county court; and that in due form of law pursuant to § 4027, Rev. Stat. 1898, such court appointed as her successor Christian Walter, and he filed his bond

and accepted the trust. That operated, by force of the statute, to vest in him the legal title to the trust property, the same as if his name were inserted in the order of the county court assigning the property to him as trustee in the first instance, in the terms of the will, instead of to appellant.

The result is that *the judgment must be reversed* and the cause remanded to the trial court with directions to enter a decree estab-

lishing the legal title to the property involved in Christian Walter as trustee for the appellant and the children of the testator for the purposes mentioned in his will, in harmony with the order of the County Court assigning his estate in trust.

So ordered. The taxable costs of both parties in this court will be paid out of the trust estate.

END OF CASES IN BOOK 62.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Second Quarter of the Judicial Year Beginning with October 1, 1903, Classified as Follows.

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. ASSOCIATIONS AND CLUBS.
- IV. DOMESTIC RELATIONS.
- V. TORTS; NEGLIGENCE; INJURIES.
- VI. PROPERTY RIGHTS; LIENS; WILLS.
- VII. CIVIL REMEDIES; RULES AND PRINCIPLES.
- VIII. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

As to liability of public institution for tort, see *infra*, V.

Making all corporations liable for injuries to employees through defective machinery, notwithstanding the employees had knowledge of the defect, when the same liability is not placed on private individuals, is held to deny the corporations the equal protection of the laws. (Mass.) 407.

Bankruptcy.

A final money judgment for the total amount due from the putative father of a natural child on his refusal to pay a monthly stipend for its support, imposed upon him by an order in bastardy proceedings, is held to be extinguished by a discharge in bankruptcy. (Minn.) 757.

Eminent domain.

In a proceeding by a magnetic telegraph company for the purpose of appropriating to its use a part of the right of way of a railroad company, it is held to be necessary and jurisdictional for the court to hear and determine, and so enter of record, that the easement sought to be appropriated by such telegraph company will not in any material degree interfere with the practical uses to which the railroad company is authorized to put such right of way. (Ohio) 941.

Special jury.

A law providing for a special jury is held not to be made unconstitutional by requiring the fee to be deposited by one applying for it, which puts it out of the reach of a poor man to have a special jury. (Mo.) 911.

Schools.

The board of education is held to have the right to require pupils to go directly home when dismissed from school, under statutory authority to pass rules relative to anything whatever that may advance the interests of education, the good government and prosperity of the free schools, and the welfare of the public concerning the same. (Mich.) 160.

62 L. R. A.

Public improvements.

The purpose for which a union passenger station is located is held to be sufficiently public to authorize special assessments upon property thereby benefited for the cost of the improvements in streets, made necessary by such location. (Mass.) 144.

Notes for patent rights.

A statute requiring notes given for patent rights to state that fact on their faces is held not to be unconstitutional. (Tenn.) 174.

Baking powder.

The statutory prohibition of the manufacture or sale of baking powder containing alum is held not to be unconstitutional in view of the dispute as to the fact of its wholesomeness, which prevents the court from taking judicial notice that it is wholesome and innocuous. (Mo.) 163.

Artesian wells.

A statute prohibiting the waste of water from artesian wells to the injury of wells of neighboring proprietors is held not to be justified as an exercise of the police power. (Wis.) 589.

Justices of the peace.

Regulating the jurisdiction of justices of the peace by a classification of the cities in which they reside, so as to make it different in different places, is held to be unconstitutional, where they are constitutional officers, and the Constitution prohibits special laws regulating their jurisdiction or duties, and a general law has been passed applicable to all justices within the state. (Utah) 432.

Limiting height of fence.

Forbidding the erection of a boundary fence exceeding 5 feet in height for the sole purpose of annoying adjoining property owners is held not to deprive the landowner of any property right. (N. H.) 602.

RÉSUMÉ OF DECISIONS.
(CONTRACTUAL AND COMMERCIAL RELATIONS.)

Carrier's rates.

Fixing the rates to be charged by an interstate carrier for carriage, within the state, of a shipment which is delivered to the carrier at a point in another state, is held to be beyond the power of a state. (Va.) 869.

Weekly payment of wages.

A statute requiring the weekly payment of wages is held to deprive citizens of their liberty and property without due process of law, by interfering with the liberty of contract. (Ind.) 136.

Infringement of copyright.

The copyright of a law book is held not to be infringed by a subsequent work on the same subject, where the second author merely collected all available citations, including those found in the copyrighted work, and, after examining the text-books and opinions, used those which he considered available to support his own original text. (C. C. A. 2d C.) 607.

Street railroads.

After a railroad company has acquired and exercised the right to cross the tracks of a street car company, the latter, equally with the former, is held to become subject to the power of the state as to the imposi-

tion of the expense of the additional safeguards necessary to avoid accidents, although the necessity for them was caused solely by the railroad company. (Mich.) 149.

Inspection of milk.

An ordinance requiring the inspection of milk sold within the limits of the city, and providing for the licensing of vendors, is held not to be void as affecting persons beyond the limits of the municipality, where it only touches those who bring or send their milk into the city for sale. (Va.) 771.

Tuberculin test.

Rules of a state board of live-stock commissioners, providing for applying a tuberculin test to all cattle that are brought into the state for dairy or breeding purposes, but exempting all other kinds, are held to be invalid. (Ill.) 888.

Local option elections.

To impose upon a court the duty of receiving and acting on petitions for the submission to the voters of the question whether or not intoxicating liquors shall be sold is held to be beyond the power of the legislature, under a constitution separating the departments of government. (Md.) 809.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

A clause in an agreement selling a partnership business, that "we agree and bind ourselves not to enter into or conduct" a similar business in the territory covered by the business sold, which is signed by the partners in their individual names, is held to bind the parties individually. (Tex.) 962.

Validity of contract.

A contract to share the profits of a "short" sale of the stock of a corporation, the shares to meet which are to be purchased at a decline anticipated because of a legislative investigation of its affairs, with one about to bring such affairs to the attention of the legislature with the intention of impairing the reputation of the corporation for the protection of his own business, made in consideration of his furnishing advance information as to the probable cause and development of the investigation, is held to be void as contrary to public policy. (N. Y.) 362.

Bills of lading.

Neither a bank which purchased a draft for a consignment of grain with bill of lading attached, nor the payees who indorsed and delivered it to the bank, are held to be liable to the drawees, the consignees of the grain, who accepted and paid the draft, for failure of title in the drawer to the property shipped. (Kan.) 758.
62 L. R. A.

A bank which purchases a draft with bill of lading attached is held not thereby to become a party to the sale so as to be responsible to the consignee in case, after he has paid the draft, the bill of lading proves to be fraudulent, so that the consideration fails. (Tex.) 968.

Guaranty.

The guarantors of a negotiable note are held to be discharged from liability where, upon failure of the makers, whilst solvent, to pay the note at maturity, no notice is given the guarantors, and demand is not made upon them until eighteen months after maturity, when the makers have become insolvent. (Neb.) 954.

Alteration of instruments.

The unauthorized insertion of the word "gold" before the word "dollars" in an instrument after its execution and delivery is held to be a material alteration. (Neb.) 393.

Accord and satisfaction.

The mere payment by a debtor of an amount denominated "a balance" upon an account rendered, and its retention by the creditor, are held not to constitute an accord and satisfaction. (Kan.) 760.

Banks.

The insolvency of a national bank and its passing into the hands of a receiver are held

to destroy the right of holders of its checks to the funds called for by them, even in a state where the holder of a check is regarded as the owner of the fund, and entitled to maintain an action for it against the drawee. (C. C. A. 7th C.) 559.

A bank cashier is held not to be acting within the scope of his authority in giving information as to the value of notes executed by customers of the bank, so as to render it liable in case the statements prove to be untrue. (N. Y.) 783.

Sale.

In the sale of a fire-insurance expiration register, which, without the knowledge or consent of the vendor, had been secretly inspected and partially copied by third persons, made without any representation as to the character or quality of the register with reference to the privacy of the information imparted by it, and without any express warranty that it constituted an exclusive record of the matter contained therein, the rule of *caveat emptor* is held to apply. (Kan.) 596.

Under a contract for sale of property, "buyer to give shipping instructions," "to be delivered as packed," "f. o. b." at place of shipment, it is held that payments must be made at the place of shipment. (Md.) 795.

Mortgage.

The mere fact that the witnesses who attest the signature of a mortgagor, and the notary public taking his acknowledgment, are stockholders of, but not otherwise interested in, the corporation named in such mortgage as grantee, is held not to render the mortgage void. (Ohio) 790.

Carriers.

See also *infra*, V.

One intending to take passage on a railroad train is held not to become a passenger, so as to require the company to protect him from assaults by strangers, by resorting to its premises an unreasonable time before the departure of the train, in the absence of an agreement on its part to do so. (Ky.) 405.

A regulation of a railroad company forbidding passengers from going to sleep in its waiting rooms, or lying down on the benches therein, is held not to be unreasonable, so as to render the carrier liable for the act of its servant in using unnecessary force to compel observance thereof on the part of a passenger who had persistently disregarded it. (Ga.) 507.

The mere purchase, by a husband, of an ordinary railway ticket for his wife, is held not to constitute a contract for the safe transportation of the wife in favor of the husband. (Ga.) 666.

62 L. R. A.

One who boards a train without a ticket because the ticket office is not open for the sale of tickets as required by statute is held to have no right to refuse to pay the extra fare required of passengers without tickets, and resist ejection on tender of the price of the ticket, but to be required to pay the additional fare, and resort to his legal remedy to recover it and the statutory penalty for failure to have the office open. (N. Y.) 357.

Master and servant.

A duty to give a letter of recommendation or clearance card to an employee who is discharged or quits is held not to be imposed upon the employer by the common law. (Ill.) 922.

A discharged railroad employee is held to have no right of action for damages against the company which discharged him, for refusal to furnish him with a clearance card or statement of the record of his service, although he may have been unable to obtain other employment in consequence of such refusal by the company. (Ohio) 931.

Insurance.

As to negligence of medical examiner, see *infra*, V.

A plain limitation upon the authority of the medical examiner and solicitor of a life insurance company, of which an applicant is bound to take notice and by which he is bound, is held to be made by stipulations in the application that the statements contained in it, and those made to the medical examiner, are true and correctly recorded, and that no information not therein contained, received, or acquired at any time by any person shall be binding on the company, or shall modify the declarations and warranties therein contained; that the persons writing the answers and statements shall be deemed the agents of the insured, and not of the company; and that the company is not to be deemed responsible for the preparation of the application, even if the stipulations are ineffectual to make the employees of the company the agents of the insured. (N. J. Err. & App.) 774.

A woman is held to have an insurable interest in the life of a man whom she is engaged to marry. (Wis.) 982.

The nonpayment of a note for part of the first premium on an insurance policy made payable to the order of the agent, who reported the premium paid and the policy delivered, is held not to entitle the company to deny liability on the policy, which provided for its suspension during default on any note given for premiums, where the agent's contract entitles him to the whole of the first premium as his commission, and he was charged with the amount thereof.

and sold the note, and the insured died after its maturity without having paid it, after which the company bought it from the agent's indorsee. (Neb.) 390.

Failure to comply with the requirement for immediate notice of the death of one insured against accident, and for proofs of death within two months, is held not to absolve the insurer from liability on the policy, where the beneficiary, who resides some distance from the place of the accident, does not learn of it or of the policy until more than the required time has elapsed, if the requirements are complied with within a reasonable time after the facts are ascertained. (Utah) 485.

The fall of a building because of an explosion in a burning building in the vicinity is held not to be within the protection of a policy insuring against direct loss or damage by fire, where the policy also provides that the insurer shall not be liable for loss caused, directly or indirectly, by explosion of any kind. (N. Y.) 651.

A provision for paid-up insurance, in a statute governing the adjustment of claims upon policies forfeited for nonpayment of premiums, is held not to mean paid-up temporary insurance for the full amount of the policy. (Mo.) 657.

Oil and gas lease.

A condition subsequent to develop the property upon discovering oil or gas in paying quantities is held to be implied in a contract giving the right, for a nominal consideration, to enter upon and explore for oil or gas, where there is a provision that, upon failure to drill a well within a specified time, the lessee shall pay a certain amount per day while such completion is delayed. (Ind.) 895.

Combination to maintain prices.

A plan by a voluntary association of merchants engaged in selling proprietary medicines, adopted by manufacturers of them, looking to the maintenance of prices, by which the manufacturers should sell at fixed prices, with a rebate only to concerns who could be relied on to maintain the selling price, is held not to be void as creating a monopoly, or in restraint of trade, or as against public policy. (N. Y.) 632.

Principal and agent.

The indorsement by the principal, of a check given in part payment of the purchase price of land, is held not to be a sufficient subscription of the contract to make it binding on him, where it was made by an agent not having sufficient authority to bind the principal, although the check was attached to the contract. (Ala.) 551.

III. ASSOCIATIONS AND CLUBS.

Investment association.

The fact that the order of calling for redemption, before maturity, certificates of an investment association, is determined by reference to a table of numbers, which, instead of being in numerical order, has an arbitrary arrangement based on multiples of the figure 3, thus making it possible in some cases for certificates to be redeemed before others of older date, is held not to make the scheme a lottery. (Ga.) 93.

Clubs.

An incorporated social club is held to have no right, without a license, to dispense liquors to its members in exchange for checks delivered to them upon their payment of special assessments levied to meet the cost of procuring the liquors, under a statute providing that giving away intoxicating liquors, or other shift or device to evade the provisions of the act, shall be held to be an unlawful sale. (Ill.) 884.

IV. DOMESTIC RELATIONS.

Alimony.

The obligations imposed upon a man by a second marriage are held not to relieve him from the payment of alimony according to the provisions of a divorce decree. (Wash.) 974.

Divorce.

The habitual and intemperate use of morphine, unaccompanied by any conduct reasonably justifying an apprehension of danger to life, limb, or health, is held not to be such cruel treatment as the law recognizes as a ground for divorce. (Ga.) 878.

Liability for necessities.

Necessary medical attendance furnished a
62 L. R. A.

husband temporarily incapacitated by illness, who is actually a part of the family, living with it as such, is held to come fairly within the rule of the statute making the wife liable as surety for necessities furnished the family. (Neb.) 190.

Wife as witness.

The commission of incest by a man, is held not to be a crime against his wife, within the meaning of a statute forbidding the latter to be a witness against him without his consent, except when he is prosecuted for the commission of a crime against her. (S. D.) 172.

V. TORTS; NEGLIGENCE; INJURIES.

Conspiracy.

Merchants who offer goods of a certain manufacturer, which they own, at a cut price for the purpose of injuring his trade and depressing the market value of his product, are held not to be liable for conspiracy. (C. C. A. 8th C.) 673.

A combination of individuals for the purpose of inflicting a malicious injury upon another by ruining his business is held to be actionable both at common law and under the statute. (Wis.) 700.

Usury.

The penalty of double the illegal interest paid, imposed for the taking of usurious interest, is held to be twice the entire amount of interest paid, and not merely twice the excess above the legal rate. (Ky.) 599.

Libel.

Statements as to the carelessness of a physician in the treatment of obstetrical cases, made in the preamble to the order of a board of health regulating the conduct of physicians in the treatment of such cases, are held not to be privileged. (Ohio) 477.

Injury to licensee of tenant.

Injuries to a licensee of a tenant, caused by the defective condition of the premises, are held to give the licensee no right to maintain an action upon the landlord's covenant to repair. (Mich.) 909.

Landlord's liability for tenant's negligence.

One who leases a lot for the purpose of producing oil or gas therefrom, reserving to herself a part of the oil produced, but reserving no control or right to direct the manner of conducting the work, and who surrenders complete possession and control to the lessees during the term of the lease, is held not to be liable to the owner of property to which oil escapes through the negligence of the lessees. (Ohio) 948.

Negligence as to bees.

A keeper of bees, who locates their hives within a few feet of a post which he has fixed for fastening horses to, when he knows that they are prone to attack perspiring horses, is held to be properly found guilty of negligence. (Iowa) 132.

Negligence of medical examiner.

An insurance company is held to be liable for injuries resulting from the negligence or misconduct of its medical adviser in making an examination of an injured person holding an accident policy issued by the company. (W. Va.) 489.

Injury to servant.

A gas company giving strangers permission to take cinders from the end of its
62 L. R. A.

dump, which is reached by a track laid over the cinders, is held not to owe its employees the duty of anticipating that the licensees may take them from beside the track, so as to undermine it and make it unsafe for use, and of taking precautions against such conduct. (Mo.) 474.

That repairs promised by an employer to be made upon a defective machine "the fore part of the following week" had not been made by Wednesday is held not to deprive an employee who complained of the defective condition of the machine, of the benefit of the rule that an employee who continues work in reliance on the master's promise to repair does not assume the risk of defects during the reasonable time allowed for making the repairs. (N. Y.) 611.

Negligence in failing to appeal.

An insurer against employers' liability, whose contract gives it the right to defend against suits by employees against the assured, and which, after a judgment in excess of the insurance has been obtained against the assured, agrees to perfect an appeal, is held not to be liable for negligently failing to do so, whereby the judgment is affirmed, in the absence of anything to show that the judgment was erroneous, and that plaintiff could not have succeeded on a second trial. (Iowa) 617.

Injury to water power.

That the owner of a dam and pond on a flowing stream has no facilities for using the power created thereby is held not to prevent his recovery of substantial damages from one who wrongfully withdraws water from the pond to the injury of the power. (Wis.) 579.

Injury to passenger.

Injury to a passenger on a street car by the conductor is held not to render the company liable, as matter of law, where the conductor explains his conduct by telling that, in passing along the footboard on the side of the car, he lost his balance, and, to save himself from falling, reached for the station, when his hand came in contact with plaintiff. (D. C.) 875.

Aggravation of injury by neglect.

An aggravation of personal injuries caused by the neglect or failure of the injured person to obtain the needed medical or surgical assistance is held not to be chargeable against the party by whose negligence the original injury was received. (C. C. A. 5th C.) 90.

Suicide of one negligently injured.

A voluntary wilful act of suicide of a per-

son rendered insane by a negligent injury, who knows the purpose and physical effect of his act, is held to be such a new and independent agency as does not come within and complete a line of causation from the accident to the death so as to render one guilty of the negligence responsible for the death. (Mass.) 751.

Street railways.

An electric railway company whose line traverses a city is held to be negligent in placing one of its cars in charge of a young man only eighteen years old, whose experience in the handling of an electric car dates only twenty days back. (La.) 747.

Obstruction of sidewalk.

If a space inside the building line is per-

mitted by the abutting owner to remain open and to be used as part of the sidewalk, it is held that he must exercise due care not to place there dangerous obstructions that may result in injury to persons lawfully on the walk. (Pa.) 959.

Tort of public institution.

The National Home for Disabled Volunteer Soldiers is held to be a corporation created by Congress for the purpose of performing an appropriate and constitutional function of the Federal government, and as such to be part of the government of the United States, and not to be liable to be sued in an action for tort. (Ohio) 936.

VI. PROPERTY RIGHTS; LIENS; WILLS.

Mines.

The extralateral rights of the owner of a lode mining claim upon secondary veins are held not to be limited by the fact that the discovery vein leaves the claim by crossing the side line, but he is held to have a right to follow a secondary vein on its dip outside of his side lines, although its apex is outside of a line drawn parallel with the end line through the point where the discovery vein leaves the claim. (Colo.) 555.

Adverse possession.

Until the close of the husband's curtesy estate, possession of land owned by husband and wife in joint tenancy by a purchaser under an executory contract of the husband alone, followed by a deed at the wife's death purporting to convey in fee the whole tract, is held not to be adverse to the wife's heirs, so as to start the running of the statute of limitations, to whom, by statute, the wife's moiety descends, subject to the curtesy estate. (Va.) 562.

Covenant in deed.

A general covenant of warranty in a deed of a tract of land is held to extend to tide lands visibly within the limits of the grant,

the paramount title to which at the time of the grant is in the state. (Wash.) 763.

Liens.

A mechanic's lien is held to attach to a leasehold interest and to buildings erected by one tenant and sold to another, who has acquired a lease of the same interest, notwithstanding the removal of the buildings at the end of the term is expressly required by the lease. (Neb.) 369.

Wills.

A devise of a fund to be distributed by the executor "to the poor," in his discretion, is held to be valid, under a statute making valid gifts "which shall have pointed out with reasonable certainty" the purpose of the charity and the beneficiaries thereof. (Ky.) 398.

A trust created by a devise to the testator's wife of all his property in trust for her and his children, with full power to continue his business if for the best interest of his estate, is held not to be void for uncertainty merely because the particular manner of executing it is not pointed out. (Wis.) 986.

VII. CIVIL REMEDIES; RULES AND PRINCIPLES.

Garnishment.

A claim for unliquidated damages arising out of contract is held not to be the subject of trustee process, although a verdict has been rendered for it in favor of the principal debtor against the trustee, in which judgment has not been entered under a statute authorizing process only when the trustee has in his possession "goods, effects, or credits" of the principal debtor, and contemplating that the whole matter shall be 62 L. R. A.

disposed of on the answer of the trustee. (Mass.) 813.

A nonresident, temporarily in the state, is held to be liable to be summoned and compelled to answer as garnishee, but not to be liable to further proceedings in the cause, for want of jurisdiction, unless when garnished he has in the state property of the defendant in his possession, or is bound to pay the defendant money, or deliver to him property within the state. (W. Va.) 178.

Injunction.

That a corporation has acquired its corporate name from the state, is held not to prevent a Federal court from enjoining it from using the name at the suit of a corporation of another state, if the statute permitted the incorporators to select the name, and it was chosen fraudulently for the purpose of appropriating the good will of the other corporation. (C. C. A. 7th C.) 81.

Appeal.

A decision by a state supreme court that the granting of a nonsuit, instead of submitting the case to the jury, where the facts are admitted, does not deprive plaintiff of due process of law, is held not to raise a Federal question which will entitle him to a writ of error from the Supreme Court of the United States. (Or.) 513.

Estoppel.

Estoppel to plead the statutory bar to an action for personal injuries is held to arise where, pending negotiations for settlement, defendant gave assurance that the bar would not be pleaded, and plaintiff, relying thereon, neglected to bring suit until the statutory period had elapsed. (Ia.) 395.

One who takes the benefit of a deed in his favor, which was made part of a transaction by which some of his property was deeded to a third person by the common grantor under the mistaken belief that it belonged to the grantor, is held to have no right, after the lapse of several years, during which he knows that the other grantee is receiving the rents and profits of the property, to repudiate the election and assert his title thereto. (Miss.) 421.

Evidence.

Parol evidence is held to be admissible to show the relation which the promisee in a non-negotiable note and another person, who have put their signatures on the back in such a manner as would make them first and second indorsers respectively if the note were negotiable, bear to one who asserts a liability against them on such note. (W. Va.) 499.

A civil engineer is held to be entitled to give in evidence his opinion respecting the

proper slope of an embankment which may affect the safety of a railroad track, although he has no acquaintance with railroad building, if he has knowledge of the subject derived from study of works of civil engineering, and from practical experience in the construction of roads, ditches, and canals, and to refer to standard works upon the subject as corroborating his opinion. (Or.) 543.

Writing otherwise irrelevant and not admitted to be genuine is held to be admissible in evidence for comparison with the disputed writings in the case, if they have been found to be genuine by the presiding judge upon clear and undoubted evidence. (N. H.) 817.

Declarations of a testator are held to be admissible to prove the existence of a lost will, although the contents thereof cannot be proved solely by such declarations. (Neb.) 383.

Form of judgment on penal bond.

A bond securing payment of monthly instalments of alimony is held not to be within the terms of a statute providing that, in cases of actions upon bonds "for the breach of any condition other than the payment of money," or for "any penal sum for the nonperformance of any covenant or written agreement," the judgment shall be for the whole amount of the bond, which shall remain as security for future defaults, and the execution shall be for the damages accrued. (Mo.) 427.

Solicitation as ground of action.

Merely soliciting a woman to sexual intercourse is held to give her no right of action. (Ky.) 900.

Trover by infant.

In case an infant avoids a contract by which he has purchased property from another infant, the purchase price of which has been spent by the latter, it is held that he cannot maintain trover as for a conversion of the property, since the defendant has at most been guilty only of a breach of an implied contract to return the purchase money, and this the law permits him, because of his infancy, to avoid. (Mass.) 755.

VIII. CRIMINAL LAW AND PRACTICE.

Arrest.

The possession by an officer of a warrant is held not to justify an arrest of the accused by the police department of another town under direction by telephone to it by the officer holding the warrant. (Mich.) 906.

Gaming.

A tent occupied by a divorced man and

his child as their only place of residence is held to be a private residence occupied by a family, within the meaning of a statute punishing gaming except when it occurs at such residence. (Tex. Crim. App.) 973.

Homicide.

Upon trial of an indictment for murder, proof of the killing of a third person is held not to be admissible. (N. Y.) 193.

INDEX TO NOTES.

(The General Index follows this.)

Abortion.			
Evidence of other crimes in prosecution for	193		
Action.			
Liability involved in the exercise of the right to control or carry on litigation in the name of another party:—			
I. In general	617		
II. Liability of beneficial plaintiff for costs			
a. Under Code and statutory provisions			
1. In New York	618		
2. In other states	621		
b. In the absence of statutory provisions			
1. In ejectment cases	623		
2. In other cases	625		
III. Costs against third parties defending			
a. In ejectment cases	626		
b. In other cases	628		
IV. Costs against third parties agreeing to pay the same	630		
V. Summary	631		
Air.			
Obstructing; effect of bad motive	683		
Animals.			
Liability of owner of bees for injuries done by them:—			
I. Introduction	132		
II. Actions for injuries inflicted by bees	133		
III. Bees as a nuisance	133		
Appeal.			
What adjudication of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts:—			
I. Scope of note	513		
II. Introduction	514		
III. Nature of decisions reviewable			
a. Finality of determination	515		
b. Adjudication must be that of the highest state court	518		
c. When adjudication is rendered in a suit	519		
IV. The nature of the controversy essential to this jurisdiction			
a. In general	519		
b. Validity of Federal law	521		
c. Questions respecting Federal authority	521		
d. Repugnancy of state statutes or authority to Federal law			
1. State authority	525		
2. State statutes generally	526		
3. State legislation impairing contract obligations	527		
e. Rights and immunities claimed under Federal law			
1. In general	529		
2. Full faith and credit	529		
3. Former jeopardy	530		
4. Commerce	530		
5. Due process of law	530		
		IV. e—continued.	
		6. Equal protection of the laws	531
		7. Treaty rights	532
		8. Land titles	532
		9. Title to office	534
		10. Mining claims	534
		11. Bankruptcy	535
		12. National banks	536
		13. Citizenship	537
		14. Indians	537
		15. Contracts	537
		16. Vested water rights	537
		17. Legal tender	537
		18. Exemption from taxation	537
		19. Customs and internal revenue	538
		20. Removal of causes	538
		21. Navigation	538
		22. Civil rights	538
		23. Patents for inventions	538
		24. Slavery	539
		25. Limitation of actions	539
		26. Miscellaneous	539
		f. Questions of local or general law are not Federal	540
		1. In general	540
		2. Practice and procedure	541
		3. Validity of state legislation under state Constitution	542
		4. Statutory construction	542
		5. Questions of fact	543
		V. Conclusion	543
		Arson.	
		Evidence of other crimes in prosecution for	193
		Assault.	
		Evidence of other crimes in prosecution for	193
		Bees.	
		Liability of owner of, for injuries done by them	132.
		Bonds.	
		Form of judgment on penal bonds:—	
		I. Introduction (comprising English statutes and decisions)	
		a. The necessity for 4 & 5 Anne, chap. 16	427
		b. Annuity and instalment bonds	428
		c. Exceptions to the scope of 8 & 9 Wm. III.	431
		d. Form of judgment under the statute 8 & 9 Wm. III.	431
		e. Summary	432
		II. Proper form of judgment (under statutes and decisions in the United States)	
		a. In general	433
		b. When the condition is for the payment of a sum certain at a day certain	433
		c. When the condition is for the performance of covenants or collateral agreements	
		1. In general	435

II. c.—continued.

2. Annuity and instalment bonds	439
3. Appeal bonds	442
4. Attachment bonds	442
5. Bail bonds	443
6. Bastardy bonds	444
7. Certiorari bonds	446
8. Injunction bonds	446
9. Indemnity bonds	446
10. Official bonds	448
11. Post-obit bonds	453
12. Replevin bonds	453
13. Title bonds	454
III. Effect of improper form	455
IV. Summary	457

Building and loan associations.

Conflict of laws as to usury in contracts of	64
--	----

Burglary.

Evidence of other crimes in criminal case	193
---	-----

Case.

Action on, for injury to business or occupation; effect of malice on liability	694
--	-----

Conflict of laws.

As to interest and usury:—

I. General principles; intention of parties	33
II. Contractual interest	35
III. Interest as damages	37
IV. Usury	
a. Effect of penal or remedial character of foreign statute	42
b. General principles governing choice of law; intention	44
c. Rule that law upholding the contract will be applied	
1. In general	49
2. When contract usurious by <i>lex loci contractus</i> , but valid by <i>lex loci solutionis</i>	51
3. When contract usurious by <i>lex loci solutionis</i> , but valid by <i>lex loci contractus</i>	55
4. When claim of usury based on transaction with drawer or indorser	59
d. When usurious by both <i>lex loci contractus</i> and <i>lex loci solutionis</i>	60
e. Effect of mortgage security	61
f. Place where money is to be used	62
g. <i>Lex loci considerationis</i>	63
h. Contracts of foreign building and loan associations	64
i. When contract to be regarded; contract of principal and surety	73
j. Effect of restriction as to rate of interest in charter of corporation	76
k. Applicability of <i>lex fori</i>	76
1. Statute forbidding corporation to plead usury	79
V. Summary	79

Constitutional law.

Review in Supreme Court, on Writ of Error, of Constitutional Questions, see APPEAL.	
---	--

Contracts.

Effect of malice on liability for causing breach of	678
---	-----

62 L. R. A.

Costs.

Liability for, of party controlling or carrying on litigation in name of another	618
--	-----

Counterfeiting.

Evidence of other crimes in prosecution for	193
---	-----

Covenant.

How far is tide land within protection of covenants in deed?	763
--	-----

Criminal law.

Evidence of other crimes in criminal case	193
---	-----

Deeds.

Covenants in; how far tide land within protection of	763
--	-----

Embezzlement.

Evidence of other crimes in prosecution for	193
---	-----

Evidence.

Of other crimes in criminal case:—

I. General rule	194
II. To show motive	
a. In general	
1. Common scheme, plan, or system	199
2. In particular instances	
(a) Murder	200
(b) Assault with intent to murder	207
(c) Arson	208
(d) Other crimes	208
b. Concealment; resisting arrest; escape	211
III. To show intent	
a. In general	214
1. When there is other evidence or presumption of intent	215
2. When intent is immaterial	218
b. Common scheme, plan, or system	
1. In general	218
2. False pretenses; fraud	222
3. Forgery	224
4. Counterfeiting	225
5. Embezzlement	226
c. In particular instances	
1. Murder	227
2. Assault with intent to murder	228
3. Assault with intent to commit rape	228
4. Abortion and attempt to procure	229
5. Slander and libel	230
6. Violation of liquor law	230
7. Larceny	231
8. Burglary and attempts to commit	236
9. Arson	238
10. Killing and injuring animals	239
11. Sending obscene, threatening, etc., letters	239
12. False pretenses; fraud	
(a) In general	240
(b) Acquisition of money	240
(c) Acquisition of property	244
(d) Other instances	248

III.—continued.

13. Forgery	
(a) In general	240
(b) Making	249
(c) Uttering	252
(d) Making and uttering	256
14. Counterfeiting	
(a) In general	257
(b) Making	257
(c) Uttering	258
(d) Possession with intent to utter	262
15. Embezzlement	264
16. Receiving stolen property	269
17. Miscellaneous crimes	274
IV. To show malice	277
V. To prove defendant's connection with act charged	
a. In general	
1. Assault and murder	278
2. Defiling young women	281
3. Larceny	281
4. Burglary	285
5. Robbery	288
6. Arson	289
7. Forgery	289
8. Violation of liquor law	290
b. Common scheme, plan, or system	291
VI. To rebut special defenses	
a. In general	299
b. Insanity	300
c. Good character	300
d. Accident or mistake	300
VII. When other crime is part of the <i>res gestæ</i>	
a. Murder	308
b. Assault with intent to murder	313
c. Other assaults	314
d. Rape	314
e. Larceny	315
f. Receiving stolen property	317
g. Burglary	317
h. Robbery	318
i. Forgery	319
j. Arson	319
k. Other crimes	319
VIII. Relevancy	
a. Murder	320
b. Rape	322
c. Larceny	322
d. False pretenses	323
e. Burglary	324
f. Forgery	324
g. Robbery	324
h. Arson	325
i. Violation of liquor law	325
j. Treason	325
k. Miscellaneous	326
IX. Sexual offenses	
a. General rule; previous acts	329
b. Subsequent acts	335
c. Acts with other persons	338
X. Committed in resisting arrest, or attempting to escape after commission of crime charged	338
XI. Effect of indictment for, conviction or acquittal of, evidential crime	
a. Indictment	339
b. Conviction	341
c. Acquittal	342
XII. Election of offense relied on	344
XIII. Right to question defendant concerning, on cross-examination	345

XIV. When not prejudicial	347
XV. Statement or insinuation by prosecution of other crime	348
XVI. Necessity and correctness of instruction to jury	
a. General rule	
1. Necessity	350
2. Correctness	353
b. Effect of instruction to disregard	355
XVII. Miscellaneous	356
XVIII. Recapitulation	357
Comparison of handwriting:—	
I. Introductory	817
II. The English general rules	
a. Before the statute of 1854	
1. At common law	818
2. In the ecclesiastical courts	829
b. After the statute of 1854	830
III. The various American general rules	832
IV. Comparison of ancient writings	861
V. Comparison with writings already in evidence, or in the record	
a. Writings already in evidence	862
b. Writings otherwise in the record	864
VI. Comparison with writings made in court	864
VII. Comparison with extraneous writings	
a. Writings proved to be genuine	866
b. Writings admitted to be genuine	866
c. Writings whose genuineness the other party is estopped to deny	867
VIII. Comparison by the jury and by the court	867
IX. Comparison by witnesses	869
X. Comparison to show copying of signature (the Howland Will Case)	870
XI. Construction and validity of the statutes	871
XII. Weight and relevancy of the evidence	
a. Weight	871
b. Relevancy	873
XIII. Comparison of lost instruments	873
Forgery.	
Evidence of other crimes in prosecution for	193
Handwriting.	
Evidence of; comparison of	817
Homestead.	
Enforcement of mechanic's lien against building only erected upon homestead lands	375
Homicide.	
Evidence of other crimes in prosecution for murder	193
Husband and wife.	
Mechanic's lien on building erected by husband on wife's land	374
Effect of second marriage upon obligation to pay alimony:—	
I. Scope of note	974
II. Remarriage of husband	!
III. Remarriage of wife	975
Interest.	
Conflict of laws as to	83
Intoxicating liquors.	
Evidence of other crimes in prosecution for violation of liquor law	193

Judgment.		I. Duty to give character	922
Form of judgment on penal bonds	427	II. Duty to give clearance card	
Landlord and tenant.		a. Of corporation	925
Mechanic's liens on buildings erected by lessees upon lessor's land	375	b. When combination exists among corporations	925
Larceny.		c. When a uniform custom to do so is shown	928
Evidence of other crimes in prosecution for	193	III. Legislation	930
Liens.		IV. Summary	931
Mechanic's liens upon buildings distinct from the land:—		Nuisance.	
I. Scope	369	Bees as	133
II. Introduction	369	Obscenity.	
III. In general	369	Evidence of other crimes in prosecution for sending obscene letter	193
IV. Erection upon land of a stranger	370	Rape.	
V. Extension of erection upon adjoining land	373	Evidence of other crimes in prosecution for	193
VI. Erection by husband upon wife's land	374	Robbery.	
VII. Erection upon homestead lands	375	Evidence of other crimes in prosecution for	193
VIII. Erection upon leasehold estates	375	Sale.	
IX. Erection by vendee of the land under a contract of purchase	380	Effect of contract to ship goods f. o. b.	795
X. Erection upon land vested in third parties by deed of trust	381	Schools.	
XI. Failure of description of the land in affidavit of claim	382	Right of school authorities to control pupils when going to and from school	160
XII. Summary	382	Slander and libel.	
Light.		Evidence of other crimes in prosecution for	193
Obstructing; effect of bad motive	683	Stoppage in transitu.	
Malice.		Effect on, of contract to ship goods f. o. b.	805
Effect of bad motive to make actionable what would otherwise not be:—		Treason.	
I. Scope of note	673	Evidence of other crimes in prosecution for	193
II. General principles involved		Usury.	
a. In general	674	Conflict of laws as to	33
b. Acts in exercise of rights without interference with legal rights of others	675	Vendor and purchaser.	
c. Acts in exercise of rights accompanied by interference with legal rights of others	677	Effect of contract to ship goods f. o. b.:—	
d. Acts not in exercise of rights and infringing rights of others	678	I. Scope	796
III. Injury to property		II. Vendor's liability as to loading and transportation expenses	796
a. Causing breach of contract	678	III. Upon whom the duty of furnishing cars or vessels lies	797
b. Obstructions to light and air	683	IV. Effect of delivery f. o. b.	
c. Waters		a. Upon the placing of the risk	798
1. Natural water courses	687	b. Upon the passing of the title	802
2. Percolating waters	688	c. Upon the place of inspection	804
d. Miscellaneous	693	d. Upon the time of payment	805
IV. Injury to business or occupation		e. Upon the right of stoppage in transitu	805
a. Causing injury to trade	694	V. Summary	808
b. Causing loss of employment or service		Waters.	
c. Causing loss of employee or servant	710	Liability for withdrawing water from reservoir	579
V. Injury to person or feelings	710	Interfering with flow of; effect of bad motive	687
VI. Judge acting without, or in excess of, jurisdiction	721	How far is tide land within protection of covenants in deed?	763
VII. Abuse of process	721	Writ and process.	
VIII. General and unclassified cases	724	Abuse of; effect of malice on liability for	721
IX. Conclusion	727		
Master and servant.			
Liability for causing loss of employment; for causing loss of employee; effect of malice on liability	714		
Duty to give recommend or clearance card to discharged employee:—			

GENERAL INDEX

TO

OPINIONS, NOTES AND BRIEFS.

(Separate Index to Notes Precedes this.)

ABORTION.

NOTES AND BRIEFS.

Evidence of other crimes in prosecution for. 193

ABUTTING OWNERS.

Liability of, for Condition of Sidewalk, see HIGHWAYS.

Assessment of, for Public Improvement, see PUBLIC IMPROVEMENTS.

ACCORD AND SATISFACTION.

1. An accord and satisfaction is the adjustment of a disagreement as to what is due from one party to another, and the payment of the amount so agreed upon. *Harrison v. Henderson* (Kan.) 760

2. The mere payment by a debtor of an amount denominated "a balance" upon an account rendered, and its retention by the creditor, do not constitute an accord and satisfaction. *Ibid.*

3. To constitute a payment by a debtor of an amount denominated "a balance," upon an account rendered, an accord and satisfaction, it must have been offered as full satisfaction of a claim, and accompanied by such declarations or under such circumstances as would amount to a condition that, if accepted by the creditor, it would be in full satisfaction of the debt. *Ibid.*

NOTES AND BRIEFS.

Accord and satisfaction; what constitutes. 761

ACKNOWLEDGMENT.

Of Mortgage, see MORTGAGE.

In taking and certifying an acknowledgment of a mortgage as provided in Ohio Rev. Stat. 1892, § 4106, the act of the notary public or other officer taking and certifying the same is a ministerial, and not a judicial, act. *Read v. Toledo Loan Co.* (Ohio) 790

NOTES AND BRIEFS.

Acknowledgment; of execution of instrument taken by party thereto; validity; rec- 62 L. R. A.

ord of, as notice to subsequent purchasers or encumbrancers; acknowledgment of mortgage before notary who is stockholder in corporation named as grantee. 790

ACTION OR SUIT.

Appearance by Garnishee, see GARNISHMENT, 4.

Against Public Corporation, see PUBLIC INSTITUTIONS.

Proper Remedy for Fraud of Investment Association, see RECEIVERS.

Against Board of Education, see SCHOOLS, 1.

An action for wrongfully appropriating water from a reservoir created by plaintiff's dam is one in tort. *Green Bay & M. Canal Co. v. Kaukauna Water Power Co.* (Wis.) 579

NOTES AND BRIEFS.

Right of parties to limit by agreement time within which suit may be brought. 486

Liability involved in the exercise of the right to control or carry on litigation in the name of another party:—(I.) In general; (II.) liability of beneficial plaintiff for costs: (a) under Code and statutory provisions: (1) in New York; (2) in other states; (b) in the absence of statutory provisions: (1) in ejectment cases; (2) in other cases; (III.) costs against third parties defending: (a) in ejectment cases; (b) in other cases; (IV.) costs against third parties agreeing to pay the same; (V.) summary. 617

Liability involved in carrying on litigation in name of other party; degree of care required; liability for negligence of attorney. 619

To enforce forfeiture of estate; necessity of prior demand. 897

ADJUSTMENT.

Of Claim on Insurance Policy, see CONFLICT OF LAWS, 1, 2.

ADVERSE POSSESSION.

1. Possession by a purchaser under an

executory contract of sale, made by the husband alone, of land owned in joint tenancy by husband and wife, is not adverse to the wife. *McNeeley v. South Penn Oil Co.* (W. Va.) 562

2. Until the close of the husband's curtesy estate, possession of land owned by husband and wife in joint tenancy, by a purchaser under an executory contract by the husband alone, followed by a deed at the wife's death, purporting to convey the fee to the whole tract, is not adverse to the wife's heirs, to whom, by statute, the wife's moiety descends, subject to the curtesy estate. *Ibid.*

3. Under a lease of two tracts of land, by the owner of one of them, possession of, and work upon, the tract owned by the lessor, for the statutory period, does not constitute constructive adverse possession of the other tract, which has never been invaded by actual physical possession, so as to bar the owner thereof from bringing an action to recover such tract. *Ibid.*

4. An executory contract for the sale of land, stipulating for future conveyance of legal title, the purchase money payable in future, is color of title under the statute of limitations as to hostile claimants, since such a contract is recognized at law, even as against the vendor, to sustain the vendee's possession, by W. Va. Code 1899, chap. 90, § 20, providing that a vendor, or any person claiming under him, shall not at law recover against a vendee, or those claiming under him, lands sold by the vendor to the vendee, when there is a writing stating the purchase, and the terms thereof, signed by the vendor or his agent, and chap. 98, cl. 6, saying that no one shall without a writing be chargeable upon any contract for sale of real estate for more than a year. *Ibid.*

NOTES AND BRIEFS.

Adverse possession; under executory contract; when remainderman bound to assert his rights; of purchaser from husband under executory contract for sale of land held by husband and wife as joint tenants; when limitation begins to run against wife and her heirs; purchaser's entry and possession under contract as adverse to wife; limitation against wife's heirs begins to run only at expiration of husband's life estate; sufficiency of actual possession of part with claim to whole; ouster of wife by entry of husband's purchaser into possession. 564

AGENTS.

Of Insurance Company, see INSURANCE, 7, 8, 10, 17.

See also PRINCIPAL AND AGENT.

AIR.

NOTES AND BRIEFS.

Air; obstructing; effect of bad motive. 683

ALIMONY.

Judgment on Bond to Secure, see JUDGMENT, 1, 2.

See also HUSBAND AND WIFE, 8, NOTES AND BRIEFS.

ALTERATION OF INSTRUMENTS.

The unauthorized insertion of the word "gold" before the word "dollars" in an instrument, after its execution and delivery, is a material alteration. *Foxworthy v. Colby* (Neb.) 393

NOTES AND BRIEFS.

What constitutes material alteration. 393

ANIMALS.

Bees.

Negligence in Hitching Horse near Hive, see TRIAL, 14.

1. A keeper of bees must exercise ordinary prudence in locating their hives so as to avoid unnecessary danger to those who are likely to make lawful use of the premises or the highway near by. *Parsons v. Manser* (Iowa) 132

2. A keeper of bees may be found guilty of negligence in locating their hives within a few feet of a post which he has fixed for fastening horses to, where he knows that they are prone to attack perspiring horses. *Ibid.*

3. The rule as to the duty which a property owner owes licensees regarding the safety of the premises is not applicable in a case where horses were left tied in a highway near a hive of bees, which attacked them and caused them to crowd over the fence into such proximity to the hives as to be stung to death. *Ibid.*

Infected animals.

4. Under a statute permitting the governor to schedule localities from which cattle cannot be imported except under the regulations of the board of live-stock commissioners, upon their reporting to him that certain contagious and infectious diseases have become epidemic in such locality, the governor cannot schedule all the states and territories of the United States, so as to prevent the importation of cattle therefrom until after a tuberculin test, upon a report of the board that "contagious disease prevails to a greater or less extent" in such states and territories. *Pierce v. Dillingham* (Ill.) 888

5. Rules of a state board of live-stock commissioners providing for applying a tu-

berculin test to all cattle which are brought into the state for dairy or breeding purposes, but exempting all other kinds, are invalid. Ibid.

6. To justify the application of the tuberculin test to all cattle imported into the state for dairy or breeding purposes, it must appear that it will in a reasonable degree, or in some manner, determine the existence or nonexistence of tuberculosis. Ibid.

7. A report by a board of live-stock commissioners that cattle affected with a disease which prevails to a greater or less extent in a particular locality are liable to communicate the disease does not meet the requirements of a statute authorizing the governor to schedule places from which cattle cannot be imported except under the regulations of the board, when the condition of cattle from such locality is such as to render them "liable to convey such disease." Ibid.

8. A statute permitting the regulations which will prevent the importation of cattle except under the rules of the state board of live-stock commissioners from "certain localities in other states" in which contagious diseases have become epidemic cannot be so extended as to comprehend the whole world outside of the state where the regulations are to be enforced. Ibid.

NOTES AND BRIEFS.

Animals; liability of land owner for injuries to trespassing stock caused by dangerous condition of premises. 133

Liability of owner of bees for injuries done by them:—(I.) Introduction; (II.) actions for injuries inflicted by bees; (III.) bees as a nuisance. 132

Regulation prohibiting importation of cattle; reasonableness of. 891

ANNUITIES.

Annuity Bonds, see BONDS, NOTES AND BRIEFS.

APPEAL AND ERROR.

Insurer's Liability for Failure to Perfect, see INSURANCE, 1.

Appellate jurisdiction.

1 A decision by a state supreme court that the granting of a nonsuit, instead of submitting the case to the jury, where the facts are admitted, does not deprive the plaintiff of due process of law, does not raise a Federal question which will entitle him to a writ of error from the Supreme Court of the United States. *Apex Transportation Co. v. Garbade* (Or.) 513

2. A Federal question raised for the first time on motion for rehearing comes 62 L. R. A.

too late as a foundation for taking the case to the Supreme Court of the United States. Ibid.

Who may be heard on appeal.

3. If, in a habeas corpus suit against a sheriff, he is required to restore his prisoner to liberty, he is a party aggrieved within the rule that only such a party is entitled to be heard on appeal or review on writ of error. *State ex rel. Durner v. Huegin* (Wis.) 700

4. A proper party to appeal on writ of error is entitled to be heard in the court of review by counsel regardless of whether that will, for the time being, recognize him as having a certain status, which is one of the very matters to be decided on such review. Ibid.

5. A necessary party to a judicial proceeding as a representative of public authority, having no interest in the litigation except to vindicate such authority, is a party in interest, and may be a party aggrieved within the meaning of the appeal statute and the practice on review on writs of error. Ibid.

Appeal bond.

6. An appeal and supersedeas bond in the sum of \$250 is sufficient, in case of an appeal from a judgment dismissing the action with \$10 costs, under a statute requiring the penalty of an appeal bond to be not less than \$200, and, "in order to effect a stay of proceedings where the appeal is from a final judgment for the recovery of money, it shall be in a penalty double the amount of damages and costs recovered in such judgment." Ibid.

Sufficiency of exceptions.

7. An exception is sufficient to bring up for review a portion of a charge to the jury when it particularly sets out the language complained of. *Scott v. Astoria & C. River R. Co.* (Or.) 543

Dismissal of appeal.

8. A cause will not be dismissed upon appeal because of failure to aver specifically in the petition in error certain facts, where the record brought up with the petition and referred to thereby contains what is lacking in the petition, and the petition, after mentioning certain errors, contains a general allegation that there are other errors, manifest upon the face of the record,—especially when voluntary appearance to the petition was entered by defendants in error without objection, and none was made until the oral argument, and no prejudice to defendants in error has resulted from the irregularity. *Mauk v. Brundage* (Ohio)

Questions not raised below.

9. The admission in evidence of pleadings in another action, which contain averments which are properly admitted, cannot be questioned on appeal on the ground of immaterial matter in the reply, unless the special attention of the trial court was called thereto, and some action in that respect was asked. *Holman v. Omaha & C. B. Ry. & Bridge Co. (Iowa)* 395

Errors cured below.

10. Where, at the trial of a cause to a jury, a party offers evidence competent to the issue, which, upon objection by the opposite party, is not permitted to be given, but afterward, during the trial, the same witness being upon the stand, the subject of the former inquiry is, without objection, fully entered upon, both in chief and on cross-examination, and the questions which had been held incompetent fully answered, the error in sustaining the objection will be deemed cured. *Mauk v. Brundage (Ohio)* 477

Review of finding.

11. A finding of a trial court sustaining an attachment upon conflicting evidence will not be disturbed on appeal. *Second Nat. Bank v. Fitzpatrick (Ky.)* 599

12. A referee's finding in an action for an accounting of the profits of a contract, that defendants are entitled to judgment dismissing the complaint, and directing judgment to be entered accordingly, upon the ground that the contract is contrary to public policy and void, is simply a nonsuit, and entitles plaintiff to have it reviewed in the light of the facts and inferences most favorable to him. *Veazey v. Allen (N. Y.)* 362

Grounds for reversal.

13. In considering the correctness of a single instruction in a charge to the jury the entire charge must be viewed, and, unless it appears that the jury would or might have been misled, mere verbal inaccuracies will not require a reversal. *Scott v. Astoria & C. River R. Co. (Or.)* 543

14. An instruction in an action against a railroad company for the death of an employee, which permits the jury to consider the question of the safety of the location of the road, is reversible error, although other portions of the charge correctly instruct them as to the degree of care which it is necessary for the company to have exercised. *Ibid.*

NOTES AND BRIEFS.

Appeal; necessity of reversal for mere technical errors as to admission or exclusion of evidence; where no substantial prejudice has resulted. 395

62 L. R. A.

What adjudication of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts:— (I.) Scope of note; (II.) introduction; (III.) nature of decisions reviewable: (a) finality of determination; (b) adjudication must be that of the highest state court; (c) when adjudication is rendered in a suit; (IV.) the nature of the controversy essential to this jurisdiction: (a) in general; (b) validity of Federal law; (c) questions respecting Federal authority; (d) repugnancy of state statutes or authority to Federal law: (1) state authority; (2) state statutes generally; (3) state legislation impairing contract obligations; (e) rights and immunities claimed under Federal law: (1) in general; (2) full faith and credit; (3) former jeopardy; (4) commerce; (5) due process of law; (6) equal protection of the laws; (7) treaty rights; (8) land titles; (9) title to office; (10) mining claims; (11) bankruptcy; (12) national banks; (13) citizenship; (14) Indians; (15) contracts; (16) vested water rights; (17) legal tender; (18) exemption from taxation; (19) customs and internal revenues; (20) removal of causes; (21) navigation; (22) civil rights; (23) patents for inventions; (24) slavery; (25) limitation of actions; (26) miscellaneous; (f) questions of local or general law are not Federal: (1) in general; (2) practice and procedure; (3) validity of state legislation under state Constitution; (4) statutory construction; (5) questions of fact; (V.) conclusion 513

Sufficiency of general exception to instruction where part only erroneous. 545

APPEARANCE.

By Garnishee, see GARNISHMENT, 4.

APPLICATION.

For Insurance Policy, see INSURANCE, 6-8.

Of Payment, see PAYMENT.

ARREST.

Wrongful, Measure of Damages for, see DAMAGES, 3, 4.

Liability for, see FALSE IMPRISONMENT.

NOTES AND BRIEFS.

Arrest; waiver of irregularity in; failure to follow exact procedure contemplated by statute; false imprisonment because of unlawful arrest; putting handcuffs on person arrested; when arrest may be made without warrant; liability of officer for unlawful arrest; using violence toward person arrested. 906

ARSON.**NOTES AND BRIEFS.**

Arson; evidence of other crimes in prosecution for 193

ARTESIAN WELLS.

Prohibiting Waste of Water from, see CONSTITUTIONAL LAW, 8.

Landowners Right to Sink, see **WATERS**, 2-4.

ASSAULT AND BATTERY.

On Passenger, see **CARRIERS**, 1-3.

On Street-Car Passenger, see **EVIDENCE**, 9.

By Street-Car Conductor on Passenger, see **TRIAL**, 10.

NOTES AND BRIEFS.

Assault; evidence of other crimes in prosecution for 193

ASSESSMENTS.

For Public Improvement, see **CERTIORARI**; **PUBLIC IMPROVEMENTS**.

ASSIGNMENT.

Of Insurance Policy, see **INSURANCE**, 12, 13.

ASSUMPSIT.**NOTES AND BRIEFS.**

Action of, for use and occupation; on implied promise arising from occupation by permission of owner without express promise to pay rent: right to waive tort when property wrongfully appropriated, and sue in assumpsit; for use and occupation; measure of damages; right to maintain for water power. 582

ASSUMPTION OF RISK.

See **MASTER AND SERVANT**, 6.

ATTESTATION CLAUSE.

To Will, see **WILLS**, 1, 2.

ATTESTING WITNESS.

To Signature of Mortgagor and Notary Taking Acknowledgment, see **MORTGAGE**.

ATTORNEYS.

Appearance by Private Attorney for State in Habeas Corpus Proceeding, see **HABEAS CORPUS**, 5, 6.

BAKING POWDER.

Containing Alum. Statute Prohibiting Sale of, see **CONSTITUTIONAL LAW**, 9.

See also **FOOD**, **NOTES AND BRIEFS**.

BANKRUPTCY.

A final money judgment obtained for 62 L. R. A.

the total amount due from a putative father, who in bastardy proceedings was required to pay a monthly stipend for the support of the child, is a debt dischargeable by proceedings under the bankruptcy act of 1898. *McKittrick v. Cahoon* (Minn.) 757

NOTES AND BRIEFS.

Bankruptcy; what constitutes a debt which will be released by discharge in; money judgment in bastardy proceeding; alimony. 757

BANKS.

Right of, on Purchasing Draft with Bill of Lading Attached, see **BILLS OF LADING**.

Powers and duties of cashier.

1. A bank cashier is not acting within the scope of his authority in giving information as to the value of notes executed by customers of the bank, so as to render it liable in case the statements prove to be untrue. *Taylor v. Commercial Bank* (N. Y.) 783

2. A bank is not made liable for the fraud of its cashier in inducing a third person to give credit to one of its customers by false representations as to his responsibility, by the facts that the customer was then largely indebted to the bank, and its representative was soon after made receiver of his property to aid the bank in collecting its claim against him, where the receivership resulted in no benefit to the bank, and it received no advantage from the credit given. *Ibid.*

3. No duty rests on the cashier of a bank to disclose the situation of the account of a customer with the bank upon receiving an inquiry from a third person as to the responsibility of the customer. *Ibid.*

Insolvency.

4. The inconvenience which will accrue to the drawee of checks of a national bank from suits by holders upon its refusal to pay them when the drawer becomes insolvent gives it no right to make the payment to the injury of the general creditors of the insolvent bank. *First National Bank v. Sel-den* (C. C. App. 7th C.) 559

5. The insolvency of a national bank and its passing into the hands of a receiver will destroy the right of holders of its checks to the funds called for by them, even in a state where the holder of a check is regarded as the owner of the fund and entitled to maintain an action for it against the drawee. *Ibid.*

NOTES AND BRIEFS.

Banks; right of action against, by holder of check for refusal to pay; rule in Illinois 64

and in the Federal courts: payment by national bank in Illinois when insolvent; receiver's right to recover amount paid. 559

False representations by cashier as to customers standing; binding effect of, upon bank; where bank does not profit thereby; cashier as general executive officer. 784

BASTARDY.

Judgment in, Dischargeable Debt, see **BANKRUPTCY**.

Merger of Rights under Order of Filiation in Judgment, see **MERGER**.

BEEES.

Negligence of Keeper of, see **ANIMALS**, 1-3.

Negligence in Hitching Horse Near Hive of, see **TRIAL**, 14.

NOTES AND BRIEFS.

Bees; liability of owners of, for injuries done by them. 132

BILLS AND NOTES.

Draft with Bill of Lading Attached, see **BILLS OF LADING**; **PLEADING**, 4.

Law Governing, see **CONFLICT OF LAWS**, 4.

Requiring Note for Patent Rights to so State on Face, see **CONSTITUTIONAL LAW**, 4, 6; **PATENTS**.

Parol Evidence as to Relation of Promisee in, see **EVIDENCE**, 16.

Notice to Guarantor of Note, see **GUARANTY**.

If a non-negotiable note bearing on its back the signature of the payee and following it that of another person does not represent an existing debt, but is made for the purpose of obtaining on it a loan of money for one or all of the parties to it, a person who makes such loan on the faith of it and takes it may, in the absence of an agreement to the contrary, of which he has notice, treat those whose names are on the back of it as copromisors with him who signed on its face, or as guarantors, at his election. *Young v. Sehon* (W. Va.) 490

NOTES AND BRIEFS.

See also **GUARANTY**.

Indorsement of signatures of promisee and another person on back of non-negotiable note; effect of liability of indorsers; assignment of bond or non-negotiable note; implied guaranty that assignee shall receive full amount thereof if unable to collect same; right to sue indorser of non-negotiable paper jointly with maker; liability of maker of note which he never delivered; right of indorsers to rescind engagement before note negotiated. 500
62 L. R. A.

BILLS OF LADING.

With Draft Attached, see **PLEADING**, 4.

1. Neither a bank which purchased a draft for a consignment of grain, with bill of lading attached, nor the payees who indorsed and delivered it to the bank, are liable to the drawees, the consignees of the grain, who accepted and paid the draft, for failure of title in the drawer to the property shipped. *Hall v. Keller* (Kan.) 758

2. A bank does not, by purchasing a draft with a bill of lading attached, become a party to the sale, so as to be responsible to the consignee in case, after he has paid the draft, the bill of lading proves to be fraudulent so that the consideration fails. *S. Brainsdell, Jr., Co. v. Citizens' Nat. Bank* (Tex.) 968

NOTES AND BRIEFS.

Bills of lading; with draft attached; liability of assignee of. 758

Transfer of draft with bill of lading attached; interest of transferee in property covered by; liability of indorsee of draft with bill of lading attached. 968

BLACKLISTING.

NOTES AND BRIEFS.

Blacklisting; of employees. 933

BOARD OF EDUCATION.

See **SCHOOLS**.

BOARD OF HEALTH.

Measure of Damages for Libel by, see **DAMAGES**, 6.

Evidence in Libel Suit against, see **EVIDENCE**, 24-26.

Libel by, see **LIBEL AND SLANDER**.

BOARDS.

NOTES AND BRIEFS.

Boards; of live-stock commissioners; power to make rules and regulations conferred upon; necessity that rules be reasonable; rule forbidding importation of cattle from all other states or countries. 390

BONDS.

On Appeal, see **APPEAL AND ERROR**, 6.

For Alimony, Judgment on, see **JUDGMENT**, 1, 2.

NOTES AND BRIEFS.

Bond; conditioned both as an appeal and supersedeas bond; amount of. 765

Form of judgment on penal bonds:— (1.) Introduction (comprising English statutes and decisions): (a) the necessity for 4 & 5 Anne, chap. 16; (b) annuity and installment bonds; (c) exceptions to the scope of 8 & 9 Wm. III.; (d) form of judgment un-

der the statute 8 & 9 Wm. III.; (e) summary; (II.) proper form of judgment (under statutes and decisions in the United States); (a) in general; (b) when the condition is for the payment of a sum certain at a day certain; (c) when the condition is for the performance of covenants or collateral agreements; (1) in general; (2) annuity and instalment bonds; (3) appeal bonds; (4) attachment bonds; (5) bail bonds; (6) bastardy bonds; (7) certiorari bonds; (8) injunction bonds; (9) indemnity bonds; (10) official bonds; (11) *post-obit* bonds; (12) replevin bonds; (13) title bonds; (III.) effect of improper form; (IV.) summary. 427

Penal; form of judgment on. 428

BOYCOTT.

1. No boycott against a merchant is effected by the refusal by the manufacturers of a proprietary medicine, at the instance of a voluntary association of merchants engaged in the same line of business, to give him a rebate from the selling price of the medicines unless he will maintain the price to consumers. *John D. Park & Sons Co. v. National Wholesale Druggists' Asso. (N. Y.)* 632

2. A merchant of large means, who is in position, by reason of large orders, to obtain more advantageous prices from manufacturers than others, so that he can undersell them in the market, has no cause of complaint if they combine, and, by representation and persuasion, induce the manufacturers to refuse to sell to him unless he will agree to maintain prices to consumers. *Ibid.*

3. The adoption of a plan for the sale of their product, by manufacturers of proprietary medicines, as proposed by an association of wholesale dealers, which results in a refusal to sell to complainant, is not shown to have been compelled by threats or intimidation by allegations that the manufacturers were prevented from selling to complainant for the reason that they wished to protect themselves "with the wholesale and jobbing druggists," and that the committee of the association recommended "that continuing and untiring opposition be shown to the sale of those articles of those proprietors who do not adopt" the plan. *Ibid.*

NOTES AND BRIEFS.

Boycott; illegality of. 964

BUILDING AND LOAN ASSOCIATIONS.

NOTES AND BRIEFS.

Building and loan associations; conflict of laws as to usury in contracts of. 64
62 L. R. A.

BURDEN OF PROOF.

See EVIDENCE, 4-9.

BURGLARY.

NOTES AND BRIEFS.

Burglary; evidence of other crimes in prosecution for. 193

CARRIERS.

Presumption and Burden of Proof as to Negligence of, see EVIDENCE, 8, 9.

Question for Jury as to Negligence of, see TRIAL, 9, 10.

1. One intending to take passage on a railroad train cannot claim the relation of passenger, so as to require the company to protect him from the assaults of strangers, by resorting to its premises an unreasonable time before the departure of the train, in the absence of an agreement, express or implied, on its part to do so; and, when the statute fixes the time during which the station must be open, that time will be regarded as the reasonable time during which the carrier's responsibility exists. *Illinois C. R. Co. v. Laloce (Ky.)* 405

2. In the absence of any duty devolving upon a railway company to provide at its stations a place wherein its patrons may sleep while awaiting the arrival or departure of trains, a regulation forbidding passengers from going to sleep in its waiting rooms, or lying down on the benches therein, is not, in a legal sense, unreasonable. *Central of Georgia R. Co. v. Motes (Ga.)* 507

3. A passenger who displays a persistent determination to disregard a regulation of the carrier forbidding passengers from going to sleep in its waiting rooms or lying down on the benches therein, and by his wrongful conduct so exasperates a servant of the company as to unfit him from properly performing the duty he owes his master with respect to his treatment of its patrons, cannot justly complain that the company's servant lost his temper and resorted to unnecessary force in compelling an observance of the regulation on the part of the passenger. *Ibid.*

4. One who boards a train without a ticket because the ticket office is not open for the sale of tickets as required by statute cannot refuse to pay the extra train fare required of passengers without tickets, and resist ejection on tender of the price of the ticket, but must pay the additional fare and resort to his legal remedy to recover it and the statutory penalty for failure to have the office open. *Monnier v. New York C. & H. R. R. Co. (N. Y.)* 357

5. The mere purchase by a husband of

an ordinary railway ticket for his wife, even though he pays for it, does not constitute a contract between the husband and the company for the safe transportation of the wife, but an implied contract for safe carriage in favor of the wife only. *Aiken v. Southern Ry. Co.* (Ga.) 666

Governmental control.

6. A state cannot fix the rates to be charged by an interstate carrier for the carriage within the state of a shipment which is delivered to the carrier at a point in another state. *Southern Express Co. v. Goldberg* (Va.) 669

NOTES AND BRIEFS.

Carriers; duty of person boarding train without ticket to pay extra fare; where ticket not procured because office was not open; liability for damages for ejection of; carrier as insurer against wrongful acts of agents. 358

When person intending to take passage on train becomes a passenger; right of passenger to protection from assaults; where carrier has no knowledge of danger. 403

Right of husband purchasing ticket for wife to sue for breach of contract; right of administrator of husband to bring action. 667

Duty toward passenger; abuse by fellow passenger; by conductor. 875

CASE.

One who is responsible for another's engaging in business in breach of his contract not to do so is liable for the damages thereby caused to the other contracting party, whether he induces the breach of the contract or not. *Raymond v. Yarrington* (Tex.) 962

NOTES AND BRIEFS.

Case; action on; when maintainable. 901

Action on, for injury to business or occupation; effect of malice on liability. 694

CASHIER.

Power and Duty of, see **BANKS**, 1-3.

CATTLE.

Infected Cattle, see **ANIMALS**, 4-8.

CERTIFICATE.

Of Investment Association, see **CONTRACTS**, 7, 15; **RECEIVERS**.

Of Investment Association as Lottery, see **LOTTERY**, 3.

CERTIORARI.

The court cannot, on certiorari to review an assessment upon property benefited for the cost of a street improvement, go beyond *L. R. A.*

hind a finding that the property assessed was all that was benefited beyond the general advantage to the real estate in the city. *Sears v. Boston Street Comrs.* (Mass.) 144

CHARITIES.

Devise for, by Will, see **WILLS**, 11.

CHECKS.

Insolvency of Bank Drawing, see **BANKS**, 4, 5.

Effect of Principal's Indorsement of, see **CONTRACTS**, 1.

NOTES AND BRIEFS.

Checks; action against bank for refusal to pay; right to stop payment of, as against bona fide holder; difference between rule in Illinois and in Federal courts; payment by national bank when insolvent; action by receiver to recover amount paid. 559

CIVIL ENGINEER.

Expert Evidence by, see **EVIDENCE**, 17, 18.

CLEARANCE CARD.

To Discharged Employee, see **MASTER AND SERVANT**, 4, 5.

CLUB.

Sale of Liquor by, see **INTOXICATING LIQUORS**, **NOTES AND BRIEFS**.

COLOR OF TITLE.

See **ADVERSE POSSESSION**, 4.

COMBINATIONS.

NOTES AND BRIEFS.

See also **CONSPIRACY**.

Combinations of merchants to maintain prices; boycott by, of merchant refusing to so maintain prices; injunction to restrain. 632

COMMERCE.

NOTES AND BRIEFS.

Commerce; interstate; what constitutes; exclusive power of Congress over; right of state to fix rates to be charged by interstate carrier for carriage within state. 660

COMMITMENT.

Warrant of, see **CRIMINAL LAW**, 3-8.

COMMON LAW.

The term "common law of England." as used in Neb. Comp. Stat. 1901, chap. 15a, which makes the common law of England the rule of decision in all cases not governed by constitution or statutes, so far as applicable, refers to that general system of law which prevails in England, and in most

of the United States by derivation from England, as distinguished from the Roman or civil-law system, and hence, the statute does not require adherence to the decisions of the English common-law courts prior to the Revolution in case the court considers subsequent decisions, either in England or America, better expositions of the general principles of that system. *Williams v. Miles* (Neb.) 383

COMPARISON.

Of Handwriting, see EVIDENCE, 10-13, 19; TRIAL, 3-5.

COMPLAINT.

In Criminal Proceedings, see INDICTMENT, ETC.

CONCLUSION.

In Pleading, see PLEADING, 4.

CONDITION.

Subsequent, in Oil or Gas Lease, see MINES, 2-4.

CONFLICT OF LAWS.

1. The right to contract for the adjustment of a claim on an insurance policy forfeited for nonpayment of premiums, according to the laws of the insurer's domicile, although the insurance is upon the life of a person residing in another state where the contract is made, is accorded by a statute of the latter state providing for such adjustment, but making its provisions inapplicable to policies issued by foreign companies authorized to do business in the state where the laws of their domicile provide for continued insurance upon such forfeiture. *Nichols v. Mutual Life Ins. Co.* (Mo.) 657

2. Leaving it optional with insured as to the kind of policy he will take in the adjustment of a claim upon a policy forfeited for nonpayment of premium does not prevent the application of a proviso of the local statute making inapplicable its provisions as to such adjustment, where the laws of the state of the insurer's domicile, with respect to which the parties have agreed the contract shall be construed, provide for the methods of adjustment which the local statute requires to make its provisions inapplicable. *Ibid.*

3. Exemption laws of another state have no extraterritorial force, and will not be enforced by the courts of this state. *Pennsylvania R. Co. v. Rogers* (W. Va.) 178

4. A note and mortgage are contracts of the state where the mortgagee resides, when they are executed in favor of a building and 62 L. R. A.

loan association upon an application addressed to it at its home office, where it was to be examined and passed upon by the company's officers, and, if approved, the necessary papers were to be filled out and forwarded for execution, after which they were to be returned to the home office for acceptance, while they expressly state that the contract shall be governed by the laws of the residence of the mortgagee, although the land by which the note is secured is located in another state, where the application is signed and delivered to the agent of the mortgagee for transmission to the home office. *United States Sav. & L. Co. v. Beckley* (Ala.) 33

NOTES AND BRIEFS.

Conflict of laws; enforcing statutory liability of other state. 190

What law governs mortgage made in one state upon land located in another; law of place of performance governing construction of; right to stipulate what law shall govern; making contract payable in one state as evidence of invasion of laws of another. 34

As to interest and usury:—(I.) General principles; intention of parties; (II.) contractual interest; (III.) interest as damages; (IV.) usury: (a) effect of penal or remedial character of foreign statute; (b) general principles governing choice of law; intention; (c) rule that law upholding the contract will be applied: (1) in general; (2) when contract usurious by *lex loci contractus*, but valid by *lex loci solutionis*; (3) when contract usurious by *lex loci solutionis*, but valid by *lex loci contractus*; (4) when claim of usury based on transaction with drawer or indorser; (d) when usurious by both *lex loci contractus* and *lex loci solutionis*; (e) effect of mortgage security; (f) place where money is to be used; (g) *lex loci considerationis*; (h) contracts of foreign building and loan associations; (i) which contract to be regarded; contract of principal and surety; (j) effect of restriction as to rate of interest in charter of corporation; (k) applicability of *lex fori*; (l) statute forbidding corporation to plead usury; (V.) summary. 33

As to interpretation of insurance policy. 658

CONSPIRACY.

Indictment for, see INDICTMENT, ETC.

See also BOYCOTT.

1. The doctrine that an act which is not actionable if done by one is not when done by many is not the law of Wisconsin. *State ex rel. Durner v. Huegin* (Wis.) 700

2. A conspiracy to wrongfully injure

another is actionable at the common law if executed to the damage of another, whether that other would have a remedy if the act were committed by a single person or not, or whether one person could commit such injury alone. *Ibid.*

3. A combination of individuals for the purpose of inflicting a malicious injury upon another is in effect an agreement to injure by violence, and it was the policy of the common law, as it is of Wis. Rev. Stat. 1898, § 4466a, to prevent such a wrong by civil and criminal liabilities. *Ibid.*

4. All agreements to maliciously injure another in any way are contrary to the policy of the law, and legislative authority is ample to outlaw such agreements to the extent of making the participants therein liable civilly and criminally. *Ibid.*

5. The term "malicious injury" as used in Wis. Rev. Stat. 1898, § 4466a, is synonymous with that term in the law of conspiracy independent of the statute. *Ibid.*

6. The doctrine that an act lawful without malice does not become unlawful by adding such element, as applied to a combination of persons to wrongfully injure another, is not the law of Wisconsin. *Ibid.*

7. A mere declaration of the common law is made by Wis. Rev. Stat. 1898, § 4466a, declaring what shall constitute an indictable conspiracy, its only effect being to remove the necessity for an overt act, which was required by the change in the common law by § 4508. *Ibid.*

8. A combination of persons to injure another without any just cause, such as an injury that is not an incidental effect of the promotion of the legitimate interests of the members of the combine, is a conspiracy to inflict a malicious injury upon another at common law, and is such an injury under the statute (Wis. Rev. Stat. 1898, § 4466a) if it relates to such other's reputation, business, trade, or profession. *Ibid.*

9. A charge of conspiracy will lie against those concerting together to perpetrate a criminal act where concert is not a mere part of it, but is in aid of it and is itself criminal, though only one of the parties, or neither one alone, could effect such purpose. *Ibid.*

10. The doctrine that, where concert of action is necessary to an offense, a charge of criminal conspiracy does not lie, does not apply where the unlawful agreement is of itself an offense, but applies only where the agreement and the consummation thereof are so closely connected that the two constitute really but one offense. *Ibid.*

11. Several persons, conducting independent business enterprises, may, in the
62 L. R. A.

absence of a statute, combine to control prices for the purpose of promoting their individual interests, and in their operations to that end impoverish a rival and drive him out of business, there being no malicious intent in their conduct, using the term in the sense of malice in law. *Ibid.*

12. An agreement between several independent concerns, each publishing a newspaper and furnishing thereby means for advertising, to compel a fourth person engaged in like business to reduce his rates for advertising or lose customers indicates a malicious purpose to injure the business of the latter within the meaning of Wis. Rev. Stat. 1898, § 4466a. *Ibid.*

13. A merchant does not subject himself to liability to an action for damages in favor of a manufacturer by sending circulars to the retail trade offering a small quantity of such manufacturer's product, which he owns, at a cut price for the purpose of injuring and destroying such manufacturer's trade and depressing the price of his goods on the market. *Passaic Print Works v. Ely & W. Dry-Goods Co.* (C. C. App. 8th C.) 673

14. Merchants cannot be held liable for conspiracy by offering goods of a certain manufacturer, which they own, at a cut price for the purpose of injuring his trade and depressing the market value of his product. *Ibid.*

15. An action lies against parties who, through conspiracy, induce another to break his contract to the injury of the one by whom the action is brought. *Raymond v. Yarrington* (Tex.) 962

NOTES AND BRIEFS.

Conspiracy: sufficiency of allegation of, in complaint: charging offense in language of statute; combination of newspaper concerns to control rates; right of person injured thereby to recover damages; necessity of bad motive to make injury actionable. 717

Definition; combination to induce persons to break their contracts; where contracts void as in restraint of trade; to deprive person of custom; necessity of using illegal means; effect of malice. 678

To injure person; liability of all where legal wrong committed by one of conspirators; boycott of business in pursuance of; what damages recoverable. 963

How proved. 924

Of employers; act lawful in an individual as subject of conspiracy when done in concert; combination to injure public or individuals as wrongful *per se*. 933

What constitutes; to compel person to do

act which he might lawfully do; combination of merchants to maintain prices; refusal to sell to person without promise to maintain price; effect of intervention of long period of time between formation of conspiracy and acts done in furtherance thereof; combination to do what might lawfully be done by individual; employing detectives to watch parties handling goods; issuance of blacklisting circulars; injunction to restrain continuance of; where articles involved are not necessities of life.

632

CONSTITUTIONAL LAW.

Right of State to Fix Rates of Interstate Carrier, see **CARRIERS**, 6.

Power of Legislature over Court, see **COURTS**, 1.

Right to Jury Trial, see **TRIAL**, 1-5.

Equal protection of the laws.

1. Neither due process of law, nor the equal protection of the law, is denied by the granting of a nonsuit, instead of submitting the case to the jury, where the facts are practically admitted. *Apex Transportation Co. v. Garbade* (Or.)

513

2. Making all corporations liable for injuries to employees through defective machinery, notwithstanding the employees had knowledge of the defect, when the same liability is not placed on private individuals, and there is no distinctive difference in the business which will warrant the classification, denies the corporations the equal protection of the laws. *Ballard v. Mississippi Cotton Oil Co.* (Miss.)

407

3. A statute rendering all corporations liable for injuries to employees from defective appliances, whether the employees knew of the defect or not, cannot be saved from unconstitutionality because of discrimination in favor of individual employers by the courts determining in each particular case whether or not the corporation is engaged in a business so dangerous that such a rule might properly be applied to it.

Ibid.

4. A statute requiring notes given for patent rights so to state on their faces is not obnoxious to constitutional prohibitions of class legislation. *State v. Cook* (Tenn.)

174

Due process of law.

Forbidding Erection of High Boundary Fence, see **FENCE**.

See also *supra*, 1.

5. A statute requiring the weekly payment of wages, by interfering with the liberty of contract, deprives citizens of their liberty and property without due process of law. *Republic Iron & S. Co. v. State* (Ind.)

136

62 L. R. A.

Police power.

6. The police power will authorize the passage of statutes requiring notes given for patent rights to state that fact on their faces. *State v. Cook* (Tenn.)

174

7. Requiring employers to make weekly payment of wages, notwithstanding private contracts which they may make with their employees, is not within the police power of the state. *Republic Iron & S. Co. v. State* (Ind.)

136

8. The police power does not justify legislation prohibiting the waste of water from artesian wells to the injury of the wells of neighboring proprietors. *Huber v. Merkel* (Wis.)

589

9. The statutory prohibition of the manufacture or sale of baking powder containing alum is not unconstitutional in view of the dispute as to the fact of its wholesomeness, which prevents the court from taking judicial notice that it is wholesome and innocuous. *State v. Layton* (Mo.)

163

NOTES AND BRIEFS.

Review in Supreme Court on Writ of Error of Constitutional Questions, see **APPEAL AND ERROR**.

Constitutional law; limit of power of executive.

890

Regulation prohibiting importation of cattle from other states; validity of; exercise of police power as class legislation.

891

Right of state to fix rates to be charged by interstate carrier for carriage within state; exclusive power of Congress over interstate commerce.

669

Right to jury trial; meaning of phrase "as heretofore enjoyed," in Constitution.

912

Right to labor as property right.

934

Requiring court to pass on petitions for local option elections; as judicial duty.

810

Prohibiting waste of water from artesian wells.

590

Scope of police power: statute regulating height of boundary fence.

602

Right to engage in lawful trade or business; in combination with others; where injury results therefrom: denial of right as deprivation of property and due process of law.

726

Provision for equal protection, as restraint upon state's power of classification for special laws: necessity of reasonableness of classification: making all corporations absolutely liable for injuries to employees through defective machinery; suf-

iciency of reason for classification as question of legislative discretion. 407

Regulating jurisdiction of justices of the peace by classification of cities in which they reside; when classification proper. 482

Constitutionality of statute requiring weekly payment of wages. 136

Forbidding sale of baking powder containing alum; as interference with right of business; right to equal protection of the laws. 164

CONSTRUCTION.

Of Contract, see **CONTRACTS**, 3-9.

Of Statute, see **STATUTES**, 4.

Of Wills, see **WILLS**, 9-11.

CONTAGIOUS DISEASE.

See **ANIMALS**, 4-8.

CONTRACTS.

Liability for Inducing Breach of, see **CASE**.

Damages for Breach of, see **DAMAGES**, 1.

Burden of Proof on Seeking to Rescind, see **EVIDENCE**, 6.

Implied Contract in Oil Lease, see **MINES**, 2.

Enforcement of Forfeiture of, in Equity, see **MINES**, 3.

Fraudulent, by Investment Association, Remedy for, see **RECEIVERS**.

Statute of frauds.

1. The indorsement by the principal of a check given in part payment of the purchase price of land is not a sufficient subscription of the contract to make it binding on him, where it was made by an agent not having sufficient authority to bind the principal, although the check was attached to the contract. *Thompson v. New South Coal Co. (Ala.)* 551

2. Mere acceptance of a portion of the purchase money is not sufficient to take a contract for the sale of land out of the statute of frauds, where the statute requires, not only the payment of the purchase money, but the placing of the purchaser in possession. *Ibid.*

Construction.

3. If a contract is of doubtful meaning and one construction would make it legal and another illegal, the courts are bound to adopt that construction which will not impute to the parties an intention to violate the law. *Equitable Loan & Security Co. v. Waring (Ga.)* 93

4. While forfeitures are not unlawful 62 L. R. A.

the law does not favor them, and all ambiguities in a contract are to be resolved against their existence; but where a contract in unmistakable terms provides for a forfeiture, and is otherwise free from legal infirmity, neither a court of law nor a court of equity will relieve against the forfeiture. *Ibid.*

5. While the construction placed upon a contract by one of the parties only is not controlling, still, where a contract is capable of being construed either as legal or illegal, and either party, and especially the party upon whom the main obligation rests, has uniformly placed that construction upon the contract which would render it legal, this fact may be properly considered in determining the validity of the contract. *Ibid.*

6. In construing a contract of an investment association the statements contained in the certificate evidencing the contract must control, where there is a variance between them and other statements in the advertising literature of the company. *Ibid.*

7. A provision in a certificate of an investment association requiring the holder to surrender it, whenever called, upon payment of its redemption value, which is declared to be the full amount paid in, with interest at 8 per cent per annum, and its proportionate share of profits earned in excess of 8 per cent per annum, does not authorize the redemption of any certificate until it has earned at least 8 per cent interest on the amounts paid in. *Ibid.*

8. A right to credit for the purchase price of goods sold is not given by a provision for a discount for cash, where the contract expressly states "Terms cash." *Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co. (Md.)* 795

9. Parties are bound individually by a clause in an agreement selling a partnership business, that "we agree and bind ourselves not to enter into or conduct" a similar business in the territory covered by the business sold, which is signed by them, in their individual names. *Raymond v. Yarrington (Tex.)* 962

Validity.

When Plan for Boycotting Merchants Adopted, see **BOYCOTT**, 3.

See also **APPEAL AND ERROR**, 12; *supra*, 5.

10. The courts are not authorized to declare a contract void merely because it may be unwise, or even foolish. *Equitable Loan & Security Co. v. Waring (Ga.)* 93

11. The mere fact that an enterprise de-

pende for its success, to some extent, on forfeitures and lapses, is not alone sufficient to render the scheme unlawful.

Ibid.

12. Enforcement of contracts clearly repugnant to sound morality and civic honesty will be denied by the courts on the ground of public policy. *Veazey v. Allen* (N. Y.) 362

13. A contract to share the profits of a "short" sale of the stock of a corporation, the shares to meet which are to be purchased at a decline anticipated because of a legislative investigation of its affairs with one about to bring such affairs to the attention of the legislature with the intention of impairing the reputation of the corporation for the protection of his own business, in consideration of his furnishing advance information as to the probable course and development of the investigation, is void as contrary to public policy. Ibid.

14. A plan by a voluntary association of merchants engaged in selling proprietary medicines, adopted by manufacturers of them, looking to the maintenance of prices, by which the manufacturers should sell at fixed prices, with a rebate only to concerns who could be relied on to maintain the selling price, is not void as creating a monopoly or in restraint of trade, nor as against public policy. *John D. Park & Sons Co. v. National Wholesale Druggists' Assn.* (N. Y.) 632

15. The contract of an investment association by which it agrees to pay each certificate holder \$500 at the end of fourteen years, in consideration of the payment of \$4 as a membership fee and monthly instalments of \$1.25 until the end of the period, the \$4 being given to the agent procuring the contract and 25 cents of each instalment being set apart for expenses, leaving only \$1 a month for investment, while it is provided that failure to pay any instalment shall subject a member to a fine of 50 cents a month, and that upon failure to pay for six months all payments made shall be forfeited,—cannot be said, as matter of law, to be incapable of performance by legitimate methods, or to be so dependent on forfeitures and lapses as to be contrary to public policy, where the company is authorized by its charter to carry on many lines of business, including the right to deal in stocks, bonds, etc., loan money, and purchase, improve, and sell property, both real and personal. *Equitable Loan & Security Co. v. Waring* (Ga.) 93

NOTES AND BRIEFS.

Contracts; when void as in restraint of trade. 684

62 L. R. A.

Malicious procurement of breach of; liability for damages in case of; effect of fact that contract is terminable at will of either party. 962

For sale of lands; statute of frauds.

551

Right of party to executed contract to set up illegality of; contract to share profits of "short" sale of stock of corporation; where depreciation of shares is result of legislative investigation instigated by parties to contract; public policy as to. 365

Effect of malice on liability for causing breach of. 678

Conflict of laws as to interpretation of. 34

Avoidance of, for usury; validity of, when largely dependent on forfeitures; right of party to illegal contract to relief. 112

CONVERSION.

NOTES AND BRIEFS.

By infant; of purchase price of property sold to other infant; right of purchaser to maintain trover for purchase price upon disaffirming contract. 755

COPYRIGHT.

Injunction against Infringement of, see INJUNCTION, 2.

A copyrighted law book is not infringed by a subsequent work on the same subject, where the second author merely collected all available citations, including those found in the copyrighted work, and, after examining the text-books and opinions, used those which he considered available to support his own original text. *Edward Thompson Co. v. American Law Book Co.* (C. C. App. 2d C.) 607

NOTES AND BRIEFS.

Copyright; suit for infringement; right to maintain where complainant has no legal right to sell infringed book; infringement by use of citation of cases from book as guide to cases to be examined in preparation of other book; by use of map to avoid expense of survey in making new map. 608

CORONERS.

Admissibility of Testimony at Inquest of, see EVIDENCE, 14, 15.

Failure to Claim Privilege While Testifying at Inquest by, see WITNESSES, 2.

CORPORATIONS.

Discrimination against, see CONSTITUTIONAL LAW, 2, 3.

Validity of Contract to Share Profits of Short Sale of Stock, see CONTRACTS, 13.

Injunction against Use of Corporate Name, see **COURTS**, 3; **INJUNCTION**, 1.

Garnishment of Foreign Corporation, see **GARNISHMENT**, 9, 10.

Public Corporations, see **PUBLIC INSTITUTIONS**.

NOTES AND BRIEFS.

Corporations: liability in action of tort at suit of party injured: where express malice is necessary element of cause of action. 784

Making all corporations absolutely liable for injuries to employees through defective machinery: validity of; exemption of natural persons. 408

Power of general superintendent of, to settle claims against, for personal injuries; estoppel of corporation to deny authority. 395

As "citizens;" right to question constitutionality of statute requiring weekly payment of wages: right to complain of act which affects only natural persons; state regulation of; in case of foreign corporations. 138

COSTS.

Against Executor, see **EXECUTORS AND ADMINISTRATORS**.

NOTES AND BRIEFS.

Costs: liability for, of party controlling or carrying on litigation in name of another. 618

COTENANCY.

Adverse Possession of Land Owned in Joint Tenancy, see **ADVERSE POSSESSION**.

Between Husband and Wife, see **HUSBAND AND WIFE**, 1, 2.

Running of Limitations against Cotenant, see **LIMITATION OF ACTIONS**, 2, 3.

COUNTERFEITING.

NOTES AND BRIEFS.

Counterfeiting: evidence of other crimes in prosecution for. 193

COURTS.

Authority to Declare Contract Void, see **CONTRACTS**, 10.

1. The legislature cannot impose upon a court the duty of receiving and acting on petitions for the submission to the voters of the question whether or not intoxicating liquors shall be sold, under a Constitution separating the departments of government. *Supervisors of Elections v. Todd* (Md.) 809

2. The judicial power to interpret a

statute does not contemplate the power to amend it when it comes before the court for construction. *Nichols v. Mutual Life Ins. Co. (Mo.)* 657

3. That a corporation has acquired its corporate name from the state will not prevent a Federal court from enjoining it from using the name at the suit of a corporation of another state, if the statute permitted the incorporators to select the name, and it was chosen fraudulently for the purpose of appropriating the good will of the other corporation. *Peck Bros. & Co. v. Peck Bros. Co. (C. C. App. 7th C.)* 81

NOTES AND BRIEFS.

Courts; power of, over findings and judgments. 975

What duties are judicial; requiring to receive and act on petitions for local option election; binding effect of court's action in performing duties unlawfully imposed. 810

COVENANT.

To Repair, Action by Tenant's Licensee on, see **LANDLORD AND TENANT**, 1.

When Limitation Runs against, see **LIMITATION OF ACTIONS**, 1.

Allegation in Action for Breach of, see **PLEADING**, 5.

1. The state is within the terms of a warranty of the title to real estate against "all persons whatsoever." *West Coast Mfg. & I. Co. v. West Coast Improv. Co. (Wash.)* 763

2. A general covenant of warranty in a deed of a tract of land will extend to tide lands visibly within the limits of the grant, the paramount title to which at the time of the grant is in the state, and the insertion of the words "together with the littoral, riparian, and shore rights" and "the tenements, hereditaments, and appurtenances thereunto belonging," does not refer to such rights merely as pertain to the upland. *Ibid.*

3. The insertion in a deed of a tract of land which includes within its limits tide lands belonging to the state, of the clause, "and also the estate, right, title, and interest at law and in equity therein and thereto," does not restrict the covenant of warranty to the right, title, and interest which the grantor actually has. *Ibid.*

4. An eviction constituting a breach of warranty of title to real estate is effected by the assertion of paramount title by the state, which the covenantee is compelled to purchase to save improvements which he has placed on the land. *Ibid.*

NOTES AND BRIEFS.

Covenant; of warranty of title; liability

on, where paramount title is in state or United States; effect of knowledge of grantee of existing encumbrance upon or defect in title; how far tide land within protection of; covenant for quiet enjoyment. 764

CREDIT.

When Right to, Given by Contract of Purchase, see CONTRACTS, 8.

CRIMINAL LAW.

Particular Crimes, see CONSPIRACY; HOMICIDE.

For Indictment, Information, Complaint, etc., see INDICTMENT, ETC.
See also HABEAS CORPUS.

Preliminary examination.

1. A preliminary examination is not an action: the proceeding is not according to the course of the common law; but it is purely statutory, and compliance with the statute is requisite to jurisdiction at every step. *State ex rel. Durner v. Huegin* (Wis.) 700

2. An examination to determine whether a criminal prosecution shall be commenced is a judicial proceeding in that, so far as the magistrate acts within his jurisdiction, his decision is as binding for the purposes of such proceeding when it is right as when it is wrong; but, if there is no evidence reasonably permitting of action, a decision upon a contrary theory is in excess of jurisdiction. *Ibid.*

Warrant of commitment.

3. A warrant of commitment for trial which states the offense charged with convenient certainty is sufficient if good in all other respects. *Ibid.*

4. The rule that a form for a commitment prescribed by statute must be strictly followed does not mean literally followed unless the statute clearly so indicates. *Ibid.*

5. The formal language, "against the peace and dignity of the state of Wisconsin, and the statutes in such case made and provided," or equivalent formal words, is unnecessary to either a criminal complaint or warrant of commitment for trial. *Ibid.*

6. The statutory form for a commitment found in *Wis. Rev. Stat. 1898, § 4774*, is satisfied by the use of language including all material elements, though such language departs from the particular wording of the form. *Ibid.*

7. The rule of convenient certainty as to describing the offense in a warrant of commitment does not require the facts to be stated in detail; a statement thereof according to their legal effect is sufficient. *Ibid.*

8. The description of an offense in a warrant of commitment by its generic name, if it has one, whether the offense be statutory or one known to the common law, states by reasonable inference all the facts requisite to such offense. *Ibid.*

NOTES AND BRIEFS.

Evidence of other crime in criminal case; exceptions in rule as to; of expert testimony as to disputed handwritings. 196

Evidence of other crimes in prosecution for. 193

CRUEL TREATMENT.

Divorce for, see HUSBAND AND WIFE, 5-7.

CUSTOM.

Evidence to Establish, see EVIDENCE, 23, 36.

A usage or custom, to be binding, must be so uniform, long established, and generally acquiesced in, and so well known, as to induce the belief that parties contracted with reference to it if nothing was said to the contrary, and that the failure to conform to it would be an exception. *Cleveland, C. C. & St. L. R. Co. v. Jenkins* (Ill.) 922

DAMAGES.

Allegations as to, see PLEADING, 1.

Exemplary, against Some of Defendants in Libel Suit, see TRIAL, 17.

1. One violating his agreement not to engage in a business which he has sold to another is, liable, at least, for nominal damages. *Raymond v. Yarrington* (Tex.) 962

2. The measure of damages to be recovered by the owner of a dam and pond from one who wilfully diverts water from the pond without right is the market value of the power actually taken, with annual interest, notwithstanding the owner had no facilities for using the power, so that it would have gone to waste had it not been taken and used by the wrongdoer. *Green Bay & M. Canal Co. v. Kaukauna Water Power Co.* (Wis.) 579

3. Damages can be recovered only to the time of the lawful arrest, where a person within the jurisdiction of the court, for whom a warrant has been issued, is taken into custody and detained until the officer arrives with the warrant, when a legal arrest is made. *McCullough v. Greenfield* (Mich.) 906

4. An officer is not liable in damages for using handcuffs on a prisoner who is unknown to him, where he has a considerable distance to go after dark, and has another person under his charge, there being noth-

ing to show wantonness or malice in his conduct. Ibid.

5. For the appropriation by a magnetic telegraph company of part of the right of way of a railroad company, the measure of compensation is the amount of decrease in the value of the use of the right of way for railroad purposes that will result from the easement appropriated and used by the telegraph company. *Cleveland, C. C. & St. L. R. Co. v. Ohio Postal Teleg. Cable Co. (Ohio)* 941

6. In an action for libel against a board of health in stating in the preamble to an order regulating the conduct of physicians in the treatment of obstetrical cases, that the reason for making the order was that a number of deaths had recently resulted from the negligence of the physician attending the patients in childbirth, plaintiff, upon showing, by a preponderance of the evidence, that the preamble was published as charged, and that he was the physician referred to by the defendants, and understood by the community to be such, is entitled to recover at least such compensatory damages as were attributable to the publication. *Mauk v. Brundage (Ohio)* 477

7. An aggravation of personal injuries, caused by the neglect or failure of the injured person to obtain the needed medical or surgical assistance, cannot be charged against the party by whose negligence the original injury was received. *Texas & P. R. Co. v. White (C. C. App. 5th C.)* 90

NOTES AND BRIEFS.

Damages; measure of, in eminent domain proceedings; for construction of telegraph line along railroad right of way. 942

For destruction of business; right to consider anticipated profits; when exemplary damages may be recovered. 963

Punitive or exemplary; when recoverable; compensatory. 901

For breach of condition subsequent; when not "speculative." 897

When remote and speculative. 620

For wrongful appropriation of water power; measure of; in trespass for mesne profits; interest on mesne profits as part of. 582

Duty of injured person to lighten consequential damages; effect of failure to keep down damages on right to recover. 90

DAMS.

Action of Tort for Appropriation of Water from Reservoir Created by, see ACTION OR SUIT.

Measure of Damages for Diversion of Water from Pond Created by, see DAMAGES, 2.

62 L. R. A.

Right to Recover for Wrongful Withdrawal of Water from Pond Created by, see WATERS, 1.

DEEDS.

NOTES AND BRIEFS.

Deeds; condition subsequent; how construed; necessity of fairly expressing in deed itself. 897

Covenants in; how far tide land within protection of. 763

DEFINITION.

Malicious Injury, see CONSPIRACY, 5.
Cruel Treatment, see HUSBAND AND WIFE, 5.

NOTES AND BRIEFS.

Meaning of word "immediate." 485

Meaning of word "injury" as used in penal statute; of "lawful;" of "malicious." 721

"Credit;" "debt." 813

DEMURRER.

To Bill for Specific Performance, see PLEADING, 3.

DISCHARGE.

Of Employee, see MASTER AND SERVANT, 1-5.

DISCRIMINATION.

See CONSTITUTIONAL LAW, 1-4.

DISMISSAL.

Of Appeal, see APPEAL AND ERROR, 8.

DISTRICT AND PROSECUTING ATTORNEY.

Appearance by Private Attorney for State in Habeas Corpus Proceeding, see HABEAS CORPUS, 5, 6.

DIVORCE.

See HUSBAND AND WIFE, 5-8.

DOCUMENTARY EVIDENCE.

See EVIDENCE, 10-15.

DUE PROCESS.

Of Law, see CONSTITUTIONAL LAW, 1, 5.

EJECTMENT.

NOTES AND BRIEFS.

Ejectment; for water power wrongfully appropriated; to recover easement. 582

ELECTRIC RAILWAYS.

See STREET RAILWAYS.

EMBEZZLEMENT.

NOTES AND BRIEFS.

Embezzlement; evidence of other crimes in prosecution for. 193

EMINENT DOMAIN.

Measure of Compensation, see DAMAGES, 5.

Burden of Proof in Proceeding in, see EVIDENCE, 7.

In a proceeding by a magnetic telegraph company, under Ohio Rev. Stat. 1892, §§ 3456-3459, for the purpose of appropriating to its use a part of the right of way of a railroad company organized under the laws of Ohio, it is necessary and jurisdictional for the court to hear and determine, and so enter of record, that the easement sought to be appropriated by such telegraph company will not in any material degree interfere with the practical uses to which the railroad company is authorized to put such right of way, and, until the court has so determined, it is without jurisdiction to order an appropriation, and impanel a jury for the assessment of compensation to the railroad company. *Cleveland, C. C. & St. L. R. Co. v. Ohio Postal Teleg. Cable Co. (Ohio)* 941

NOTES AND BRIEFS.

Eminent domain; condemnation of land already dedicated to public use; constructing telegraph line over railroad right of way; conclusiveness of finding of lower court as to validity of appropriation; measure of damages. 942

EMPLOYER'S LIABILITY.

Insurance against, see INSURANCE, 1.

ENTIRETIES.

Estate by, see HUSBAND AND WIFE, 1, 2.

EQUAL PROTECTION.

See CONSTITUTIONAL LAW, 1-4.

EQUITY.

1. Equity will not interfere with the action of an association of merchants in keeping watch of other merchants for the purpose of ascertaining who refuses to maintain the fixed price for proprietary medicines. *John D. Park & Sons Co. v. National Wholesale Druggists' Asso. (N. Y.)* 632

2. The doctrine of equitable election is founded upon the principle that he who seeks equity must do equity. *Barrier v. Kelly (Miss.)* 421

NOTES AND BRIEFS.

Equity; relief in, on ground of accident. 560

ESTOPPEL.

1. A person is not estopped from asserting the invalidity of an unauthorized contract made by his agent for the sale of his 62 L. R. A.

land by accepting a portion of the purchase money. *Thompson v. New South Coal Co. (Ala.)* 551

2. One who takes the benefit of a deed in his favor, which was made part of a transaction by which some of his property was deeded to a third person by the common grantor under the mistaken belief that it belonged to the grantor, cannot, after the lapse of several years, during which he knows that the other grantee is receiving the rents and profits of the property, repudiate the election and assert his title thereto. *Barrier v. Kelly (Miss.)* 421

3. Mere silence on the part of a woman who knows that her husband has made an executory contract for the exchange of a tract of land owned by them as joint tenants, and that the vendee has entered into possession thereunder, or a mere expression of satisfaction with the exchange, is not sufficient to estop her or those claiming under her from asserting her rights in the tract,—especially when the Code allows a married woman to pass her title only by a deed joined in by her husband and acknowledged by both. *McNeeley v. South Penn Oil Co. (W. Va.)* 562

4. Estoppel to plead the statutory bar to an action for personal injuries arises where, pending negotiations for settlement, defendant gave assurance that the bar would not be pleaded, and plaintiff, relying thereon, neglected to bring suit until the statutory period had elapsed, but brought it as soon as it became apparent that the negotiations would be ineffectual. *Holman v. Omaha & C. B. Ry. & Bridge Co. (Iowa)* 395

EVICITION.

As Bar of Warranty of Title, see COVENANT, 4.

EVIDENCE.

Judicial notice.

1. Courts will take judicial notice of the general business affairs of life, and of the manner in which ordinary railroad business is conducted, and of the everyday practical operation of railroads. *Cleveland, C. C. & St. L. R. Co. v. Jenkins (Ill.)* 922

2. The possibility of a landslide is not such a fact as the court can take judicial notice of, or resort to appropriate books for reference to enable it to declare the fact as conclusive to the jury. *Scott v. Astoria & C. River R. Co. (Or.)* 543

3. Courts may take judicial notice of neighboring proprietors. *Huber v. Merkel (Wis.)* 589

Presumptions and burden of proof.

4. A testator is presumed to have de-

stroyed a will *animo revocandi*, where it is shown to have been made and left in his custody and after his death it cannot be found; but this presumption may be overcome by evidence, circumstantial or otherwise, to the contrary. *Williams v. Miles* (Neb.) 383

5. Delivery of an insurance policy to the insured by the insurer is *prima facie* evidence of the payment of the cash consideration recited in the instrument. *Union L. Ins. Co. v. Parker* (Neb.) 390

6. One seeking, after a lapse of several years, to set aside a settlement under a transaction by which his ancestor, in making a division of his property, deeded land belonging to complainant to a third person under the mistaken belief that it belonged to the ancestor, and at the same time deeded certain property to complainant, who makes no offer to restore the property deeded to him, must, in order to succeed, show that such property was of no value. *Barrier v. Kelly* (Miss.) 421

7. The burden of proof to establish that the appropriation by a magnetic telegraph company of part of the right of way of a railroad company will not materially interfere with the use to which the railroad company is authorized to put its right of way is on the telegraph company. *Cleveland, C. C. & St. L. R. Co. v. Ohio Postal Teleg. Cable Co.* (Ohio) 941

8. From the fact that a street car was not stopped upon the happening of an accident within the space within which it was possible to stop it, there arises an inference that the motorman was not as prompt or as energetic as it was possible for a motorman to be, and this inference overcomes the statement of witnesses that the motorman did all that was possible to stop the car. *Crisman v. Shreveport Belt Ry. Co.* (La.) 747

9. Where a peaceable passenger on a street car is unlawfully assaulted and injured by the conductor, the burden is on the carrier to show that there was no negligence on its part, and that the injury was the result of unavoidable accident. *Kohner v. Capitol Traction Co.* (D. C. App.) 875

Documentary evidence.

See also *infra*, 23: TRIAL, 3-5: WITNESSES, 1, 2.

10. Writing otherwise irrelevant and not admitted to be genuine may be admitted in evidence for comparison with disputed writings in the case, if they have been found to be genuine by the presiding judge upon clear and undoubted evidence. *University of Illinois v. Spalding* (N. H.) 817

11. Genuine signatures are not inadmissible. *L. R. A.*

sible in a case, for comparison with disputed ones, because made subsequent to the making of the latter, if made before the controversy has arisen, or under such circumstances as to negative all idea that they were made for the purpose of being used as evidence in favor of the one making them. *Ibid.*

12. For the purpose of determining the authorship of a disputed writing, specimens of writing which a person suspected of being the author was requested to make, by a prosecuting attorney before he was in custody or any formal charge had been made against him, are admissible in connection with the writing, although there was a strong suspicion against him, and, because of the publicity of the case, refusal to comply with the request would have subjected him to criticism. *People v. Molineux* (N. Y.) 193

13. Under a statute permitting comparison of a disputed writing to be made with any writing proved to the satisfaction of the court to be genuine, letters, to be admissible in evidence for purposes of such comparison in a criminal case, must be proved to be genuine beyond a reasonable doubt. *Ibid.*

14. That the prosecuting attorney suspects a witness before a coroner's jury of the commission of the crime under investigation will not give him the status of an accused person with reference to the use of his testimony at a subsequent trial of him for commission of the crime. *Ibid.*

15. Testimony at the coroner's inquest, of one subsequently accused of murdering the one the cause of whose death the coroner is investigating, is not inadmissible upon his trial for the murder because he was not advised of his rights when it was given, if at that time he was not under arrest, or formally accused of the crime. *Ibid.*

Parol evidence concerning writings.

See also *infra*, 34.

16. Parol evidence is admissible to show the relation which the promisee in a non-negotiable note and another person, who have put their signatures on the back in such a manner as would make them first and second indorsers, respectively, if the note were negotiable, bear to one who asserts a liability against them on such note, since the parties so signing are not deemed to have thereby made a complete and specific contract, analogous to the contract of commercial indorsement, making them liable as guarantors in the order of their signatures. *Young v. Sehon* (W. Va.) 499

Opinion evidence.

17. A civil engineer testifying as an expert may refer to standard works upon the

subject of civil engineering as corroborating his opinion. *Scott v. Astoria & C. River R. Co. (Or.)* 543

18. A civil engineer may give in evidence his opinion respecting the proper slope of an embankment which may affect the safety of a railroad track, although he has no acquaintance with railroad building, if he has knowledge of the subject derived from study of works of civil engineering, and from practical experience in the construction of roads, ditches, and canals. *Ibid.*

19. Comparison of handwriting to determine the authorship of a disputed writing is not limited to cases where the disputed writing is the subject-matter of the issue to be tried, but may be made in case of a disputed address upon a poison package by means of which murder was committed for the commission of which the alleged writer is on trial. *People v. Molineux (N. Y.)* 193

Declarations.

See also *infra*, 35.

20. Although the contents of a lost will cannot be proved solely by the declarations of the testator, such declarations are admissible to prove the existence of the will. *Williams v. Miles (Neb.)* 383

21. The declarations of a testator may be shown to rebut the presumption that a will shown to have been made and left in his custody, but which cannot be found upon his death, was destroyed by him *animo revocandi*. *Ibid.*

22. Upon trial of one accused of murder by poison evidence that a third person, also killed by poison, whose killing is sought to be proved as evidence against accused, informed his physician that he had received a box of powder through the mail, and taken part of the contents, is incompetent. *People v. Molineux (N. Y.)* 193

Relevancy and materiality.

23. Letters given by railroad companies to discharged employees are not admissible to establish a custom of another road to give such letters, unless it is in some way connected with the letters given, or knows and approves of their issuance. *Cleveland, C. C. & St. L. R. Co. v. Jenkins (Ill.)* 922

24. Evidence of the financial standing of certain of the defendants in an action for libel is competent to go to the jury to show the standing and influence of the defendants in the community and the importance which the people of the community would naturally attach to their utterances. *Mauk v. Brundage (Ohio)* 477

25. In an action for libel by a physician against a board of health, testimony having been given for the defendants that a physician having due regard to the health and 62 L. K. A.

life of his patient should not attend an obstetrical case while attending a case of diphtheria, unless imperative necessity demands it, the plaintiff should be allowed to show in rebuttal, by other testimony, that a physician might, with due regard to the health and life of an obstetrical patient, treat her while attending a case of diphtheria, by properly disinfecting himself, and that such practice is eminently proper. *Ibid.*

26. Expert testimony to show that death might result to a woman in childbirth from blood poisoning by carelessness on the part of a physician who had shortly before been attending other patients affected by blood poison and other contagious diseases is admissible in an action by such physician for libel because of charges made by a board of health against him of carelessness in the treatment of obstetrical cases, although there was no testimony tending to show that plaintiff had treated such cases of blood poison or had communicated such disease to his patients, where the defense is not justification, but that defendants had reason to believe, and did believe, the charges to be true, since the defendants were entitled to prove that they believed the charges to be true, and that, if that belief had been well founded, the serious consequences charged would have been the natural result; at least where the statute provides that in every case the defendant may prove any mitigating circumstances to reduce the amount of damages. *Ibid.*

27. The exception to the rule that evidence of one crime is not admissible to prove another, which permits such proof in case of a common plan or scheme, will not permit the admission, upon a trial for murder by poison, of evidence of the commission of another similar crime, where one occurred several weeks later than the other, and one was induced by jealousy caused by interference in a love affair, and the other by hatred resulting from quarrels over the management of an athletic club; and it is immaterial that at different times accused was carrying on correspondence under the names of those against whom the murders were planned, where the correspondence under neither name had any reference to the other person, and the only similarity was in the correspondence and the results obtained, with nothing to show that the result in one case had any connection with the other. *People v. Molineux (N. Y.)* 193

28. The exception permitting evidence of other crimes to prove the identity of one on trial for murder does not justify proof of the commission of another murder by similar means, whose perpetrator is not shown, merely because accused had the requisite

knowledge and opportunity to concoct the poison with which both crimes were committed, which is a rare one, where he is not the only person who possessed such knowledge and opportunity. *Ibid.*

29. Evidence of the commission of another similar crime is not admissible against one accused of murder, as tending to establish the identity of accused, merely because he had carried on a correspondence in the name of both victims, which was similar in subject-matter and results, but which was not connected with either of the murders, and the series of letters in one set of correspondence contains no reference to, and throws no light upon, the matters referred to in the other. *Ibid.*

30. Proof of intent to commit a murder by poison, which conclusively appears from the attending circumstances, cannot be aided by evidence of another murder committed by similar means, but for a different cause. *Ibid.*

31. Upon trial of an indictment for murder by poison, where there is no doubt as to the cause of death, and the circumstances show transparent criminality, evidence of the commission of another murder by poison is not admissible to negative mistake or accident. *Ibid.*

32. Evidence of the killing of a third person is not admissible upon trial of an indictment for murder which was induced by hatred engendered by quarrels of which the third person had no knowledge, where the motive for the other killing was jealousy caused by intervention in a love affair. *Ibid.*

33. Proof of the killing of a third person is not admissible on a trial for murder to show motive, upon the ground that accused had forged the name of both decedents to letters, where there is nothing in either set which sheds any light upon the question of motive for the other crime. *Ibid.*

Weight and sufficiency.

Of Expert Evidence, Instruction as to, see *TRIAL*, 16.

34. Parol evidence to show that a former will was revoked by implication by reason of a subsequent will, which cannot be found, must be clear, unequivocal, and convincing. *Williams v. Miles* (Neb.) 383

35. Evidence as to declarations of a testator in a contest over his will should be scrutinized carefully and weighed cautiously. *Ibid.*

36. Proof of isolated instances is not sufficient to establish a usage or custom. *Cleveland, C. C. & St. L. R. Co. v. Jenkins* (Ill.) 922

37. Failure to give the statutory signals 62 *L. R. A.*

upon approaching a crossing may be found from testimony that the persons who were in a position to have heard them had they been given did not hear them, although there is affirmative testimony that they were given. *Daniels v. New York, N. H. & H. R. Co.* (Mass.) 751

NOTES AND BRIEFS.

Judicial notice of statutes of other state. 179

Refusal to take judicial notice that manufacture of alum baking powders is a lawful business. 164

Presumption that intentions of parties to contract were honest; in absence of proof of corrupt intent. 365

Presumption that person will perform his duty. 476

Presumption of injury because of interference with intangible rights. 584

Presumption of correctness of judgment: burden of showing damages because of negligence of attorney in conducting suit; burden of proving that negligence in conducting suit, causing damage, was not that of attorney. 620

Presumption that tuberculosis is a contagious disease. 891

Parol; to vary terms of written guaranty. 955

Parol; to explain terms in contract. 799

Of declarations of party to conspiracy. 934

Comparison of handwriting:— (I.) Introductory; (II.) the English general rules: (a) before the statute of 1854: (1) at common law; (2) in the ecclesiastical courts; (b) after the statute of 1854; (III.) the various American general rules; (IV.) comparison of ancient writings; (V.) comparison with writings already in evidence, or in the record: (a) writings already in evidence; (b) writings otherwise in the record; (VI.) comparison with writings made in court; (VII.) comparison with extraneous writings: (a) writings proved to be genuine; (b) writings admitted to be genuine; (c) writings whose genuineness the other party is estopped to deny; (VIII.) comparison by the jury and by the court; (IX.) comparison by witnesses; (X.) comparison to show copying of signature (*The Howland Will Case*); (XI.) construction and validity of the statutes; (XII.) weight and relevancy of the evidence: (a) weight; (b) relevancy; (XIII.) comparison of lost instruments. 817

Of books on civil engineering; of cost of constructing railroad, in action against; presumption as to improper location of road-bed and ignorance thereof by person in-

jured; testimony of expert witness as to rules adopted by scientific engineering for construction of slopes; showing rainfall in given locality by record of government observations. 544

Of other crimes in criminal case:—(I.) General rule; (II.) to show motive: (a) in general: (1) common scheme, plan, or system; (2) in particular instances: (a) murder; (b) assault with intent to murder; (c) arson; (d) other crimes; (b) concealment; resisting arrest; escape; (III.) to show intent: (a) in general: (1) when there is other evidence or presumption of intent; (2) when intent is immaterial; (b) common scheme, plan, or system: (1) in general; (2) false pretenses; fraud; (3) forgery; (4) counterfeiting; (5) embezzlement; (c) in particular instances: (1) murder; (2) assault with intent to murder; (3) assault with intent to commit rape; (4) abortion and attempt to procure; (5) slander and libel; (6) violation of liquor law; (7) larceny; (8) burglary and attempts to commit; (9) arson; (10) killing and injuring animals; (11) sending obscene, threatening, etc., letters; (12) false pretenses; fraud: (a) in general; (b) acquirement of money; (c) acquirement of property; (d) other instances; (13) forgery: (a) in general; (b) making; (c) uttering; (d) making and uttering; (14) counterfeiting: (a) in general; (b) making; (c) uttering; (d) possession with intent to utter; (15) embezzlement; (16) receiving stolen property; (17) miscellaneous crimes: (IV.) to show malice; (V.) to prove defendant's connection with act charged; (a) in general: (1) assault and murder; (2) defiling young women; (3) larceny; (4) burglary; (5) robbery; (6) arson; (7) forgery; (8) violation of liquor law; (b) common scheme, plan, or system; (VI.) to rebut special defenses: (a) in general; (b) insanity; (c) good character; (d) accident or mistake; (VII.) when other crime is part of the *res gestæ*: (a) murder; (b) assault with intent to murder; (c) other assaults; (d) rape; (e) larceny; (f) receiving stolen property; (g) burglary; (h) robbery; (i) forgery; (j) arson; (k) other crimes: (VIII.) relevancy: (a) murder; (b) rape; (c) larceny; (d) false pretenses; (e) burglary; (f) forgery; (g) robbery; (h) arson; (i) violation of liquor law; (j) treason; (k) miscellaneous; (IX.) sexual offenses: (a) general rule; previous acts; (b) subsequent acts; (c) acts with other persons; (X.) committed in resisting arrest, or attempting to escape after commission of crime charged; (XI.) effect of indictment for, conviction or acquittal of, evidential crime: (a) indictment; (b) con-

62 L. R. A.

viction; (c) acquittal; (XII.) election of offense relied on; (XIII.) right to question defendant concerning, on cross-examination; (XIV.) when not prejudicial; (XV.) statement or insinuation by prosecution of other crime; (XVI.) necessity and correctness of instruction to jury: (a) general rule: (1) necessity; (2) correctness; (b) effect of instruction to disregard; (XVII.) miscellaneous; (XVIII.) recapitulation. 194

Of other crime in criminal case; exceptions to rule; of comparisons of handwritings; testimony of experts as to. 196

Exclusion of evidence competent for some purpose because incompetent upon other issues; to controvert denial of ill will. 602

EXAMINATION.

Of Insured after Injury, see INSURANCE, 14-16; MASTER AND SERVANT, 8, 9.

EXCEPTIONS.

Sufficiency of, see APPEAL AND ERROR, 7.

EXECUTORS AND ADMINISTRATORS.

The interest, costs, and disbursements accruing in an action to determine the right to the proceeds of a life insurance policy, payable to the personal representative of the insured, are not chargeable against the executor personally, but should be paid out of the estate, in the absence of any misconduct or bad faith on his part in defending the action, although his defense proves unavailing. *Opitz v. Karel* (Wis.) 982

EXEMPTION.

Extraterritorial Force of Law for, see CONFLICT OF LAWS, 3.

EXPERTS.

Evidence by, see EVIDENCE, 17-19.

EXPLOSION.

Fall of Insured Building Caused by, see INSURANCE, 20.

EXTRALATERAL RIGHTS.

Of Owner of Lode Mining Claim, see MINES, 1.

FALSE IMPRISONMENT.

Damages Recoverable for, see DAMAGES, 3, 4.

1. The possession by an officer of a warrant will not justify an arrest of the accused by the police department of another town under direction by telephone to it by the officer holding the warrant. *McCullough v. Greenfield* (Mich.) 906

2. The liability of an officer for illegal arrest is not waived by pleading guilty of the offense for which the arrest was made.

FAMILY.

NOTES AND BRIEFS.

Family; what constitutes. 190

FEDERAL QUESTION.

See APPEAL AND ERROR, 1, 2.

FENCES.

Forbidding the erection of a boundary fence exceeding 5 feet in height for the sole purpose of annoying adjoining property owners does not deprive the landowner of any property right. *Horan v. Byrnes* (N. H.) 602

FIANCE.

Insurable Interest in Life of, see INSURANCE, 2.

FILIATION.

Merger of Rights under Order of, in Judgment, see MERGER.

FINDINGS.

Review of, see APPEAL AND ERROR, 11, 12.

FIXTURES.

NOTES AND BRIEFS.

What are trade fixtures. 369

FOOD.

Ordinance for Inspection of Milk, see MUNICIPAL CORPORATIONS.

NOTES AND BRIEFS.

Food; constitutionality of statute prohibiting manufacture of baking powder containing alum. 164

Imposing fee on milk venders to pay charges of inspection; ordinance providing for inspection as exercise of police power; extraterritorial effect of. 771

FOREIGN CORPORATIONS.

Garnishment of, see GARNISHMENT, 9, 10.

FORFEITURE.

Construing Contracts to Avoid, see CONTRACTS, 4.

Validity of Enterprise Depending on, see CONTRACTS, 11; FRAUD.

Of Insurance Policy, see INSURANCE, 11.

Of Oil or Gas Lease, see MINES, 3, 4.

FORGERY.

NOTES AND BRIEFS.

Forgery; evidence of other crimes in prosecution for. 193

FRAUD.

An enterprise dependent for success 62 L. R. A.

upon forfeitures or lapses, even many forfeitures or lapses, is not, for this reason alone, inherently fraudulent. *Equitable Loan & Security Co. v. Waring* (Ga.) 93

F. O. B

NOTES AND BRIEFS.

See also VENDOR AND PURCHASER.

Meaning of. 796

GAMBLING.

See GAMING.

GAMING.

1. A tent occupied by a divorced man and his child as their only place of residence is a private residence occupied by a family, within the meaning of a statute punishing gaming, except when it occurs at such residence. *Hipp v. State* (Tex.) 973

2. That a game was played outside of a residence does not take it out of an exception in a statute punishing gaming "at any place, except a private residence occupied by a family," if it occurred within an inclosure containing the residence, and only a few feet from it. *Ibid.*

GARNISHMENT.

1. Garnishment is in the nature of a proceeding *in rem*, although there is no actual manual seizure of property by the executory officer, and jurisdiction of the debt or property sought to be thereby subjected must be obtained, else the court cannot pronounce judgment of condemnation against it. *Pennsylvania R. Co. v. Rogers* (W. Va.) 178

2. A garnishee, in the eye of the law, is a mere stakeholder, a custodian of property or estate attached in his hands, and has no right to do any voluntary act to the prejudice of either the plaintiff or defendant in the action. *Ibid.*

3. Omission to show, in the return of service of an order of attachment upon a foreign corporation as garnishee, that the agent upon whom the service was made resides in the county in which he was served, renders the service invalid, and, in such case, the court obtains no jurisdiction of the *res* for want of service on the garnishee. *Ibid.*

4. A garnishee cannot give jurisdiction of a debt due from him by his voluntary appearance, when not previously served with the order of attachment, nor when an attempted service is invalid. *Ibid.*

5. An assignee of the principal debtor may appear in a proceeding to reach a fund by trustee process, and raise the objection

that the fund is not subject to such process. *Wilde v. Mahaney* (Mass.) 813

6. Where no fund is held under the writ in a proceeding to reach a fund by trustee process, the trustee cannot be directed to make any payment to one claiming as assignee of the principal debtor. *Ibid.*

What subject to.

7. A claim for unliquidated damages arising out of contract is not the subject of trustee process, although a verdict has been rendered for it in favor of the principal debtor against the trustee, in which judgment has not been entered under a statute authorizing process only when the trustee has in his possession "goods, effects, or credits" of the principal debtor, and contemplating that the whole matter shall be disposed of on the answer of the trustee. *Ibid.*

Against whom.

8. A nonresident, temporarily in the state, may be summoned and compelled to answer as garnishee; but if, upon his answer, it be established that he is a nonresident, he cannot be subjected to further proceedings in the cause, for want of jurisdiction, unless, when garnished, he have in the state property of the defendant in his possession, or be bound to pay the defendant money or deliver to him property within the state. *Pennsylvania R. Co. v. Rogers* (W. Va.) 178

9. Foreign corporations and nonresident individuals stand upon the same footing in respect to garnishment, except that the former are subject to garnishment when doing business in the state in which the garnishment issues, in such sense and to such extent as to have become domiciled therein. *Ibid.*

10. A debt due from a foreign railroad corporation operating no railroad in this state, and doing no business here other than maintaining, jointly with other railroads, an agency relating to through freight service, and for the soliciting of freight for such company to be handled on its lines without the state, is beyond the territorial jurisdiction of the courts of this state, and not subject to garnishment here. *Ibid.*

NOTES AND BRIEFS.

Garnishment; by nonresident railroad company; to obtain wages of nonresident employees; statutes of state where contract of employment made as part thereof; application of such statutes in other state; sufficiency of jurisdiction of garnishee; prohibition to restrain garnishment proceedings; assignment of claims to nonresident for purpose of avoiding exemption laws of other state; sufficiency of service on agent of railroad company; right of garnishee paying 62 L. R. A.

judgment to plead such judgment in bar of action for same debt brought by principal defendant. 179

Garnishee not compelled to pay second time. 560

Of unliquidated claims. 813

GAS.

Gas Lease, see MINES, 2-4, NOTES AND BRIEFS; NEGLIGENCE, 1.

Liability of Company for Injury to Employee, see MASTER AND SERVANT, 7.

GENUINENESS.

Of Handwriting, Comparison to Determine, see EVIDENCE, 10-13, 19; TRIAL, 3-5.

GIFT.

Of Insurance Policy, see INSURANCE, 13.

NOTES AND BRIEFS.

Gift; *inter vivos*; by delivery without writing of insurance policy. 983

GUARANTY.

Of Note, see BILLS AND NOTES

1. The contract of a guarantor of a negotiable note is a guaranty of the maker's solvency, and, unless there is a different intention expressed in the contract, he is entitled to reasonable notice of the default of the maker. *Lemert v. Guthrie* (Neb.) 954

2. The failure of the holder of a negotiable note to notify the guarantor of the default of the makers within a reasonable time after default does not absolutely discharge the guarantor, but only to the extent that he is damaged by the delay. *Ibid.*

3. Notice of nonpayment by the makers of a negotiable note is not waived by guarantors of the note by signing a guaranty stamped on the back of the note which contains a waiver of demand and notice of protest on the note when due. *Ibid.*

4. The guarantors of a negotiable note are released from liability where, upon failure of the makers, while solvent, to pay the note at maturity, no notice is given the guarantors and demand is not made upon them until eighteen months after maturity, when the makers have become insolvent. *Ibid.*

NOTES AND BRIEFS.

Guaranty; of payment of note; effect of waiving demand and notice; effect of neglect of holder to sue maker on liability of guarantor; necessity of consideration for guaranty; necessity of notice of default; effect of insolvency of maker. 955

HABEAS CORPUS.

Who Entitled to Appeal in, see **APPEAL AND ERROR**, 3.

Conclusiveness of Judgment in, see **JUDGMENT**, 3.

1. An error is jurisdictional, strictly so called, remediable by writ of habeas corpus, within the rule that such errors only can be reached by such writ, where an examining magistrate acts upon evidence, and such evidence, looking at it from the most favorable standpoint, will not reasonably permit of such action. *State ex rel. Durner v. Huegin* (Wis.) 700

2. A habeas corpus suit does not reach beyond the commitment to the proceedings leading up thereto, where the person in custody is detained by virtue of the final judgment or order of a court having jurisdiction of the subject-matter and the person, but such is not the case where the person in custody is being held on a commitment for trial. *Ibid.*

3. Upon proceedings before a committing magistrate being properly brought to the attention of the court for review in habeas corpus proceedings, the court has jurisdiction to examine into the sufficiency of the complaint to charge a criminal offense, and of the evidence as regards whether it will admit of a reasonable inference of the existence of the ultimate facts necessary to hold the person charged for trial, i. e., that the offense was committed and that there is probable cause for believing the accused to be guilty thereof. *Ibid.*

4. Regardless of what a habeas corpus proceedings should be called under the Code, which divides all judicial proceedings into actions and special proceedings, it is to all intents and purposes a civil suit—a proceeding in the nature of a civil action—in which the party seeking to establish his right to personal liberty is “plaintiff” within the meaning of Wis. Rev. Stat. 1898, § 2601. and the person charged with the wrong is an adverse party, to all intents and purposes a defendant, regardless of the names by which such persons are commonly known in such a proceeding. *Ibid.*

5. While an attorney cannot appear on the side of the state in a habeas corpus suit at public expense, he may appear by request of the proper officer at private expense, to represent the interests of the state, and he may appear regardless of such consent to represent the person charged with the wrong. *Ibid.*

6. The statutory and judicial policy which precludes a private attorney from appearing for the state in a criminal case in a trial or appellate court, except by a 62 L. R. A.

special appointment for that purpose, does not apply to habeas corpus proceedings. *Ibid.*

NOTES AND BRIEFS.

Habeas corpus; right of sheriff when made party to be represented by counsel of his own selection; right of court to pass upon sufficiency of complaint in original suit, where it has already been passed upon by a court of competent jurisdiction; right to review evidence taken before committing magistrate. 716

HANDCUFFS.

Officer's Liability for Putting on Prisoner, see **DAMAGES**, 4.

HANDWRITING.

Comparison of, see **EVIDENCE**, 10-13, 19.

NOTES AND BRIEFS.

Expert testimony as to disputed handwritings on trial for homicide. 200
Evidence of comparison of. 817

HEALTH.

Measure of Damages for Libel by Board of, see **DAMAGES**, 6.

Evidence in Libel Suit against Board of, see **EVIDENCE**, 24-26.

Libel by Board of, see **LIBEL AND SLANDER**.

HEIRS.

Competency as Witnesses, see **WITNESSES**, 4.

HIGHWAYS.

Improvement of, see **PUBLIC IMPROVEMENTS**.

1. A manufacturer who uses the sidewalk in front of his building to store stone slabs which are used in his business is liable for injuries thereby occasioned to any person lawfully using the walk, and who is himself without fault. *Rachmel v. Clark* (Pa.) 959

2. If a space inside the building line is permitted by the abutting owner to remain open, and to be used as part of the sidewalk, he must exercise due care not to place there dangerous obstructions which may result in injuries to persons lawfully on the walk, including children who may be attracted to, and enter upon, the premises. *Ibid.*

NOTES AND BRIEFS.

Highways; right of abutting owners to reasonable use of sidewalks in conducting business. 960

HOMESTEAD.**NOTES AND BRIEFS.**

Enforcement of mechanic's lien against

building only, erected upon homestead lands. 375

HOMICIDE.

Evidence on Trial for, see EVIDENCE, 15, 22, 27-33.

NOTES AND BRIEFS.

Homicide; evidence of other crimes on trial for; of comparison of disputed handwriting with others conceded to be genuine. 196

Evidence of other crimes in prosecution for murder. 193

HUSBAND AND WIFE.

Adverse Possession against Wife, see ADVERSE POSSESSION.

Contract with Carrier by Husband Purchasing Ticket for Wife, see CARRIERS, 5.

Estoppel of Married Woman, see ESTOPPEL, 3.

When Limitation Runs against Wife's Heirs, see LIMITATION OF ACTIONS, 3.

Competency of Wife as Witness against Husband, see WITNESSES, 5.

Property rights; estates by entirety.

1. Estates by entirety were abolished by W. Va. Code 1868, chap. 66, § 3, giving a wife power to take and hold to her separate use land, its rents and profits, as if unmarried, and denying power in the husband to dispose of the land, or its rents and profits, and chap. 71, § 18, providing that, if an estate of inheritance be conveyed to husband and wife, one moiety thereof shall, on the death of either, descend to his or her heirs, subject to debts, curtesy, or dower. *McNeeley v. South Penn Oil Co* (W. Va.) 562

2. A joint tenancy, and not an estate by entirety, is created by a conveyance to a husband and his wife, made after the passage of W. Va. Code 1868, chap. 71, § 18, destroying the right of survivorship in case of a conveyance of an estate of inheritance to husband and wife, and chap. 66, § 3, giving a wife power to take and hold to her separate use land, and its rents and profits, as if unmarried, and denying power in the husband to dispose of the land or its rents and profits. *Ibid.*

Necessaries.

3. Necessary medical attendance furnished a husband temporarily incapacitated by illness, who is actually a part of the family, living with it as such, comes fairly within the rule of a statute making the wife liable, as surety, for necessities furnished the family. *Leake v. Lucas* (Neb.) 190

4. The requirement that, in order to sustain an action against a wife for necessities furnished the family, a judgment must first be obtained against the husband, execution issued and returned unsatisfied, which is made by Neb. Comp. Stat. chap. 53, § 1, is satisfied by obtaining a judgment against him in the state where the family resided at the time the necessities were furnished, and issuing execution, which was returned unsatisfied, where it is impossible to obtain a judgment against him in Nebraska, to which state he and his family removed shortly after the necessities were furnished. *Ibid.*

Divorce; alimony.

5. "Cruel treatment," within the meaning of a statute providing that such treatment shall be a ground for divorce, is the wilful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justifies an apprehension of danger to life, limb, or health. *Ring v. Ring* (Ga.) 878

6. The habitual and intemperate use of morphine, unaccompanied by any conduct reasonably justifying an apprehension of danger to life, limb, or health, is not such cruel treatment as the law recognizes as a ground for divorce. *Ibid.*

7. The intention to wound is a necessary element of the cruel treatment for which a divorce is allowed. *Ibid.*

8. One cannot relieve himself from the payment of alimony according to the provisions of a divorce decree by the obligations imposed upon him by a second marriage. *State ex rel. Brown v. Brown* (Wash.) 974

NOTES AND BRIEFS.

Right of husband purchasing railway ticket for wife to sue for breach of contract; service and labor of wife as property of husband; as part of his estate after death; right of administrator of husband to bring action for injury to wife. 607

Tenancy by entirety; effect of married woman's acts upon; alienation by husband of wife's freehold during coverture; right of wife or heirs to enter notwithstanding; executory contract by husband to convey wife's interests in land; when possession of, becomes adverse; when remainderman bound to enter for forfeiture; when limitations begin to run against wife's heirs; estoppel of married woman by silence. 564

Mechanic's lien on building erected by husband on wife's land. 374

Statutory liability of wife for necessities furnished family; enforcement of, in other state; medical attendance of husband as "necessaries."

Intoxication as ground for divorce; what is cruel treatment justifying divorce; use of morphine as; false charges of improper conduct. 878

Effect of second marriage upon obligation to pay alimony:—(I.) scope of note; (II.) remarriage of husband; (III.) remarriage of wife. 975

Application for reduction of alimony; where changed circumstances relied upon were brought about by applicant's own acts; increase of, because of increased expenses; effect of second marriage on obligation to pay. 976

As witnesses for or against each other; on indictments for crime against wife; commission of incest by husband as crime against wife. 172

IDENTITY.

Evidence to Prove, see EVIDENCE, 28, 29.

INCEST.

Wife's Competency to Testify against Husband Committing, see WITNESSES, 5.

INDECENT PROPOSAL.

Merely soliciting a woman to sexual intercourse gives her no right of action. Reed v. Maley (Ky.) 900

INDICTMENT, INFORMATION, AND COMPLAINT.

Warrant of Commitment, see CRIMINAL LAW, 3-8.

1. A complaint stating that three persons, naming them, concerted together, using substantially the language of the statute, for the purpose of maliciously injuring another in his business, describes the conspiracy made criminal by Wis. Rev. Stat. 1898, § 4460a. State ex rel. Durner v. Huegin (Wis.) 700

2. When a complaint charges the offense of conspiracy in the language of the statute, and a conspiracy to carry out the particular purpose of such conspiracy in a particular way is also charged, accompanied by a statement of overt acts pursuant to the conspiracy, the latter part may be rejected as surplusage in construing the complaint, but the two charges of conspiracy may be read together as charging a conspiracy of the nature indicated by the particular allegations as regards the method adopted for effecting the criminal purpose. Ibid.

INFANTS.

Question for Jury as to Negligence of, see TRIAL, 12.

In case an infant avoids a contract 62 L. R. A.

by which he has purchased property from another infant, the purchase price of which has been spent by the latter, he cannot maintain trover as for a conversion of the property, since the defendant has at most been guilty only of a breach of an implied contract to return the purchase money, and this the law permits him, because of his infancy, to avoid. Drude v. Curtis (Mass.) 755

NOTES AND BRIEFS.

Infants; contracts of, voidable, not void; trover by, to recover price paid for property bought of other infant upon disaffirming contract; where infant vendor has spent the money. 755

As trespasser. 960

INFECTED ANIMALS.

See ANIMALS, 4-8.

INFRINGEMENT.

Of Copyright, Injunction against, see INJUNCTION, 2.

INJUNCTION.

From Federal Court against Use of Corporate Name, see COURTS, 3.

1. Persons connected with a branch of a corporation which has built up a large manufacturing interest with goods of superior excellence, known in the market by its corporate name, who, upon the financial embarrassment of the corporation, purchase the goods in the branch and organize a corporation to continue the business, will, at the suit of purchasers of the name and good will of the corporation, be enjoined from using a name so similar to the old one that customers are misled, where it is not descriptive of the new concern, and could have been assumed for no other purpose than to profit by the good will of the old corporation. Peck Bros. & Co. v. Peck Bros. Co. (C. C. App. 7th C.) 81

2. A preliminary injunction will not be awarded against the infringement of a copyright where the evidence raises a doubt whether complainant has not been guilty of similar piracy to that charged against defendant. Edward Thompson Co. v. American Law Book Co. (C. C. App. 2d C.) 607

NOTES AND BRIEFS.

Injunction; to enjoin conspiracy to injure business; to restrain continuance of combination to maintain prices. 632

INQUEST.

Of Coroner, Admissibility of Testimony at, in Evidence, see EVIDENCE, 14, 15.

Failure to Claim Privilege while Testifying at, see WITNESSES, 2.

INSOLVENCY.

Of Bank, see **BANKS**, 4, 5.

INSPECTION.

Of Milk, Ordinance for, see **MUNICIPAL CORPORATIONS**.

INSTRUCTIONS.

Review of, see **APPEAL AND ERROR**, 13, 14.

See also **TRIAL**, 15, 16.

INSURABLE INTEREST.

See **INSURANCE**, 2.

INSURANCE.

Law Governing Adjustment of Claim, see **CONFLICT OF LAWS**, 1, 2.

Presumption of Payment of Premium, see **EVIDENCE**, 5.

Costs, etc., against Personal Representative of Insured, see **EXECUTORS AND ADMINISTRATORS**.

Liability of Insurer for Negligence of Medical Adviser, see **MASTER AND SERVANT**, 8, 9.

Sale of Fire Insurance Expiration Register, see **SALE**, 1.

1. An insurer against employer's liability, whose contract gives it the right to defend against suits by employees against the assured, and which, after a judgment in excess of the insurance has been obtained against the assured, agrees to perfect an appeal, is not liable for negligently failing to do so, whereby the judgment is affirmed, in the absence of anything to show that the judgment was erroneous, and that plaintiff could not have succeeded on a second trial. *Getchell & M. Lumber & Mfg. Co. v. Employer's Liability Assur. Corp.* (Iowa) 617

Insurable interest.

2. A woman has an insurable interest in the life of a man whom she is engaged to marry. *Opitz v. Karel* (Wis.) 982

Paid-up policy.

3. A proviso in a statute governing the adjustment of claims upon life insurance policies forfeited for nonpayment of premiums, that "in no instance shall a policy be forfeited . . . after the payment of three annual premiums thereon;" but in all such instances "the holder of such policy shall be entitled to paid-up insurance" the value of which shall be equal to that provided in another section of the statute,—does not give a right to extend temporary insurance, although the section referred to provides for the ascertainment of a premium which may be used to obtain temporary insurance for the full amount of the policy. *Nichols v. Mutual Life Ins. Co.* (Mo.) 657

62 L. R. A.

4. A provision for paid-up insurance in a statute governing the adjustment of claims upon policies forfeited for nonpayment of premium will not be construed by the court to mean paid-up temporary insurance for the full amount of the policy. *Ibid.*

5. A paid-up policy calling for unconditional payment for a certain sum to the executors, administrators, or assigns of the insured at his death, with reservation to the insurer of the right to pay the money to any person who has incurred expense on behalf of the insured, constitutes "insurance in force upon his life," within the meaning of an application calling for information upon that point. *Metropolitan L. Ins. Co. v. Dimick* (N. J.) 774

Application.

6. In case of a variance between the original application for a policy of life insurance, which is made a part of the contract, and a copy of the application appended to the policy, but not referred to in the body thereof, the original application must control. *Ibid.*

7. A plain limitation upon the authority of the medical examiner and solicitor of a life insurance company, of which an applicant is bound to take notice and by which he is bound, is made by stipulations in the application that the statements contained in it and those made to the medical examiner are full and true and correctly recorded, and that no information not therein contained, received, or acquired at any time by any person shall be binding on the company, or shall modify the declarations and warranties therein contained, that the persons writing the answers and statements shall be deemed the agents of the insured and not of the company, that the company is not to be deemed responsible for the preparation of the application or for anything contained therein or omitted therefrom, and that any false answer or concealment of facts shall render the policy null and void, even if the stipulations are inefficacious to make the employees of the company the agents of the insured. *Ibid.*

8. A statement to the medical examiner, signed by an applicant for life insurance, is to be deemed a part of the application referred to in the policy, which made the answers and statements contained in the application a part of the contract and declared them warranties, one part of the application declaring that the answers and statements contained in it, together with those made to the medical examiner and contained in a separate part, should be the basis of the contract and become a part thereof. *Ibid.*

Warranties; conditions.

See also *supra*, 8, 17, 19.

9. An untrue statement concerning a matter of fact that is, or ought to be, within the personal knowledge of an applicant for life insurance, constitutes a breach of warranty, and renders the policy void, where the policy makes the answers and statements contained in the application warranties, and constitutes them a part of the contract. *Ibid.*

10. Untrue answers entered by the solicitor and by the medical examiner of a life insurance company and signed by an applicant for insurance constitute a breach of warranty, and render the policy void, provided the answers are of such a character as by the contract are made warranties, where the application made the statements contained in it warranties, and provided that the company should not be responsible for the preparation of the application, and that any false answer or suppression of facts should render the policy void. *Ibid.*

Forfeiture for nonpayment.

11. Nonpayment of a note for part of the first premium on an insurance policy, made payable to the order of the agent, who reported the premium paid and the policy delivered, does not entitle the company to deny liability on the policy which provided for its suspension during default on any note given for premiums, where the agent's contract entitled him to the whole of the first premium as his commission, and he was charged with the amount thereof and sold the note, and the insured died after its maturity without having paid it, after which the insurer bought it from the agent's indorsee. *Union L. Ins. Co. v. Parker (Neb.)* 390

Assignment.

12. The beneficiary named in a policy of life insurance cannot take advantage of provisions in the policy as to methods of its assignment, which were inserted for the benefit of the insurer. *Opitz v. Karel (Wis.)* 982

13. One who takes a policy of insurance upon his own life, payable to his personal representative, may make a valid gift of the proceeds to another by a delivery of the policy, although the policy itself provides that an assignment of it must be in writing and filed in the office of the insurer, if the insurer does not seek to enforce the provision against the assignee. *Ibid.*

Examination of insured after accident.

14. The law governing the relations of physician and patient does not apply between the insured in an accident policy and the medical adviser of the insurance com-
62 L. R. A.

pany in making an examination of the insured upon the happening of an accident. *Tompkins v. Pacific Mut. L. Ins. Co. (W. Va.)* 489

15. Though the insured in an accident policy giving the insurer a right of examination in case of injury is not bound to submit to such examination, and may refuse at the risk of loss of his indemnity, or of litigation on account of his refusal, he may submit to it without losing his right to exact care and skill in its exercise; and it is no defense to his action that he consented to examination in a particular manner, if he did so in pursuance of a request or demand that it be so made. *Ibid.*

16. Only a right of examination, as to an injured person entitled to a weekly indemnity under an accident insurance policy, is conferred upon the company issuing the policy, by a provision therein that any medical adviser of the company shall be allowed to examine the person or body of the insured in respect to any injury or cause of death in such manner and at such times as he may require. *Ibid.*

Waiver; estoppel.

17. By the common law of the state of New York plaintiff in an action upon a life insurance policy cannot avoid the effect of a warranty contained in the application on the ground that an agent of the company knew the facts and incorrectly entered them in the application, where the instrument itself contains an express limitation upon the powers of the agent and provides that the company shall not be responsible for the preparation of the application or for anything contained therein or omitted therefrom. *Metropolitan L. Ins. Co. v. Dimick (N. J.)* 774

Notice and proof of death.

18. Conditions subsequent in an accident policy, as to notice and proof of death within a certain time, do not, in the absence of express legislation to that effect, apply to the legal representatives of the insured to whom the insurer has agreed to pay the indemnity in the event of death. *Munz v. Standard L. & A. Ins. Co. (Utah)* 485

19. Failure to comply with a requirement for immediate notice to the insurer of the death of one insured against accident, and for proofs of death within two months, does not absolve the insurer from liability on the policy, in case the beneficiary, who resides some distance from the place of the accident, does not learn of it, or of the policy, until more than the required time has elapsed since the accident, if the requirements are complied with within a reasonable time after the facts are ascertained. *Ibid.*

Cause of loss.

20. The fall of a building because of an explosion in a burning building in the vicinity is not within the protection of a policy insuring against direct loss or damage by fire, where the policy also provides that the insurer shall not be liable for loss caused, directly or indirectly, by explosion of any kind. *Hustace v. Phenix Ins. Co. (N. Y.)*

651

NOTES AND BRIEFS.

Insurance; liability under New York standard fire policy for loss caused by explosion; liability where explosion in adjoining building proximate cause of loss; duty of company seeking to limit liability to make terms clear; fall of building by explosion in adjoining building as "direct loss or damage by fire;" effect of provision against liability for loss caused by explosion, where explosion occurs as incident of fire.

651

Stipulation that policy shall be suspended while note given for premium remains due and unpaid; failure to answer request of insured for extension of time on note as waiver of default; power of agent to waive express terms of contract; acknowledgment of receipt of premium as estoppel to contest validity of policy because of nonpayment of premium; sale of note by agent and retention of proceeds; duty of company to return note when insisting on suspension.

390

Gift of policy; how made; effect of clause prohibiting assignment; right of assignor to set up, where insurer does not object.

983

Policy construed most strongly against company.

621

Made in one state upon life of person residing in another; what law governs; right of parties to stipulate as to what law shall govern; effect of statute of state where insured lives to prohibit forfeiture after payment of two premiums; right to temporary insurance for full amount of policy; meaning of "paid-up insurance."

658

Admitting evidence as to what agent or physician knew to overcome positive statements in application; application as part of *res gestæ* in connection with policy.

775

Negligence of medical adviser of company in removing plaster cast from injured foot of one insured against accident.

490

Stipulation requiring immediate notice of death of insured; failure to give, caused by ignorance of death; sufficiency of compliance with provision; question for court whether notice given was "immediate;" right of parties to limit time within which suit may be brought.

485

62 L. R. A.

INTENT.

Evidence of, see EVIDENCE, 30.

INTEREST.

In a suit for a penalty for charging usurious interest, interest should be allowed from the date of filing the petition. *Second Nat. Bank v. Fitzpatrick (Ky.)*

590

NOTES AND BRIEFS.

Interest; conflict of laws as to. 33

INTOXICATING LIQUORS.

Court's Duty to Act on Petition for Submission to Voters of Prohibitory Statute, see COURTS, 1.

An incorporated social club cannot, without a license, dispense liquors to its members in exchange for checks delivered to them upon their payment of special assessments levied to meet the cost of procuring the liquors, under a statute providing that giving away intoxicating liquors, or other shift, or device to evade the provisions of the act, shall be held to be an unlawful sale. *State ex rel. Stevenson v. Law & Order Club (Ill.)*

884

NOTES AND BRIEFS.

Intoxicating liquors; dispensing of, to members of club as sale; dissolution of club because thereof.

886

Evidence of other crimes in prosecution for violation of liquor law.

193

INVESTMENT ASSOCIATION.

Construing Contract of, see CONTRACTS, 7.

Validity of Contract of, see CONTRACTS, 15.

Certificate of, as Lottery, see LOTTERY, 3.

Remedy for Fraudulent Contract by, see RECEIVERS.

An investment association which applies the principle of survivorship to the investments by subscribers, the survivorship depending upon default of the members, instead of death, is not prohibited by law. *Equitable Loan & Security Co. v. Waring (Ga.)*

93

JOINT TENANTS.

Adverse Possession of Land Owned by, see ADVERSE POSSESSION.

Husband and Wife as, see HUSBAND AND WIFE, 2.

Running of Limitation against, see LIMITATION OF ACTIONS, 2, 3.

JUDGMENT.

Merger of Rights under Order in, see MERGER.

1. A bond securing payment of monthly

instalments of alimony is not within the terms of a statute providing that, in cases of actions upon bonds "for the breach of any condition other than the payment of money," or for "any penal sum for the non-performance of any covenant or written agreement," the judgment shall be for the whole amount of the bond, which shall remain as security for future defaults, and the execution shall be for the damages accrued. *Burnside v. Wand* (Mo.) 427

2. A mistake in entry of judgment on a bond securing payment of instalments of alimony, to the effect that the debt shall be discharged upon payment of the damages due, which can be corrected *nunc pro tunc* so as to provide for execution for the amount due and for the judgment to remain as security for further breaches, is not shown by a record indicating that the bond was treated as a penal bond for the payment of money with a condition of defeasance "by which the same became void on the payment of a less sum," that the petition prayed for judgment for the penalty of the bond and for execution for the sum due, and that judgment was ordered for plaintiff. *Ibid.*

3. An order or judgment in a habeas corpus suit is *res judicata* as to the person charged with unlawfully restraining another, of his liberty till reversed in some proper proceeding. *State ex rel. Durner v. Huegin* (Wis.) 700

NOTES AND BRIEFS.

Judgment: form of, on penal bonds; inadvertently satisfied without consideration; correction of entry of satisfaction; within what time correction may be made; right of court to order entry of correct judgment *nunc pro tunc* at subsequent term, where clerk has entered erroneous one. 429

Form of judgment on penal bonds. 427

Presumption of correctness of. 620

Not final until recorded; announcement of court's decision as; power of court over; power to vacate after term; judgment inadvertently signed, void; right to sign other findings and judgment based thereon. 975

JUDICIAL NOTICE.

See EVIDENCE, 1-3.

JURISDICTION.

Of Garnishment Proceeding, see GARNISHMENT.

Of Justice of the Peace, see STATUTES, 2. 3.

JURY.

Right to Trial by, see TRIAL, 1-5.

1. The law providing for special juries 62
L. R. A.

is not rendered unconstitutional by the fact that the jurors are selected by the sheriff or jury commissioner, and not drawn by lot as the regular panel is. *Eckrich v. St. Louis Transit Co.* (Mo.) 911

2. A law providing for a special jury is not made unconstitutional by requiring the fee to be deposited by one applying for it, which puts it out of the reach of a poor man to have a special jury. *Ibid.*

JUSTICE OF THE PEACE.

Prohibition from Circuit Court to, see PROHIBITION.

Regulating Jurisdiction of, by Classifying Cities, see STATUTES.

NOTES AND BRIEFS.

Justices of the peace; regulating jurisdiction of, by classification of cities in which they reside; validity of. 482

LANDLORD AND TENANT.

Negligence of Lessee for Oil or Gas Purposes, see NEGLIGENCE.

1. No action can be maintained by a licensee of a tenant upon the landlord's covenant to repair, for injuries caused by a defective condition of the premises. *Brady v. Klein* (Mich.) 909

2. Renting premises in a defective condition will not, where they do not constitute a nuisance, render the landlord liable for an injury thereby caused to a licensee of the tenant. *Ibid.*

NOTES AND BRIEFS.

Landlord and tenant; lease for purpose of operating for oil or gas; actual production as implied condition precedent to continuance of lessee's title; forfeiture for failure to operate; lease determinable at will of either party; implied covenant to begin operations within reasonable time. 896

Mechanics' liens on buildings erected by lessees upon lessors' land. 375

Agreement by landlord to repair; liability for injuries to third persons for neglect to do so; necessity of privity of contract in order to recover. 910

LAND SLIDE.

Judicial Notice as to Possibility of, see EVIDENCE, 2.

LAPSE.

Fraud in Enterprise Dependent on, for Success, see FRAUD.

LARCENY.

NOTES AND BRIEFS.

Larceny; evidence of other crimes in prosecution for. 193

LEASE.

For Oil or Gas, see **MINES**, 2-4.

NOTES AND BRIEFS.

Lease; for purpose of operating for oil or gas; forfeiture of, for failure to operate; condition subsequent; how construed. 896

LEGISLATURE.

Power over Court, see **COURTS**, 1.

LETTERS.

Admissibility in Evidence, see **EVIDENCE**, 13.

LEVY AND SEIZURE.

Extraterritorial Force of Exemption Laws, see **CONFLICT OF LAWS**, 3.

LIBEL AND SLANDER.

Measure of Damages for, see **DAMAGES**, 6.

Evidence in Action for, see **EVIDENCE**, 24-26.

Question for Court as to, see **TRIAL**, 7, 8.

1. A preamble to an order of a village board of health in regard to the treatment of obstetrical cases, which states that the reason for making the order is that the board has become satisfied that a number of recent deaths in the village have resulted from the carelessness and negligence of the physicians attending the patients in childbirth soon after attending and handling other patients affected by blood poison and other infectious diseases, and that from the same cause others in the village have barely escaped death, is libelous *per se*. *Mauk v. Brundage* (Ohio.) 477

2. No privilege attaches to statements as to the carelessness of a physician in the treatment of obstetrical cases, made in the preamble to an order of a board of health regulating the conduct of physicians in the treatment of such cases, since such statements were not all important or material to the end sought to be attained. *Ibid.*

NOTES AND BRIEFS.

Libel; in charging physician with carelessness causing death of patients; in publication of resolution of city council attacking character of private citizen; when publication privileged; effect of belief that charges were true; presumption of malice. 478

Evidence of other crimes in prosecution for. 193

LICENSE.**NOTES AND BRIEFS.**

Licensing milk venders; imposing fee for, as tax or fine. 771
62 L. R. A.

LIENS.

A mechanic's lien attaches to a leasehold interest and to buildings erected by one tenant and sold to another who has acquired a lease of the same interest, and this notwithstanding the removal of the buildings at the end of the term is expressly required by the lease. *Zabriskie v. Greater America Exposition Co.* (Neb.) 369

NOTES AND BRIEFS.

Mechanics' liens upon buildings distinct from the land:—(I.) Scope; (II.) introduction; (III.) in general; (IV.) erection upon land of a stranger; (V.) extension of erection upon adjoining land; (VI.) erection by husband upon wife's land; (VII.) erection upon homestead lands; (VIII.) erection upon leasehold estates; (IX.) erection by vendee of the land under a contract of purchase; (X.) erection upon land vested in third parties by deed of trust; (XI.) failure of description of the lands in affidavit of claim; (XII.) summary. 369

LIGHT.**NOTES AND BRIEFS.**

Light; obstructing; effect of bad motive. 683

LIMITATION OF ACTIONS.

Estoppel to Plead Bar, see **ESTOPPEL**, 4.

Title of Act Concerning, see **STATUTES**, 3.

Repeal of Statute as to, see **STATUTES**, 5.

See also **ADVERSE POSSESSION**.

1. The statute of limitations does not begin to run against an action for breach of a covenant to warrant and defend the title to real estate until an eviction occurs. *West Coast Mfg. & I. Co. v. West Coast Improv. Co.* (Wash.) 763

2. To make a conveyance of the whole tract by one joint tenant operate as an ouster of his cotenants, so as to start the statute of limitations running against them, there must be a possession taken under that deed, attributable to it alone. *McNeeley v. South Penn Oil Co.* (W. Va.) 562

3. A right of entry, in favor of a deceased wife's heirs, who by statute were entitled upon her death, to her moiety of an estate held by her and her husband as joint tenants, subject to debts and the husband's curtesy, first arises upon the death of the husband, so that the statute of limitations then only begins to run against them in favor of one holding under an executory contract to sell the estate, made by the husband alone dur-

ing the wife's life, and followed by a conveyance upon her death.

Ibid.

NOTES AND BRIEFS.

Limitation of actions; agreement of defendant not to set up statute of limitations; estoppel to set up where plaintiff forbears to sue in consequence of promise. 396

LOCAL IMPROVEMENTS.

See PUBLIC IMPROVEMENTS.

LOTTERY.

1. In order to constitute a lottery, three ingredients are essentially necessary,—consideration, prize, and chance. *Equitable Loan & Security Co. v. Waring* (Ga.) 93

2. Determining by lot what portion of a number of people who are entitled in any event to a given amount, but who cannot all be paid at one time, shall be paid at different times, is not sufficient to make the transaction a lottery. Ibid.

3. The fact that the order of calling for redemption before maturity certificates of an investment association is determined by reference to a table of numbers, which, instead of being in numerical order, has an arbitrary arrangement based on multiples of the figure 3, thus making it possible in some cases for certificates to be redeemed before others of older date, does not make the scheme a lottery, or one in the nature of a lottery. Ibid.

NOTES AND BRIEFS.

Lottery; what constitutes; sufficiency of difficulty or improbability of accomplishing undertaking; contract depending on forfeitures; when party is *in pari delicto* so as to be barred from relief. 112

MALICE.

NOTES AND BRIEFS.

Malice; definition of; malicious procurement of breach of contract; recovery of exemplary damages for. 902

What constitutes; effect of, to make otherwise lawful act actionable; as necessary element of conspiracy. 722

Effect of, to make otherwise lawful act actionable. 677

Effect of bad motive to make actionable what would otherwise not be:—(I.) Scope of note; (II.) general principles involved: (a) in general; (b) acts in exercise of rights without interference with legal rights of others; (c) acts in exercise of rights accompanied by interference with legal rights of others; (d) acts not in exercise of rights and infringing rights of others; (III.) injury to property: (a) causing 62 L. R. A.

breach of contract; (b) obstructions to light and air; (c) waters: (1) natural water courses; (2) percolating waters; (d) miscellaneous; (IV.) injury to business or occupation: (a) causing injury to trade; (b) causing loss of employment or service; (c) causing loss of employee or servant; (V.) injury to person or feelings; (VI.) judge acting without, or in excess of, jurisdiction; (VII.) abuse of process; (VIII.) general and unclassified cases; (IX.) conclusion. 673

MALICIOUS FENCE.

See FENCE.

MALICIOUS INJURY.

Combination to inflict, see CONSPIRACY.

MARRIAGE.

Liability for Alimony after Divorced Husband's Second Marriage, see HUSBAND AND WIFE, 8.

MASTER AND SERVANT.

Validity of Statute Making Corporations Liable for Injury to Employees, see CONSTITUTIONAL LAW, 2, 3.

Validity of Statute Requiring Weekly Payment of Wages, see CONSTITUTIONAL LAW, 5, 7.

Title of Statute as to Wages, see STATUTES, 2.

Employment and discharge.

See also EVIDENCE, 23.

1. A rule of a railroad company as to an investigation in case of a suspended employee is not part of a contract with an employee whose employment began before the rule was passed. *Cleveland, C. C. & St. L. R. Co. v. Jenkins* (Ill.) 922

2. A railroad company may lawfully refuse to continue in its employ a person who has engaged in a strike affecting its interests, or who has shown himself to be negligent, incompetent, inefficient, or dishonest. *New York, C. & St. L. R. Co. v. Schaffer* (Ohio) 931

3. It is the right of every person, natural or artificial, to employ or refuse to employ in his business whomsoever he may wish; and he cannot be called upon to answer for his judgment in that regard by the public or individuals, nor can the motives which prompt his action be considered. Ibid.

4. A master is under no legal obligation to give to his discharged servant a statement of his service, and whether or not it was satisfactory; and a discharged railroad employee cannot maintain an action for damages against the company which dis-

charged him, for refusal to furnish him with a clearance or statement of the record of his service, although he may have been unable to obtain other employment in consequence of such refusal by the company. *Ibid.*

5. A duty to give a letter of recommendation or a clearance card to an employee who is discharged or quits is not imposed upon the employer by common law. *Cleveland, C. C. & St. L. R. Co. v. Jenkins* (Ill.) 922

Assumption of risks.

6. That repairs promised by an employer to be made upon a defective machine when the mill was shut down for repairs "the fore part of the following week" had not been made by Wednesday does not deprive an employee, who complained of the defective condition of the machine, of the benefit of the rule that an employee who continues work in reliance on the master's promise to repair does not assume the risk of defects during the reasonable time allowed for making the repairs. *Rice v. Eureka Paper Co.* (N. Y.) 611

Master's liability to servant.

Question for Jury as to, see TRIAL, 11.

7. A gas company giving strangers permission to take cinders from the end of its dump, which is reached by a track laid over the cinders, does not owe its employees the duty of anticipating that the licensees may take them from beside the track, so as to undermine it and make it unsafe for use, and of taking precautions against such conduct. *Chandler v. Kansas City, Mo., Gas Co.* (Mo.) 474

Master's liability to third persons for servant's acts.

See also CARRIERS, 3.

8. The medical adviser of an insurance company, who, in examining the foot of one insured against accident, which has been sprained so as to require a plaster cast or similar appliance to hold the injured ligaments in place, removes and fails to replace such appliance, because of which injury results, is guilty of negligence for which the company must answer in damages. *Tompkins v. Pacific Mut. L. Ins. Co.* (W. Va.) 489

9. The relation of master and servant exists between an insurance company and its medical adviser in making an examination of an injured person holding an accident policy issued by the company, and the company must answer for injuries resulting from the negligence or misconduct of its agent in making the examination. *Ibid.*

NOTES AND BRIEFS.

Right of master to discharge; duty to 62 L. R. A.

give letter or clearance to discharged servant; blacklisting employees; right of employers to combine. 933

Duty of master to give testimonial or clearance card to discharged servant; effect of custom as to. 924

Duty to give recommend or clearance card to discharged employee:—(I.) Duty to give character; (II.) duty to give clearance card: (a) of corporation; (b) when combination exists among corporations; (c) when a uniform custom to do so is shown; (III.) legislation; (IV.) summary. 922

Liability for causing loss of employment; for causing loss of employee; effect of malice on liability. 714

Statute making all corporations absolutely liable for injuries to employees through defective machinery; constitutionality of. 408

Master's duty to furnish safe machinery; assumption of risk by servant who continues work on faith of master's promise to repair; where risk obvious; where defect existed when servant began work; injury as result of unforeseen accident. 611

Duty of master to furnish safe place to work; extent of; liability for acts of third party rendering place unsafe; where such person licensed to go on premises. 475

MAXIMS.

1. Cujus est solum, ejus usque ad cælum. *Horan v. Byrnes* (N. H.) 602

2. De minimis non curat lex. *State ex rel. Durner v. Huegin* (Wis.) 700

3. Equity regards the substance, and not the form, of things. *Burnside v. Wand* (Mo.) 427

4. He who asks equity must do equity. *Ibid.*; *Barrier v. Kelly* (Miss.) 421

5. Res ipsa loquitur. *Kohner v. Capital Traction Company* (D. C. App.) 875; *People v. Molineux* (N. Y.) 193

6. Sic utere tuo ut alienum non lædas. *Horan v. Byrnes* (N. H.) 602

NOTES AND BRIEFS.

Damnum absque injuria. 723

He who comes into a court of equity must come with clean hands. 608

Res ipsa loquitur. 875

MECHANICS' LIENS.

See LIENS.

MEDICAL EXAMINER.

Limitation on Authority of, see INSURANCE, 7.

MERGER.

The rights of a person entitled to recover

under an order of filiation in a bastardy proceeding, by which the putative father was required to pay a monthly stipend for the support of the child, are merged in a subsequent judgment for the total amount due, obtained upon the refusal of the father to pay the monthly stipend. *McKittrick v. Cahoon* (Minn.) 757

MILK.

Ordinance for Inspection of, see MUNICIPAL CORPORATIONS.

See also FOOD, NOTES AND BRIEFS.

MINES.

1. The extralateral rights of the owner of a lode mining claim upon secondary veins are not limited by the fact that the discovery vein leaves the claim by crossing a side line, but he has a right to follow a secondary vein on its dip outside his side lines, although its apex is outside of a line drawn parallel with the end line through the point where the discovery vein leaves the claim. *Ajax Gold Mining Co. v. Hilkey* (Colo.) 555

Oil and gas.

Lessee's liability for Negligence, see NEGLIGENCE.

Repeal of Statute as to, see STATUTES, 5.

Question for Jury as to Negligence in Permitting Escape of Oil, see TRIAL, 13.

2. A condition subsequent to develop the property upon discovering oil or gas in paying quantities is implied in a contract giving the right, for a nominal consideration, to enter upon and explore for oil or gas, where there is a provision that, upon failure to drill a well within a specified time, the lessee shall pay a certain amount per day while such completion is delayed. *Gadbury v. Ohio & I. Consol. Nat. & Illum. Gas Co.* (Ind.) 895

3. Equity may enforce a forfeiture of a contract for the right to explore for oil or gas on a tract of real estate where it would be against equity to permit the lessee longer to assert his title. *Ibid.*

4. A forfeiture of a gas lease for breach of a condition subsequent is sufficiently evidenced to give equity jurisdiction of a suit to declare it, where, although the lessor was not out of possession so that he could not enter for the breach, he has, after failure for a long time without apparent excuse to develop the property, treated the lease as abandoned. *Ibid.*

NOTES AND BRIEFS.

Mines; lease for oil and gas purposes; actual production as condition precedent to continuance of lessee's title; forfeiture by failing to operate; implied covenant to begin operations within reasonable time. 896
62 L. R. A.

Ownership of veins apexing within surface boundary of claim; right to follow such veins across side lines of location; end lines as limit of extralateral rights to all lodes within surface; what are end lines; but one set of end lines allowed; apex of discovery vein passing through one end and one side line of location; how extralateral rights upon such vein bounded. 555

MISTAKE.

Estoppel to Claim, see ESTOPPEL, 2.

MONEY HAD AND RECEIVED.**NOTES AND BRIEFS.**

Money had and received; nature of action for; when action lies. 582

MONOPOLY.

In Sale of Proprietary Medicines, see CONTRACTS, 14.

MORTGAGE.

Taking Acknowledgment of, as Ministerial Act, see ACKNOWLEDGMENT.

The fact that the witnesses who attest the signature of a mortgagor and the notary public taking his acknowledgment are stockholders of, but not otherwise interested in, the corporation named in the mortgage as grantee, does not render the instrument invalid, in the absence of fraud and undue advantage. *Read v. Toledo Loan Co.* (Ohio) 790

NOTES AND BRIEFS.

Mortgage; what constitutes material alteration of; right to enforce, after alteration. 393

MOTIONS AND ORDERS.

The court may recall an inadvertent order which has been handed to the clerk for entry, at any time before it is actually filed or entered on the records, under a statute providing that all judgments shall be entered by the clerk under the direction of the court. *State ex rel. Brown v. Brown* (Wash.) 974

MOTIVE.

Effect of, on Lawfulness of Act, see CONSPIRACY, 6.

For Homicide, Evidence of, see EVIDENCE, 33.

In Refusing Employment, Effect of, see MASTER AND SERVANT, 3.

Effect of, on Landowner's Right to Sink Well, see WATERS, 2.

MUNICIPAL CORPORATIONS.

1. An ordinance requiring the inspection of milk sold within the limits of the city, and providing for the licensing of vendors,

is not void as affecting persons beyond the limits of the municipality, where it only touches those who bring or send their milk into the city for sale. *Norfolk v. Flynn* (Va.) 771

2. An ordinance requiring the payment of a license fee by milk vendors to pay the salary and expenses of the milk inspector does not violate the statute forbidding the municipality to impose any tax, fine, or penalty on persons selling their own farm or domestic products in the city. *Ibid.*

NOTES AND BRIEFS.

Municipal corporations; power to enact rules conferred upon; necessity that rules be reasonable. 890

MURDER.

See HOMICIDE.

NAME.

Injunction from Federal Court against Use of Corporate Name, see COURTS, 3.

Of Corporation, Injunction against Use of, see INJUNCTION, 1.

NATIONAL HOME.

See PUBLIC INSTITUTIONS, 2.

NECESSARIES.

See HUSBAND AND WIFE, 3, 4.

NOTES AND BRIEFS.

Necessaries; medicines and medical attendance as. 190

NEGLIGENCE.

Of Keeper of Bees, see ANIMALS, 1-3.

Presumption and Burden of Proof as to, see EVIDENCE, 8, 9.

Of Abutting Owner Obstructing Sidewalk, see HIGHWAYS.

Of Master or Servant, see MASTER AND SERVANT.

In Operation of Street Railway. see STREET RAILWAYS, 2-5.

Question for Jury as to, see TRIAL, 9-14.

One who leases a lot for the purpose of producing oil or gas therefrom, reserving to herself one eighth of the oil produced and delivered in tank or the pipe lines, but reserving no control or right to direct the manner of drilling, or of the erection of tanks on the leased premises, and who surrenders complete possession and control thereof to the lessees during the term of the lease, is not liable to the owner of property to which oil escapes to its injury, solely through the negligence and omission of duty on the part of the lessees. *Langenbaugh v. Anderson* (Ohio) 948
62 L. R. A.

NOTES AND BRIEFS.

Negligence; duty of owner of premises to trespassers; to person coming on premises with owner's permission; duty to trespassing stock. 133

In failing to guard against possible occurrences; of master in providing place for servant to work. 476

Motorman in charge of street car; effect of contributory negligence of person injured. 747

Question for jury as to. 960

In permitting escape of dangerous substance to adjoining property; question for jury as to dangerous character of substance. 950

Liability for, of governmental charitable corporation. 938

Whether question for court or jury. 875

As proximate cause of death where person rendered insane by negligent injury commits suicide; in failing to give statutory signals at crossing. 751

NOMINAL DAMAGES.

See DAMAGES, 1.

NONRESIDENT.

Garnishment against, see GARNISHMENT, 8, 9.

NONSUIT.

Denial of Due Process by Granting, see CONSTITUTIONAL LAW, 1.

NOTARY PUBLIC.

NOTES AND BRIEFS.

Notary public; validity of acknowledgment of instrument before notary interested therein; of mortgage where notary stockholder of corporation named as grantee; notary as ministerial officer; distinction between judicial and ministerial acts of. 790

NOTICE.

To Guarantor, see GUARANTY, NOTES AND BRIEFS.

Of Death of Insured, see INSURANCE, 18, 19.

NUISANCES.

NOTES AND BRIEFS.

Nuisance; bees as. 133

NUNC PRO TUNC.

Correction of Mistake in Entry of Judgment, see JUDGMENT, 2.

OBSCENITY.

NOTES AND BRIEFS.

Obscenity; evidence of other crimes in prosecution for sending obscene letter. 193

OFFICERS.

Liability for Making Arrest, see **FALSE IMPRISONMENT.**

NOTES AND BRIEFS.

Officers; liability for unlawful arrest; for putting handcuffs on person arrested; for using violence or subjecting him to humiliation. 908

OIL.

Oil Lease, see **MINES, 2-4, NOTES AND BRIEFS; NEGLIGENCE, 1.**

OPINION EVIDENCE.

See **EVIDENCE, 17-19, 24-26.**

ORDER.

See **MOTIONS AND ORDERS.**

ORDINANCE.

See **MUNICIPAL CORPORATIONS.**

OUSTER.

By Joint Tenant Starting Limitation Running, see **LIMITATION OF ACTIONS, 2.**

PAID-UP POLICY.

See **INSURANCE, 5.**

PAROL EVIDENCE.

See **EVIDENCE, 16.**

PARTNERSHIP.

Construction of Agreement for Sale of Business, see **CONTRACTS, 9.**

PASSENGERS.

See **CARRIERS.**

PASSENGER STATION.

Special Assessments for Location of, see **PUBLIC IMPROVEMENTS.**

PASSIVE TRUST.

See **TRUSTS, 8, 9.**

PATENT MEDICINES.

Restraint of Trade in, see **CONTRACTS, 14.**

Jurisdiction of Equity to Prevent Maintenance of Fixed Price of, see **EQUITY, 1.**

PATENTS.

Requiring Notes Given for Patent Rights to so State, see **CONSTITUTIONAL LAW, 4, 6.**

A state statute forbidding the taking of a note for an interest in a patent right which does not state that fact on its face is not repugnant to the provision of the Federal Constitution empowering Congress to secure to inventors the exclusive right to their discoveries. *State v. Cook* (Tenn.) 174

62 L. R. A.

PAYMENT.

The maker of a note carrying interest at a usurious rate will not be held to have intended a general payment to be applied on interest merely because the payment was so applied on the books of the bank without his knowledge. *Second Nat. Bank v. Fitzpatrick* (Ky.) 579

PENALTY.

Interest in Suit for, see **INTEREST.**

Incorporating Clause for, in Statute for Weekly Payment of Wages, see **STATUTES, 2.**

For Taking Usurious Interest, see **USURY, 2, 3.**

PERCOLATING WATERS.

Landowner's Right to Gather and Use, see **WATERS, 3, 4.**

PERPETUITIES.

See **TRUSTS, 2, 3.**

PHYSICAL EXAMINATION.

Of insured after Accident, see **INSURANCE, 14-16; MASTER AND SERVANT, 8, 9.**

PHYSICIANS.

Measure of Damages for Libel of, see **DAMAGES, 6.**

Evidence in Libel Suit by, see **EVIDENCE, 24-26.**

Libel of, by Board of Health, see **LIBEL AND SLANDER.**

PLEADING.

For Indictment, etc., see **INDICTMENT, ETC.**

1. Direct allegation of damages for wrongful withdrawal of water from plaintiff's power reservoir is not necessary, since it is implied by the law. *Green Bay & M. Canal Co. v. Kaukauna Water Power Co.* (Wis.) 579

2. Money received as rents for water wrongfully taken from plaintiff's pond cannot be recovered in an action to recover for the wrongful taking of the water. *Ibid.*

3. If a bill to compel specific performance of a contract for the sale of land shows the contract to be void under the statute of frauds, that defense may be set up by demurrer. *Thompson v. New South Coal Co.* (Ala.) 551

4. A conclusion in a pleading setting forth that drafts with bill of lading attached were transferred to a bank, that thereby the bank "became and was the owner of said draft and bill of lading" and of the property represented, does not enlarge the legal effect of the facts stated so as to charge that the bank purchased, not

only the draft, but the bill of lading. *S. Blaisdell, Jr., Co. v. Citizens' Nat. Bank (Tex.)* 968

5. An allegation of defendant's claim as to the extent of its ownership is immaterial, in an action for breach of a plainly written covenant of warranty in a deed of real estate, and is properly stricken out of the complaint. *West Coast Mfg. & I. Co. v. West Coast Improv. Co. (Wash.)* 763

NOTES AND BRIEFS.

Pleading; duty of party relying on waiver of condition precedent in life insurance policy to plead and prove such waiver. 390

Demurrer to bill for specific performance; of contract by agent; where bill shows ratification of agent's act; interposing defense of statute of frauds by demurrer; where bill shows that contract is obnoxious to it. 551

Sufficiency of allegation of conspiracy; charging offense in language of statute. 717

Declaration construed to be in tort unless it clearly appears that suit is on contract. 667

In action to recover estate for breach of condition subsequent; necessity of showing, not only breach, but also forfeiture on account thereof. 896

Special plea to be taken most strongly against pleader; necessity of averring and proving particular custom. 799

POISON.

Evidence as to Killing Other Person by, see EVIDENCE, 22.

POLICE POWER.

See CONSTITUTIONAL LAW, 6-9.

PRELIMINARY EXAMINATION.

See CRIMINAL LAW, 1, 2.

PREMIUMS.

Forfeiture of Insurance Policy for Non-payment of, see INSURANCE, 11.

PRESUMPTIONS.

See EVIDENCE, 4-9.

PRINCIPAL AND AGENT.

Indorsement by Principal of Purchase-Money Check as Subscription of Contract, see CONTRACTS, 1.

Estoppel of Principal to Assert Invalidity of Agent's Act, see ESTOPPEL, 1.

Insurance Agent, see INSURANCE, 17.

That a person might possibly have profited by the fraudulent representations of his agent, made outside the scope of his authority, does not render him responsible

for them if he in fact did not do so. *Taylor v. Commercial Bank (N. Y.)* 783

NOTES AND BRIEFS.

Principal and agent; indorsement by principal of check given in payment of purchase price of land sold by agent as sufficient subscription of contract; where check attached to contract; estoppel. 552

PRIVILEGE.

In Preamble to Order of Board of Health, see LIBEL AND SLANDER.

Question for Court as to, see TRIAL, 7, 8.

Failure to Claim, while Testifying at Coroner's Inquest, see WITNESSES, 2.

PROHIBITION.

Prohibition lies from a circuit court to a justice of the peace to restrain him from proceeding in an action when the subject-matter thereof is beyond his territorial jurisdiction, and also when, by reason of want of service or invalidity of service, he has not acquired such jurisdiction; although, when he has jurisdiction of the subject-matter, and the question of his jurisdiction of the person depends upon some fact to be determined by him, his erroneous decision in favor of jurisdiction is only error, not subjecting him to prohibition. *Pennsylvania R. Co. v. Rogers (W. Va.)* 178

PROOF OF DEATH.

See INSURANCE, 18, 19.

PROPRIETARY MEDICINE.

Restraint of Trade in, see CONTRACTS, 14.

Jurisdiction of Equity to Prevent Maintenance of Fixed Price of, see EQUITY, 1.

PROXIMATE CAUSE.

1. A verdict should be rendered for defendant in an action to recover damages for negligently killing a person who, as a result of injuries received, becomes insane and kills himself, in the absence of anything to show that he acted under an uncontrollable impulse, or that he did not understand the physical nature of his act. *Daniels v. New York, N. H. & H. R. Co. (Mass.)* 751

2. A voluntary wilful act of suicide of a person rendered insane by a negligent injury, who knows the purpose and physical effect of his act, is such a new and independent agency as does not come within and complete a line of causation from the accident to the death so as to render the one guilty of the negligence responsible for the death. *Ibid.*

NOTES AND BRIEFS.

Proximate cause; what constitutes. 652
 Of death; where person rendered insane
 by negligent injury commits suicide. 751

PUBLIC IMPROVEMENTS.

Review of Assessment on Certiorari,
 see CERTIORARI.

1. The cost and benefit of the whole improvement should be considered in assessing the property on either street, and not merely that on the street where the property is situated, under a statute providing for the building of a union passenger station, and the extension of two streets, and the widening of one of them, and directing the assessment, upon any real estate which receives any peculiar benefit from the construction of the station, and the streets, of a proportional part of the expense incurred by the city therefor. *Sears v. Boston Street Comrs.* (Mass.) 144

2. In determining the cost of an improvement consisting of a union passenger station and the improvement of two streets connecting therewith, which shall be assessed on property abutting on either street, the legislature may lump the cost of the improvement on both streets, and is not required to confine the amount to be assessed against the property on either to the cost of the improvement upon it. Ibid.

3. The benefit to property located on one street by reason of the location of a union passenger station and the extension and improvement of that street and another one may be determined, for the purpose of assessing upon it its proportional cost of the improvement, without considering the benefit to other property by reason of the station in connection with changes in other streets beside the two named, and property upon which is made a separate assessment district. Ibid.

4. The time of finishing the passenger station may be taken as the moment for estimating the benefit in the assessment of the cost upon property benefited by the location of the station and the improvement of streets leading to it, and the public is not limited to the time when its work upon the improvement is finished. Ibid.

5. In assessing upon abutting property the cost of the improvement of streets leading to a newly located passenger station, the benefit to the property, arising from the station, may be considered, as well as that from the improvement of the street, where the location of the station and the street improvement are all parts of the same improvement, and the benefit to the property 62 L. R. A.

assessed results entirely from the city's expenditures. Ibid.

6. The purpose for which a union passenger station is located is sufficiently public to authorize special assessments upon property thereby benefited for the cost of the improvements in streets, made necessary, by such location. Ibid.

7. The benefit to property in the vicinity of a newly located passenger station may be so different from the general benefit to all the property in the city as to justify an assessment of a portion of the cost of improving streets leading to the station, made necessary by it. Ibid.

NOTES AND BRIEFS.

Public improvements; assessment for, as exercise of taxing power; special burden for special benefits; necessity of special benefit. 145

PUBLIC INSTITUTION.

1. The grant of power to a public corporation created by Congress to administer a public charity, to sue and be sued at law and in equity, applies to such matters only as are within the scope of its other corporate powers, and does not authorize such corporation to be sued for a tort. *Overholser v. National Home for Disabled Volunteer Soldiers* (Ohio) 936

2. The National Home for Disabled Volunteer Soldiers is a corporation created by Congress for the purpose of performing an appropriate and constitutional function of the Federal government, and for national purposes only; and as such it is a part of the government of the United States, and cannot be sued in an action sounding in tort. Ibid.

NOTES AND BRIEFS.

Public institutions; National Home for Disabled Volunteer Soldiers; liability of, to be sued in tort. 938

PUBLIC POLICY.

See CONTRACTS, 12-14.

QUARANTINE.

NOTES AND BRIEFS.

Quarantine; of cattle imported from other states; reasonableness of. 891

QUESTIONS OF FACT.

See TRIAL, 6-14.

RAILROADS.

Compensation for Appropriating Part of Right of Way by Magnetic Telegraph Company, see DAMAGES, 5.

Proceeding by Magnetic Telegraph Company to Appropriate Part of Right of Way, see EMINENT DOMAIN.

Judicial Notice as to Manner of Conducting Business of, see EVIDENCE, 1.

Burden of Proof in Proceedings to Condemn Part of Right of Way, see EVIDENCE, 7.

Proof of Failure to Give Crossing Signals, see EVIDENCE, 37.

Street Railroad Crossing Railroad Track, see STREET RAILWAYS, 1.

NOTES AND BRIEFS.

Railroads; duty to give statutory signals at crossing; sufficiency of evidence that signals not given. 757

RAPE.

NOTES AND BRIEFS.

Rape; evidence of other crimes in prosecution for. 193

REAL PROPERTY.

NOTES AND BRIEFS.

Real property; covenants of warranty in deed; liability on, where paramount title in state or United States; knowledge by grantee of encumbrance upon or defect in title; purchase of paramount title as eviction; how far tide land within protection of covenants. 764

RECEIVERS.

A receiver will not be appointed for an investment association at the suit of holders of certificates therein, on the ground that the contract contained in the certificates is different from that represented in the literature of the company, and that they were fraudulently induced to purchase such certificates, since their remedy was to have in due time applied for a rescission of the contract, and have asked that the company be required to repay to them the sums received as a result of the fraud. *Equitable Loan & Security Co. v. Waring* (Ga.) 93

REFERENCE.

Review of Finding by Referee, see APPEAL AND ERROR, 12.

REGISTER.

Of Fire Insurance Expiration, Sale of, see SALE, 1.

REHEARING.

Raising Federal Question on Motion for, see APPEAL AND ERROR, 2.

REPEAL.

Of Statute, see STATUTES, 5.

62 L. R. A.

RESIDENCE.

Tent as, see GAMING, 1.

RES JUDICATA.

See JUDGMENT, 3.

RESTRAINT OF TRADE.

In Sale of Proprietary Medicines, see CONTRACTS, 14.

RESUME.

For *Résumé* of Contents of Book, see p. 961.

RETURN.

In Garnishment Proceeding, see GARNISHMENT, 3.

REVIVAL.

Of Revoked Will, see WILLS, 8.

REVOCATION.

Of Will, see WILLS, 3-8.

ROBBERY.

NOTES AND BRIEFS.

Robbery; evidence of other crimes in prosecution for. 193

RULES.

As to Investigation in Case of Suspended Employee, see MASTER AND SERVANT, 1.

SALE.

1. In the sale of a fire-insurance expiration register, which, without the knowledge or consent of the vendor, had been secretly inspected and partially copied by third persons, made without any representation as to the character or quality of the register with reference to the privacy of the information imparted by it, and without any express warranty that it constituted an exclusive record of the matter it contained, the rule of *caveat emptor* applies. *Kinkel v. Winne* (Kan.) 596

2. Payments must be made at place of shipment under a contract for sale of property, "buyer to give shipping instructions," "to be delivered as packed," "f. o. b." at place of shipment. *Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co.* (Md.) 795

3. A buyer having a right to inspect goods to be delivered f. o. b. must exercise it at the place of shipment, and cannot insist on reserving the right until the goods reach his place of business, so as to delay payment until that time, unless the right is expressly given by the contract. *Ibid.*

NOTES AND BRIEFS.

Sale; stipulation to ship goods f. o. b.;

where delivery must be made; where payment due; when buyer entitled to possession; right to inspect; stipulation for cash payment; vendor's right to rescind; admissibility of parol evidence to explain contract. 796

Of personal property; implied warranty of title; right to recover price where party sells by mistake; property not owned by him. 596

Effect of contract to ship goods f. o. b. 795

SCHOOLS.

1. A tradesman has no right of action against the principal of a public school for enforcing a lawful order of the board of education requiring pupils to go directly home when dismissed from school, although the effect of such enforcement is to injure his trade with the pupils. *Jones v. Cody* (Mich.) 160

2. The board of education may require pupils to go directly home when dismissed from school, under statutory authority to pass rules relative to anything whatever that may advance the interests of education, the good government and prosperity of the free schools, and the welfare of the public concerning the same. *Ibid.*

NOTES AND BRIEFS.

Schools; control of pupil outside of school; requiring pupils to pay for school property destroyed by them; reasonableness of rules; liability of school officer for errors of judgment in attempting to enforce discipline; effect of malice. 162

Right of school authorities to control pupils when going to and from school. 160

SHORT SALES.

Of Corporate Stock, Validity of Contract to Share Profits of, see *CONTRACTS*, 13.

SIDEWALKS.

Negligence of Abutting Owner as to, see *HIGHWAYS*.

SOCIAL CLUB.

Sale of Liquor by, see *INTOXICATING LIQUORS*.

SOLICITATION.

To Sexual Intercourse, see *INDECENT PROPOSAL*.

SPECIAL JURY.

See *JURY*.

SPECIFIC PERFORMANCE.

Sufficiency of Bill to Compel, see *PLEADING*, 3.
62 L. R. A.

STATE.

Within Terms of Warranty, see *COVENANT*, 1.

STATION.

Special Assessments for Location of, see *PUBLIC IMPROVEMENTS*.

STATUTE OF FRAUDS.

See *CONTRACTS*, 1, 2.

STATUTE OF LIMITATIONS.

See *LIMITATION OF ACTIONS*.

STATUTES.

1. The jurisdiction of justices of the peace cannot be regulated by a classification of the cities in which they reside, so as to make it different in different places, where they are constitutional officers, and the Constitution prohibits special laws regulating their jurisdiction or duties, and a general law has been passed applicable to all justices within the state; and the fact that it further provides that the legislature may restrict their jurisdiction is immaterial. *Love v. Liddle* (Utah) 482
Title.

2. The legislature is not precluded from incorporating a clause providing for a penalty, in a statute requiring the weekly payment of wages, by the fact that mention of that fact is not made in the title of the act, by the constitutional provision that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. *Republic Iron & S. Co. v. State* (Ind.) 136

3. The title "An Act Concerning the Limitation of Actions in Certain Cases," which does not specify the cases in which it is to apply, is not sufficiently definite to meet the requirement of W. Va. Const. art. 6, § 30, that no act shall embrace more than one object, and that shall be expressed in the title. *McNeeley v. South Penn Oil Co.* (W. Va.) 562

Construction.

4. The amendment of a statute relating to railroad companies alone, by re-enacting it with the insertion of the word "all" in place of the word "railroad," cannot be restricted by construction so as to apply only to railroad corporations and others of that kind. *Ballard v. Mississippi Cotton Oil Co.* (Miss.) 407

Repeal.

5. The three-year period of limitation for bringing suit to question the title of one in possession of land under a lease to operate for oil or minerals, prescribed by W. Va. Acts 1872-73, chap. 61, p. 152, was

abolished by W. Va. act March 16, 1882, chap. 102, p. 298, re-enacting W. Va. Code 1868, chap. 104, prescribing ten years as the period of limitation for all suits to recover possession of land, and providing that all acts or parts of acts inconsistent therewith and coming within the purview thereof are repealed. *McNeeley v. South Penn Oil Co.* (W. Va.) 502

NOTES AND BRIEFS.

Statute; adopted from other state or country; adopting construction there put upon it. 432

Construction of; giving effect to all parts. 724

Interpretation of; not declared unconstitutional unless unconstitutionality is clear. 409

Validity of provision for penalties where no penalty mentioned in title. 136

STOCK.

Validity of Contract to Share Profits of Short Sale of, see CONTRACTS, 13.

STOPPAGE IN TRANSITU.

NOTES AND BRIEFS.

Stoppage *in transitu* effect on, of contract to ship goods *f. o. b.* 805

STREET RAILWAYS.

1. After a railroad company has acquired and exercised the right to cross the tracks of a street car company, the latter, equally with the former, becomes subject to the power of the state as to the imposition of the expense of the additional safeguards necessary to avoid accidents, although the necessity for them was caused solely by the railroad company. *Detroit, Ft. W. & B. I. Ry. v. Osborn* (Mich.) 149

Negligence in operation.

Presumption as to, see EVIDENCE, 8.

2. It is negligence on the part of an electric railway company whose line traverses a city, to have one of its cars in the charge of a young man only eighteen years old, whose experience in the handling of an electric car dates only twenty days back. *Crisman v. Shreveport Belt Ry. Co.* (La.) 747.

3. A street car company employing an inexperienced motorman, only eighteen years old, to operate a car, is liable for the death of a person caused by the motorman's shortcomings, and doubt as to whether the accident might not have been avoided had the car been in the hands of a more experienced and competent motorman will be construed against the company. *Ibid.*

4. It is the duty of a motorman who

sees a person on horseback riding through a crowded street somewhat ahead of the car close enough to the track to challenge attention, while the car is gaining upon him, to prepare for emergencies by turning off his current and winding the slack of his brake, and failure to do the latter is negligence. *Ibid.*

5. A motorman is not negligent on failing to check the speed of his car until the actual emergency arises, where he sees a person on horseback riding somewhat ahead of the car, through a crowded street, close enough to the track for his proximity to challenge attention, though not so close as to be within the line of danger, where the car is gaining upon him, whose horse suddenly swerves to one side and enters upon the track 10 or 15 feet ahead of the car. *Ibid.*

NOTES AND BRIEFS.

Street railways; defense of contributory negligence in action for injury; effect of, where motorman by reasonable care might have avoided accident. 747

Right of state to impose on, expense of additional safeguards made necessary by crossing of tracks by railroad company. 150

STRIKE.

Right to Discharge Employee Engaging in, see MASTER AND SERVANT, 2.

SUBSCRIBING WITNESSES.

To Signature of Mortgagor and Notary Taking Acknowledgment, see MORTGAGE.

SUBTERRANEAN WATERS.

Landowner's Right to Gather and Use, see WATERS, 3, 4.

SUICIDE.

Of Person Rendered Insane by Negligent Injury, see PROXIMATE CAUSE.

SUPERSEDEAS.

Supersedeas Bond, see APPEAL AND ERROR, 6.

TELEGRAPHS.

Appropriation of Part of Railroad Right of Way for, Measure of Compensation, see DAMAGES, 5.

Proceeding for Acquiring Part of Railroad Right of Way for Line, see EMINENT DOMAIN.

Burden of Proof in Condemnation Proceedings by, see EVIDENCE, 7.

TENANCY BY ENTIRETIES.

See HUSBAND AND WIFE, 1, 2.

TENANCY IN COMMON.**NOTES AND BRIEFS.**

Tenancy in common; executory contract by one tenant for sale of whole tract; when possession under such agreement becomes adverse to cotenant. 504

TENT.

As Residence, see GAMING, 1.

TICKETS.

See CARRIERS, 4, 5.

TIDE LANDS.

Within Covenant of Warranty, see COVENANT, 1.

TORTS.**NOTES AND BRIEFS.**

Tort; liability of governmental charitable institution for. 938

TRADE NAME.

Injunction against Use of, see COURTS, 3; INJUNCTION, 1.

NOTES AND BRIEFS.

Trade name; right of successors of corporation to exclusive use of; protection of; constructive fraud where act innocent in itself results in unfair trade; rule as to corporate trade names; right of foreign corporation to protection in use of name. 85

TREASON.**NOTES AND BRIEFS.**

Treason; evidence of other crimes in prosecution for. 193

TRESPASS.**NOTES AND BRIEFS.**

Trespass; against person standing on sidewalk in front of premises and using abusive language toward owner. 900

Action of, for mesne profits; right to maintain, without previous action of ejectment; measure of damages. 582

TRIAL.

Denial of Due Process by Granting Nonsuit, see CONSTITUTIONAL LAW, 1.*

Jury.

Special Jury, see JURY.

1. A statute adopting the common law of England as part of the law of the state includes the common-law jury, both regular and special. *Eckrich v. St. Louis Transit Co. (Mo.)* 911

2. The jury, the right to trial by which is continued inviolate by the Constitution 62 L. R. A.

of 1875, is the jury as it had existed prior to the time of the adoption of that Constitution, including the special jury of the common law, and not the jury provided for by the statutes at and prior to the adoption of the first state Constitution, where the state statutes merely prescribe the qualification of jurors and mode of their selection, without anything to indicate an intention to abolish the common-law jury,—especially when, prior to the adoption of the first Constitution, the common law had been adopted by statute. *Ibid.*

3. Statutes permitting a comparison of writings to determine the genuineness of one in dispute are not in conflict with the provision of the Constitution preserving the right of trial by jury inviolate. *People v. Molineux (N. Y.)* 193

4. A statute permitting a comparison of a disputed writing to be made with any writing proved to the satisfaction of the court to be genuine does not deprive the jury of the right to pass upon the genuineness of the standards submitted for comparison. *Ibid.*

5. Comparison of disputed writing with standards produced in court may be made by witnesses, or by the court and jury, without the aid of witnesses. *Ibid.*

Questions of law and fact.

6. If plaintiff has made a prima facie case he is entitled to have it submitted to the jury, regardless of the case which is made by defendant. *Kohner v. Capital Traction Co. (D. C. App.)* 875

7. The question of the libelous character of a publication, and whether, if libelous, it is privileged, is for the court. *Mauk v. Brundage (Ohio)* 477

8. In an action for libel, the question whether the publication is or is not libelous *per se* is a question for the court; and the question whether or not the publication is privileged, the controlling facts being conceded, is also for the court. *Ibid.*

9. Whether a regulation adopted and sought to be enforced by a carrier of passengers is or is not reasonable is a question of law, and not one of fact for determination by a jury. *Central of Georgia R. Co. v. Motes (Ga.)* 507

10. The liability of a street car company for injury to a passenger by the conductor cannot be decided, as matter of law, where the conductor explains his conduct by stating that, in passing along the footboard on the side of the car he lost his balance, and, to save himself from falling, reached for the stanchion, when his hand came in contact with plaintiff,—since the jury have a

right to pass upon the truth of such assertion. *Kohner v. Capitol Traction Co.* (D. C. App.) 875

11. The jury cannot be permitted to consider whether or not the safest route for the erection of a railroad was selected in an action to hold the company liable for the death of an employee. *Scott v. Astoria & C. River R. Co.* (Or.) 543

12. Whether or not a child injured through another's negligence was in the exercise of ordinary care and caution for one of its age and discretion is a question for the jury. *Rachmel v. Clark* (Pa.) 959

13. In an action against the lessor and lessees in an oil and gas lease to recover for the burning of plaintiff's building on a lot adjoining the leased premises through the alleged negligence of the lessees, whereby oil escaped from a tank on the latter, and flowed under the building, and thence down the slope of the hill to a creek, where it came in contact with a fire, which followed back the trail of oil and burned said building, and the plaintiff's petition, on which issue is joined, alleges that such escape of oil resulted from the negligent acts and omissions of duty on the part of the lessees in not safely keeping and caring for the oil, the case should have been submitted to the jury on the questions of negligence put in issue by the pleadings. *Langenbaugh v. Anderson* (Ohio) 948

14. Whether or not the owner of a horse is negligent in hitching it within a few feet of a hive of bees, which he could have seen had he looked, is for the jury. *Parsons v. Manser* (Iowa) 132

Instructions.

15. An instruction that the jury shall find for plaintiff in certain contingencies is erroneous, unless it confines them to the evidence. *Cleveland, C. C. & St. L. R. Co. v. Jenkins* (Ill.) 922

16. The court properly refuses an instruction to the effect that the jury, in passing upon the testimony of a party, may take into consideration his situation and interest in the result of the verdict and all the circumstances surrounding him, and give to it only such weight as they may deem it fairly entitled to, when a witness against him is deeply interested in a moral sense, and no such direction as to his testimony is included. *Tompkins v. Pacific Mut. L. Ins. Co.* (W. Va.) 489

Verdict.

17. If, in an action against a board of health for libel by statements in the preamble to a public order to physicians and surgeons, the evidence warranted a finding that, in the passing and publication of such

preamble, some of the defendants were actuated by express malice and others were not, and the jury should so find, it is proper practice to render a verdict against all of the defendants for compensatory damages, and an additional amount as exemplary damages against those found to have been guilty of express malice. *Mauk v. Brundage* (Ohio) 477

NOTES AND BRIEFS.

Right to jury trial; extent of; validity of statute imposing conditions upon; requiring person asking for special jury to pay fee therefor. 912

Question for jury as to dangerous character of substance confined on property. 950

Question for jury as to negligence. 960

When negligence is a question for the court. 875

Question for court whether notice of death of insured person was "immediate;" where facts are undisputed. 486

TROVER.

By Infant Purchasing Property from Other Infant, see *INFANTS*.

TRUSTEE PROCESS.

See *GARNISHMENT*.

TRUSTS.

1. The mere fact that no time is stated in the creation of a trust for its termination, does not render it void for uncertainty. *Holmes v. Walter* (Wis.) 986

2. Where a trust has no express provision for its termination it is not void on that account if it does not offend against the statute as to suspending the absolute power of alienation. *Ibid.*

3. The law prohibiting the suspension of the absolute power of alienation does not apply to personal property in any case, and it does not apply to realty where the trustee has the absolute power to sell the same, or where the beneficiaries are all *in esse*, and can, by uniting, convey the whole title. *Ibid.*

4. A trust is fully expressed and clearly defined, within the meaning of the statute, when the general purpose thereof is clearly within the statute, the general scheme of the trust is made evident, and the subject of the trust and persons to be benefited are made sufficiently clear that a court of equity can judicially determine the same and superintend the execution of the trust. *Ibid.*

5. When the title to property is conveyed to one for the benefit of another, with active duties to be performed by the grantee with reference to the subject of the convey-

ance, evidencing an intention that the primary use of the property shall be in the grantee, an active trust is created whether any technical words to that effect are used or not. Ibid.

6. A trust created by a devise to the testator's wife, of all his property in trust for her and his children, with full power to continue his business, if for the best interest of his estate, is not void for uncertainty merely because the particular manner of executing it is not pointed out. Ibid.

7. When an instrument creating a trust does not in terms or by necessary implication prohibit the termination thereof, if all parties who are or may be interested are in existence and are *sui juris*, they may, by uniting, terminate the trust subject to such restraints as are contained in Wis. Rev. Stat. 1898, §§ 2089, 2091. Ibid.

Passive trusts.

8. A purely passive trust is annihilated as soon as created, by the operation of the statute Wis. Rev. Stat. 1898, § 2075, causing the legal title to vest with the beneficial right. Ibid.

9. The statute operating upon passive trusts so as to vest the legal title with the beneficial right does not affect active trusts whether they be valid or invalid, since, if the former, they are to be executed according to the scheme of the creator thereof; and if invalid the property is entirely unaffected by the instrument and goes under the residuary clause of the will in the absence of any other direction contained therein, and, if there be no such residuary clause or direction, it goes as intestate estate. Ibid.

NOTES AND BRIEFS.

Meaning of word "trusts" in its technical and legal sense; what sufficient to show intent to create. 987

TUBERCULIN TEST.

See ANIMALS, 4-6.

UNION STATION.

Assessments for Making, see PUBLIC IMPROVEMENTS.

USAGE.

See CUSTOM.

USURY.

Interest in Suit for Penalty for Charging, see INTEREST, 5.

Application of General Payment on Usurious Note, see PAYMENT.

1. In a suit by a national bank upon a note tainted with usurious interest which is credited on, or eliminated from, the note, 62 L. R. A.

the judgment should be for the principal with interest at the legal rate from the commencement of the action. Second Nat. Bank v. Fitzpatrick (Ky.) 599

2. The principal sum due upon the note need not be paid or tendered before the commencement of a suit for statutory penalties for the collection of usurious interest. Ibid.

3. The penalty of double the illegal interest paid, imposed for the taking of usurious interest, is twice the entire amount of interest paid, and not merely twice the excess above the legal rate. Ibid.

NOTES AND BRIEFS.

Usury; avoiding contract because of. 112
Conflict of laws as to. 33

VARIANCE.

Between Copy and Original Application for Policy, see INSURANCE, 6.

VENDOR AND PURCHASER.

NOTES AND BRIEFS.

Vendor and purchaser; effect of contract to ship goods f. o. b.:—(I.) Scope; (II.) vendor's liability as to loading and transportation expenses; (III.) upon whom the duty of furnishing cars or vessels lies; (IV.) effect of delivery f. o. b.: (a) upon the placing of the risk; (b) upon the passing of the title; (c) upon the place of inspection; (d) upon the time of payment; (e) upon the right of stoppage *in transitu*; (V.) summary. 796

VERDICT.

Different Verdicts against Different Defendants, see TRIAL, 17.

WAGES.

Validity of Statute Requiring Weekly Payment of, see CONSTITUTIONAL LAW, 5, 7.

Title of Statute as to, see STATUTES, 2.

WARRANT.

Of commitment, see CRIMINAL LAW, 3-8.

Possession of, by Officer as Justification for Arrest by Another, see FALSE IMPRISONMENT, 1.

WARRANTY.

Covenant of, see COVENANT.

By Application for Insurance, see INSURANCE, 8-10.

Allegations in Actions for Breach of, see PLEADING, 5.

WATERS.

Action of Tort for Wrongful Appropriation of, see ACTION ON SUIT.

Measure of Damages for Diversion of,
see DAMAGES, 2.

Pleading in Action for Wrongful With-
drawal of, see PLEADING, 1, 2.

1. That the owner of a dam and pond
on a flowing stream has no facilities for us-
ing the power created thereby does not pre-
vent his recovery of substantial damages
from one who wrongfully withdraws water
from the pond to the injury of the power.
Green Bay & M. Canal Co. v. Kaukauna
Water Power Co. (Wis.) 579

Wells.

Prohibiting Waste of Water from, see CON-
STITUTIONAL LAW, 8.

2. A landowner has a right to sink a
well on his land and use the water there-
from as he chooses, or allow it to flow away
regardless of the effect of such use upon his
neighbor's wells; and such right is not af-
fected by malicious intent. *Huber v. Mer-*
kel (Wis.) 589

3. The right of a landowner to sink
wells and gather and use percolating waters
as he will, even though the flow of his neigh-
bor's well be diminished, cannot be taken
away from him or impaired by legislation,
unless by the exercise of eminent domain
or the police power. *Ibid.*

4. No definite subterranean stream
which supplies artesian wells is shown by
the facts that such wells may be obtained
over a space 2½ by 5 miles; that water is
struck in a stratum of lime or sandstone;
and when it is found the drill bit rests on
the bottom of the well and makes no sudden
drop. *Ibid.*

NOTES AND BRIEFS.

Water course as parcel of the land; a
corporeal hereditament, not an easement;
ejectment for water power; wrongful ap-
propriation of; right of owner to waive
tort and sue on contract in assumpsit;
measure of damages for; effect of use or
nonuse of power by owner; property in flow-
ing stream. 581

Percolating; rights in; destroying neigh-
bor's well by digging well on one's own
land; effect of malice; constitutionality of
statute prohibiting waste of water from ar-
tesian wells. 590

How far tide land is within protection of
covenants in deed. 763, 765

Interfering with flow of; effect of bad mo-
tive. 687

Liability for withdrawing water from
reservoir. 579

WEATHER BUREAU.

Testimony by Agent of, see WITNESSES,

1.

WELLS.

See CONSTITUTIONAL LAW, 8.

Landowner's Right to Sink, see WA-
TERS, 2-4.

WILLS.

Proof of Contents of Lost Will, see EV-
IDENCE, 20, 21.

Scrutinizing Evidence as to Testator's
Declarations, see EVIDENCE, 35.

Trust Created by, see TRUSTS, 6.

Attestation clause.

1. If a will is in fact signed, attested,
and subscribed as required by the statute, a
formal attestation clause is not necessary.
Williams v. Miles (Neb.) 383

2. The subscribing witnesses to a lost
will may testify that the testator signed
and they witnessed and subscribed in the
required manner, without proving that there
was an attestation clause, or establishing
the contents thereof. *Ibid.*

Revocation.

Presumption as to, see EVIDENCE, 4.

Rebuttal of Presumption as to, see EVI-
DENCE, 21.

See also EVIDENCE, 34.

3. Courts do not favor revocation by
implication, and incline to such a construc-
tion as will give effect to both instruments.
Ibid.

4. The fact that a subsequent will was
made is not sufficient, of itself, and without
some proof of its actual contents, to show
revocation of a former will. *Ibid.*

5. Unless a subsequent will expressly
revokes the former one, such former will is
only revoked so far as it is inconsistent with
the latter. *Ibid.*

6. A subsequent will may have the ef-
fect of revoking a prior will, either by rea-
son of an express clause of revocation, or of
an inconsistent disposition of the testator's
property. *Ibid.*

7. A subsequent will which has the ef-
fect of revoking a prior will may be shown
for the purpose of defeating probate of such
prior will, although, by reason of its loss or
destruction, the exact dispositions made
therein cannot be shown and are incapable
of execution; the revocation will be effec-
tual, even though in other respects the will
cannot be carried out. *Ibid.*

8. If the testator destroys a subsequent
will revoking a former one by implication,
such act, of itself, will not operate to re-
vive the former will, the revival of the
former will in such a case depending upon
the intention of the testator, which is to be
deduced from all the circumstances. *Ibid.*

Construction.

9. The rule that judicial construction is neither required nor permissible unless uncertainty of sense is clearly apparent applies to wills the same as to other instruments. *Holmes v. Walter* (Wis.) 986

10. Where the field of construction is entered upon respecting a will, the rule that a meaning is to be preferred which will support, instead of defeat, it applies as strongly to testamentary trusts as to any other testamentary disposition of property. *Ibid.*

11. A devise of a fund to be distributed by the executor "to the poor," in his discretion, is valid, under a statute making valid gifts to charity "which shall have pointed out with reasonable certainty" the purpose of the charity and the beneficiaries thereof. *Thompson v. Brown* (Ky.) 398

WITNESSES.

Of Mortgagor and Notary Taking His Acknowledgment, see MORTGAGE.

1. An agent of the government weather bureau in charge of a particular station may testify as to whether or not the rainfall of a particular day was excessive, from knowledge gained by an examination of the records of the station, although for a portion of the time they were kept by his predecessor in office. *Scott v. Astoria & C. River R. Co.* (Or.) 543

2. One called to testify at a coroner's inquest as a mere witness, who fails to claim a privilege on the ground that his testimony may tend to incriminate him, cannot object to the introduction of his testimony on his subsequent trial for the commission of the crime then under investigation by the coroner. *People v. Molineux* (N. Y.) 193
62 L. R. A.

3. That one person at a trial did not deny having made a statement imputed to him by a witness cannot be shown for the purpose of falsifying testimony given by him at a subsequent trial. *Horan v. Byrnes* (N. H.) 602

Competency.

4. Persons who would take as heirs or next of kin in case of intestacy are not disqualified, under Neb. Code Civ. Proc. § 329, providing that no person having a direct legal interest in the result of any civil action, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation with the deceased person, from testifying as to transactions and conversations with the deceased in a contest over an alleged will. *Williams v. Miles* (Neb.) 333

5. The commission of incest by a man is not a crime against his wife, within the meaning of a statute forbidding the latter to be a witness against him without his consent, except when he is prosecuted for the commission of a crime against her. *State v. Burt* (S. D.) 172

NOTES AND BRIEFS.

Witnesses; using paper to refresh memory; where writing not made by witness himself; distinction between paper offered as evidence and one to be used to refresh memory. 775

Husband and wife as witnesses for or against each other; in what cases. 172

WRIT AND PROCESS.**NOTES AND BRIEFS.**

Writ and process; abuse of; effect of malice on liability for. 721





3 6105 063 244 334

